# COMPLIANCE WITH INTERNATIONAL AML/CFT STANDARDS

"A comprehensive assessment of the anti-money laundering and combating the financing of terrorism framework with recommendations for improvement

## Assessment Report

**Project against Economic Crime (PECK)**

Funded by the European Union and the Council of Europe

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**Project against Economic Crime in Kosovo[1] (PECK)**
**www.coe.int/peck**

# ASSESSMENT REPORT

on compliance with international standards
in the area of anti-money laundering
and combating the financing of terrorism (AML/CFT)

2 December 2014

1. 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.

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**FOREWORD**

For the bigger part of its history, humankind has lived in groups based on privileged relations within family, clan or tribe. The early moves towards modern statehood in Europe began in the 17th century, with the gradual abandoning of the age-old paternalistic relations between rulers and ruled, where the rulers extended favours to their subjects in exchange for services and loyalty. The great thinkers of the time, such as Hugo Grotius and Thomas Hobbes developed new theories, according to which the rulers' sovereignty was justified only because it protected the broader public interest.

As ideas spread about the rule of law and the Rights of Man and of Citizen, expectations grew that the public authorities would ensure equal treatment to the whole population.

In today's Europe, the States are responsible for maintaining law and order, for protecting property rights, providing social security and public health, for the education system, clean environment, as well as for the macroeconomic management, the regulation of finances and monopoly… and they must do all this in a competent and impartial way.

Corruption and money laundering are strong indicators for bad governance, economic stagnation and social injustice. They are universally seen as threats to democracy, Human Rights and the rule of law – threats so big that they are defined as criminal offenses in the Criminal Codes of the Council of Europe member States. Nevertheless, corrupt behaviour is extremely resilient and tends to reappear in different incarnations. Therefore, successful combating of economic crime requires unwavering commitment and a continuous effort by the public authorities.

Economic crime – including corruption, money laundering and terrorist financing, but also trafficking in human beings, cybercrime and other forms of financial and organised crime – remains an important concern in Kosovo. Reducing the levels of such crime in the future will be a strong indicator about the progress in the reform of the justice and law-enforcement system and the political will to undertake the necessary measures to prevent and supress corruption.

The Council of Europe has been supporting Kosovo in combating economic crime through legislative expertise and the provision of training and policy advice. We have done this together with the United Nations Mission in Kosovo (UNMIK), the Organisation for Security and Cooperation in Europe (OSCE), the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) and the European Union Office in Kosovo.

Our support included the drafting of the (provisional) criminal and criminal procedure codes, legislation concerning the prosecution and investigation procedures, anti-corruption and anti-money laundering legislation, as well as capacity building for the Anti-Corruption Agency with regard to the use of special investigative means, financial investigations, witness protection and other measures against organised crime and money laundering.

In 2012, the European Union and the Council of Europe, together with the Kosovo authorities, undertook an exercise, which was in many respects unique. Under the jointly funded Project against Economic Crime in Kosovo (PECK), for the first time, Kosovo became subject of a comprehensive and structured assessment of its anti-corruption (AC) and anti-money laundering and terrorism financing (AML/CFT) frameworks. The assessment was based on the methodologies applied by European monitoring bodies to all other Council of Europe member States.

There were two assessment cycles, covering the institutional, legal, policy and operational areas divided in separate themes. The assessment was mostly modelled after the Council of Europe Group of States against Corruption - GRECO and the Committee of Experts on the Evaluation of

Anti-Money Laundering Measures and the Financing of Terrorism - MONEYVAL. These methodologies were specifically tailored to the domestic context in Kosovo.

The reader will find in this publication the outcome of the two assessments. The two reports offer analysis, findings and recommendations that provide a solid basis for further legislative, institutional and operational reforms in the AC and AML/CFT areas in Kosovo. When the reforms are implemented, compliance with the relevant international standards will improve significantly.

The assessment reports also provide a solid basis for the streamlining of future international technical assistance to Kosovo in the area of economic crime.

I am confident that these reports will be used as a baseline by the authorities and all other stakeholders working to improve the situation with economic crime in Kosovo.

The process also serves a broader purpose, as it has given practical experience of the spirit of our intergovernmental monitoring work. This is of special importance as the relationship between Kosovo and the Council of Europe develops further.

I am grateful to our colleagues at the European Union with whom we share the same vision of a corruption-free Europe, for their partnership, guidance and constructive engagement throughout the process. There is unique added value in our strategic cooperation.

I thank all Kosovo authorities that have contributed to the implementation of this pioneering exercise. I am especially indebted to the main PECK beneficiary institutions – the Kosovo Anti-Corruption Agency, the Financial Intelligence Unit and the Office of Good Governance within the Prime Minister's Office. Their leadership and coordinating role with the ministries, central institutions, executive agencies, law enforcement bodies, the judiciary and the financial sector have been crucial for the success of the assessments.

Finally, I thank the domestic contact points, the Council of Europe experts, the international counterparts, as well as my colleagues in the project team and in the Economic Crime and Cooperation Unit in Strasbourg for their untiring efforts that made the assessments happen.

**Ivan Koedjikov**
Head of Action against Crime Department
Directorate General Human Rights and Rule of Law
Council of Europe

## FOREWORD

Within its long-term assistance to Kosovo, the European Union has placed specific focus on the functioning of rule of law and its institutions. This support is provided through annual EU-funding of different actions and projects, including anti-corruption and anti-money laundering. Among such actions is also the joint EU and Council of Europe "Project against Economic Crime in Kosovo". The project started in early 2012, with a key goal to bring Kosovo closer to the internationally recognised assessment methods in these fields.

The European Union treats the fight against corruption, money laundering and the financing of terrorism with a highest priority. Fighting these negative phenomena goes hand in hand with the efforts of building sustainable democratic societies, functioning rule of law and high respect for human rights.

Once Kosovo has embarked on its European journey, these fights became priority areas within the EU-Kosovo dialogue, too. They translate in conditionality of different political processes and reports, such as the Visa liberalisation, Stabilisation and Association Agreement as well as the implementation of EU assistance in Kosovo.

The assessments conducted within the project follow the methodology of two Council of Europe monitoring mechanisms, Greco and Moneyval. They have resulted in concrete findings and recommendations, but they have also provided Kosovo institutions with practical experience on the planning, implementation and coordination of fight against corruption and money laundering. During these processes, Kosovo institutions have shown serious commitment and readiness to strengthen their abilities, but further engagement is needed for fulfilment of the recommendations listed in the assessment reports.

Knowing the scale of challenges that are ahead of Kosovo institutions in this process, the European Union stands ready to provide the necessary technical support. Yet, the main burden and responsibility lay within relevant Kosovo government institutions. There is, more than ever, a need for strong political will and determination in this crucial combat.

**Samuel Žbogar**
Head of the EU Office in Kosovo
and EU Special Representative

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# INFORMATION AND METHODOLOGY USED FOR THE ASSESSMENT OF KOSOVO

1. This assessment has been prepared by the Joint European Union/Council of Europe Project against Economic Crime in Kosovo (PECK), implemented over a period of 41 months starting from 1 February 2012 to 30 June 2015. This Report is the product of the second (out of two) assessment cycles which lasted from December 2013 to December 2014.[2] The assessment included two components: anti-money laundering and combating the financing of terrorism (AML/CFT) and anti-corruption (AC) which were assessed in the framework of a single integrated process.

2. The assessment of the anti-money laundering and combating the financing of terrorism regime of Kosovo was based on the FATF Recommendations 2003 and the Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF)[3] and was prepared using the AML/CFT assessment Methodology 2004.[4] Separate Questionnaires, also based on the FATF Methodology, were prepared for the two assessment cycles and formed the basis for the two on-site visits.

3. During the first assessment cycle the assessment team conducted a focused assessment of Kosovo's compliance with key, core and some other important FATF Recommendations, specifically Recommendations: 1, 2, 3, 4, 5, 6, 10, 13, 14, 17, 18, 20 (EC 20.2), 23, 26, 27, 28, 29, 30, 31, 32, 33, 36 and 40, and SR II, SR III, SR IV, SR VI, SR VIII and SR IX.[5]

4. During the second assessment cycle the assessment team conducted an assessment of Kosovo's compliance with the rest of the FATF Recommendations, specifically Recommendations: 7, 8, 9, 11, 12, 15, 16, 19, 20 (EC 20.1), 21, 22, 24, 25, 34, 37, 38 and 39 and SR V, and SR VII.

5. Because this Report covers the entire FATF Recommendations, during the second assessment cycle on-site visit the assessment team also revisited those FATF Recommendations that were assessed in the first assessment cycle. Moreover, given the joint nature of the assessment exercise, that covered AML/CFT and anti-corruption measures, the Report will cross-reference those findings of the anti-corruption component that are relevant to AML/CFT.

6. Furthermore, the Report also covers a selected range of issues related to the 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 (hereafter "The Third EU Directive")[6] and Directive 2006/70/EC of the Commission of 1 August 2006 on laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (hereafter "the Implementing Directive"),[7] as well as a range of elements of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198). No ratings have been assigned to the assessment of these issues.

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2. The first assessment cycle was undertaken through September 2012 and May 2013 and a first Assessment Report was adopted in June 2013. Prior to the second assessment cycle, a Workshop on lessons learned from the first assessment cycle was held in Pristina, Kosovo on 30 October 2013 while an Interagency Workshop on progress made by the Kosovo institutions in the implementation of the PECK recommendations from the first assessment cycle was held in Pristina, Kosovo, on 3-4 December 2013. This workshop also launched the second assessment cycle. It was followed by the publication in April 2014 and prior to the second assessment cycle on-site visit, of a Follow-up Report on progress achieved by Kosovo since the first assessment cycle. However the Follow-up Report did not re-rate the relevant Recommendations as this represented only a desk-review of progress achieved as reported by the Kosovo authorities.

3. This report is not based on the revised FATF Recommendations, which were issued in February 2012.

4. As updated in February 2009.

5. R.35 and SR.I, which *inter alia* set requirements for the signing and ratification of relevant UN instruments, have been excluded from the assessment due to their inapplicability in the case of Kosovo, which due to its legal status in line with UNSCR 1244 cannot become a party to these instruments – please refer to Section 6.2 of this Report.

6. OJ L309, 25 November 2005, pp 15-36.

7. OJ L214, 4 August 2006, pp. 29-34.

7. Both assessment cycles were based on the laws, regulations and other material supplied by Kosovo authorities, and information obtained by the assessment team during and subsequent to its on-site visits to Pristina from 26 to 30 November 2012 for the first assessment, and from 14 to 18 April 2014 for the second assessment. During the on-site visits, the assessment team met with officials and representatives of relevant ministries and agencies and the private sector in Kosovo. A list of the bodies met is set out in Annex 2 to this Assessment Report.

8. The first assessment cycle was conducted by an assessment team of the EU/CoE Joint Project against Economic Crime in Kosovo (PECK), which comprised: Mr Lajos Korona (legal assessor), Mr Herbert Zammit LaFerla (financial assessor), Mr Cedric Woodhall (law enforcement assessor), Mr Edmond Dunga, PECK Project Advisor, and Mr Igor Nebyvaev, CoE Secretariat Administrator.

9. The second assessment cycle was conducted by an assessment team of the EU/CoE Joint Project against Economic Crime in Kosovo (PECK), which comprised: Mr Lajos Korona (legal assessor), Mr Herbert Zammit LaFerla (financial assessor), Mr Frederic Cottalorda (law enforcement assessor), Mr Edmond Dunga, PECK Project Advisor and Ms Maia Mamulashvili, CoE Project Manager.

10. The experts reviewed the institutional framework, the relevant AML/CFT laws,[8] regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions, and Designated Non-Financial Businesses and Professions (DNFBPs) as well as examining the capacity, the implementation and the effectiveness of all these systems.

11. The structure of this Report broadly follows the structure of MONEYVAL and FATF Reports in the Third Round of evaluations.

12. The 'recommendations and comments' in respect of individual Recommendations that have been reassessed in this Report are entirely new and reflect the position of the assessment team on the effectiveness of implementation of the particular Recommendation, taking into account all relevant information in respect of the essential and additional criteria available to the assessment team.

13. The ratings that have been reassessed in this Report reflect the position as at the on-site visit in April 2014 or shortly thereafter.

14. This Report provides a summary of the AML/CFT measures in place and undertaken by local authorities in Kosovo as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, sets out Kosovo's levels of compliance with the FATF Recommendations (see Table 1), and provides recommendations on how certain aspects of the system could be strengthened (see Table 2).

15. Some recommendations made in this Report contain proposed draft legal text to rectify the deficiencies identified. These proposals should be regarded as indicative and may have to be edited or redrafted by authorities in Kosovo to correlate to various aspects of the legislative structure in Kosovo.

8. As the amendments to the AML/CFT Law came in force in February 2013 this Report has taken the new law in consideration in reviewing the Cycle 1 assessment of Recommendations and reflected developments in the revised analysis, comments and recommendations including for rating purposes where appropriate.

# EXECUTIVE SUMMARY

## Background information

16. The following is a summary of AML/CFT measures in place in Kosovo as at the date of the second on-site visit (14 – 18 April 2014) and subsequently. While building on the first Assessment Report (AR) of 10 June 2013 following the first on-site visit of November 2012 and the eventual Follow-Up Report of April 2014, it describes and analyses those measures, and provides recommendations on how certain aspects of Kosovo's AML/CFT system could be strengthened. It describes Kosovo's levels of compliance with the FATF 40+9 Recommendations.

## Key findings

- This is the first complete assessment of Kosovo in compliance with international AML/CFT standards. The legislative framework of Kosovo in this area has until recently been largely based on various legal acts adopted by the United Nations Mission in Kosovo (UNMIK) and only in the last several years there has been a transition of the norms to local legislation. The same can be observed with regard to the institutional framework, which was and to some extent remains within the jurisdiction of the EU Rule of Law Mission in Kosovo (EULEX). The transition of the FIU from EULEX to local ownership for example has been completed only in 2012. Certain jurisdiction of EULEX remains with the Special Prosecutor's Office of Kosovo (SPRK) which has exclusive jurisdiction in terms of prosecuting ML offences. EULEX also maintains specialised judges and police; some EULEX personnel remain within the FIU.

- There is little shared knowledge, recognised information or any publicly available statistical data on the phenomenon of ML or TF in Kosovo notwithstanding the National Risk Assessment (NRA) undertaken by the Kosovo authorities during 2013. The extent of ML is related to the extent of informal black economy (drug dealing, prostitution, smuggling of illegal goods and other criminal activities), excluding, in this context, tax evasion, as part of the grey economy. The threat of TF has been confirmed by various authorities in Kosovo met in the course of the two on-site visits.

- At the policy level the most important development is that of an AML/CFT strategy, that was adopted in January 2014 abrogating the previous strategy that had been adopted in September 2012. In September 2012 the Kosovo Government had also adopted four related strategies for the period 2012-2017 namely, a strategy against organised crime, a strategy against drugs, a strategy for fighting terrorism and a strategy for the protection of the borders. The January 2014 Strategy is accompanied by an Action Plan to implement the strategy.

- Although a NRA has been conducted in 2013 this does not include the assessment of sectorial risks, which, according to the Kosovo authorities will be undertaken later. According to the Action Plan on the implementation of findings from the NRA action 2.2.2, all Kosovo institutions are obliged to undertake the Sectorial Assessment and it clearly specifies which sectors will be assessed based on the identified risks.

- In January 2014 the Government of Kosovo published the new National Strategy of Kosovo and its Action Plan for the prevention of and the fight against the informal economy, ML, TF and other economic and financial crimes for the period 2014-2018. The goals, objectives and actions of the National Strategy and the Action Plan 2014-2018 are based on the NRA of 2013. The policy documents constitute a mechanism of managing risks in the informal economy, ML, FT and other economic and financial crimes in Kosovo. The primary goal of the National Strategy and the Action Plan 2014-2018 is therefore to provide support in achieving the objectives of the programme of the Government of Kosovo in this respect.

- The National Office for Economic Crimes Enforcement was established with a Prosecutor being appointed as the National Coordinator (referred to as: The National Coordinator for Combating Economic Crime – hereafter "NCCEC") in January 2014. The establishment and operations of the National Co-ordinator are governed by the KPC Regulation of December 2013 on the establishment and functioning of the National Coordinator. According to the

Regulation the aim of the establishment of the National Co-ordinator is that of increasing the efficiency in the prosecution of crimes, and the sequestration and confiscation of material benefits deriving from crimes.

- Overall the anti-money laundering regime, as a multi-level interagency system has been capable of producing an extremely low number of sporadic, inconsequential outputs. Even though it may be incorrect to consider these minor results accidental, overall they confirm rather than deny the general inability of the institutional AML value chain to function in a proper integrated way with the involvement of all of its components: reporting; intelligence/analysis; investigation; prosecution; conviction/confiscation. This is caused by a number of cross-cutting factors, including the lack of systemic cooperation/coordination mechanisms and feedback across *all* segments, as well as a lack of necessary resources in *most*.

- The analysis of various components, undertaken in this Report also produced an extensive list of specific factors at the level of individual institutions which also negatively impact the system as a whole, the most important of them being:
  - The low effectiveness on the preventative side which is significantly hampered by a deficient regulatory regime and lack of proper supervision which does not function on a risk-sensitivity basis (this has also been identified in the 2013 NRA) and enforcement/sanctioning regime. This means the preventative system is significantly failing in its main two functions: barring criminal proceeds from entering the financial system and ensuring that competent authorities are informed when such facts do take place.
  - Insufficient institutional standing of the FIU, which reflects on its capacities to enhance cooperation with other domestic authorities, access information and improve the quality of analysis;
  - Reluctance, lack of understanding and capacity of law enforcement/prosecutors to pursue ML investigations/prosecutions and the seizure/confiscation of criminal proceeds;
  - Lack of capacities in the judiciary and its reluctance in taking a proactive approach in issues of seizure/confiscation of criminal proceeds.

- Notwithstanding that Kosovo has undertaken a NRA, but which did not include a sectorial risk assessment, Kosovo authorities have not implemented a risk-based approach with regard to any components of the AML/CFT regime, including for the supervisory regime, except, but to a limited extent, for the financial sector for the purposes of the customer due diligence procedures.

**Legal system and related institutional measures**

17. The criminal offence of ML, which is listed among the offences in the Special Part of the Criminal Code (CC) but defined separately within the AML/CFT Law represents a remarkable level of compliance with the wording of the Vienna and Palermo Conventions particularly as the material (physical) elements of the offence are concerned. Certain provisions, however, that go beyond this scope raise some concerns (e.g. some of them have a redundant character causing overlap with other offences provided in the same article).

18. The Kosovo legislation applies the principle of the universality of the predicate offences ("all-crimes approach") covering all but one of the 20 categories of predicate offences for ML required by the FATF Recommendations except for the offence of market manipulation. It was noted however as a restrictive prosecutorial practice that proceeds of tax evasion offence are considered not to constitute criminal proceeds and therefore this offence makes an apparent exception to the all-crimes approach. In addition, the assessment team noted an overall uncertainty among practitioners regarding the level of proof for the predicate crime which is likely resulting from the inadequate formulation of the respective legislation and the lack of adequate guidance. Equally, the provision that defines the coverage of self-laundering is unclear and inadequately formulated, which appears to pose problems to practitioners. Perpetrators having committed both the ML offence and the predicate crime, for example, would only be prosecuted and indicted for the more serious offence although there is no statutory basis for such a restrictive interpretation.

19. The separateness of the ML offence might be the reason why its concept and terminology appear so different from that of the CC, even in case of generic terms such as the range and scope of ancillary offences or the knowledge standards applicable in case of ML offences which might cause difficulties in concrete cases and should therefore be revisited so that the same terms and concepts can be used in any sources of criminal substantive law. Effectiveness of the application of the ML offence could not be assessed due to conflicting statistics provided to the assessment team and the complete lack of additional information regarding pending cases.

20. While the criminal liability of legal entities is generally provided for, the assessment team found a number of contradictory provisions in the respective pieces of legislation as regards the basics of corporate criminal responsibility (whether or not it depends on the culpability of the natural person and whether a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that). The issue calls for urgent harmonisation of the respective legislation. Furthermore, the evaluation team found the criminal sanctions (fines) applicable to legal persons for committing a criminal offence being ineffectively mild (not proportionate and dissuasive) as compared to the respective sanctions applicable to natural persons.

21. The FT offence as it is provided for by the CC (facilitation of the commission of terrorism) fails to cover the financing of an individual terrorist for any purpose and, from a more general aspect, one can find a rather inconsistent and redundant terminology being applied throughout the FT-related provisions of the CC which raises the risk of confusion. The coverage of "act of terrorism" as required by the FT Convention is deficient, considering the lack of the complete and general notion of the "generic" offence of terrorism as subject of FT as well as the overly restrictive coverage of the "treaty offences" FT by requiring an extra purposive element thereto. Furthermore, it is doubtful whether and to what extent the CC definition of "terrorist act" extends to the terrorism-related offences themselves (e.g. recruitment for terrorism) particularly whether the funding of these offences could be considered a FT offence.

22. The latest amendments to the AML/CFT Law introduced a "new" FT offence in the AML/CFT Law with a formulation apparently being more in line with the requirements of FATF SR.II but without having any impact on the "old" FT offence in the CC. Introduction of the "new" FT offence thus resulted in the duplication of FT criminalisation with two competing criminal offences under which FT activities could equally be subsumed. It is an explicit case of legal uncertainty that poses a serious risk to the effective application of the respective provisions. Furthermore, the new FT offence in the AML/CFT Law remained a "foreign body" both in terms of its location and applicability (considering its legal terminology that would require proper explanation or definition e.g. for the notion of "individual terrorist" which is entirely missing).

23. The Kosovo seizure and confiscation framework is regulated primarily by the Criminal Procedure Code (CPC) and is generally adequate in terms of legislative design and scope, however there are a number of inconsistencies. Article 96[9] provides for the confiscation of 'material benefits acquired through the commission of criminal offences'. This covers all crimes that generate criminal proceeds, including ML, TF and other predicate offences. Article 69 of the CC provides for the general confiscation of objects (instrumentalities) used in the commission of criminal offences. The legislative framework does not however include any standard of proof or procedure for the final confiscation of *instrumentalities intended for use* in the commission of an offence, which raises doubts about the possibility of their final confiscation. While the CC allows for a property of 'equivalent' (i.e. corresponding) value to be confiscated this has never happened in practice. Both direct and indirect proceeds can be confiscated. There is a conflict of provisions between the CPC and the CC with regard to confiscation from third parties, whereby the CPC sets a higher standard of proof, which could ultimately impact the effectiveness of law enforcement as and when they undertake confiscation measures. Additionally there is inconsistency of language as regards the definition of provisional measures such as seizure and their confusion with norms relating to confiscation. The provisions allow for property to be confiscated *ex parte* and without prior notice, however it has not been demonstrated that this has been applied in practice. Even though some law enforcement authorities seem to have the proper tools available to undertake tracing of assets, little is done in practice in this regard. While the steps to be taken by *bona fide* third parties seem to be clear and transparent in legislation, the onus of proof is perhaps unjustifiably shifted to the *bona fide*, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property. There is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result

9. Article 96 of the Criminal Code No. 04-L-082 of 20 April 2012.

of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

24. There is no specific legal framework that would enable the Kosovo authorities to take the necessary preventive and punitive measures to freeze and if appropriate, seize terrorist related funds or other assets without delay, in accordance with the relevant United Nations resolutions. The sole piece of legislation is the Law on Implementation of International Sanctions (LIIS) which is, however, far too incomplete in its present form, but providing an essential legal basis and a legislative authorisation for the issuance of *ad hoc* secondary legislation without any detailed rules on roles, responsibilities and procedures (which may be a reason why it has never been applied since 2010). From a more generic point of view, Kosovo meets practically none of the Essential Criteria of SR.III and the assessment team strongly recommends that the Kosovo authorities adopt a comprehensive set of rules (either judicial or administrative) that would enable them to adequately implement the targeted financial sanctions contained in the respective UNSCRs relating to the prevention and suppression of the financing of terrorist acts and the freezing of terrorist assets, addressing all requirements under FATF SR.III.

25. The Financial Intelligence Unit (FIU) was established at the end of 2010 and inherited the building and structures of its predecessor - the Financial Intelligence Centre (FIC), a body established by UNMIK and later run by EULEX to perform the functions of an FIU. It functions as a central independent national institution responsible for researching, obtaining, analysing and dissemating to competent authorities and making public the infirmation with regard to the potential MLand TF. The FIU has issued guidance to reporting entities by means of 'Administrative Directives' and 'Administrative Instructions', which cover the manner of reporting, and particulars of risk areas that reporter subjects should pay special attention to.[10] The reporting entities are requested to file STRs and other reports electronically through the UN-developed goAML system, which is used as core software by the FIU. The FIU has recently issued various other Administrative Instructions and Administrative Directives dealing with various aspects of the AML/CFT Law such as PEPs, statistics, training, and sanctions. The scope and mode of FIU access to various databases is not fully satisfactory, which negatively impacts the analytical function of the Unit. The procedure to request additional information from reporting entities as described in the AML/CFT Law contains significant ambiguity and is open to legal challenge by the reporting entities, even though the FIU have explained that no problems have occurred in practice. The FIU disseminates materials either to the KP or the SPRK and other institutions as determined by the AML/CFT Law; however the extent and quality of feedback it receives on the progress and outcomes of these disseminations is very low and unsystematic. The FIU is operationally independent; in terms of general oversight it reports to a Management Board composed of heads of key agencies involved in the AML system in Kosovo. The FIU premises are physically secure. Since 2011, the FIU publishes its annual activity report on its website. The FIU has applied for membership in the Egmont Group, but states that it has not applied yet the Egmont Principles for information exchange in its activities. Unfortunately the assessment team has not been provided with sufficient information to comprehensively judge the effectiveness of the FIU. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the insufficiency of interagency feedback and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort. At the same time the FIU provided at least one example where its information was used in a successful ML investigation. The assessment team has also been provided with sanitised files intended for dissemination to law enforcement authorities. These materials demonstrate the clear ability of analysts in the FIU to perform analysis to the point as to be able to infer the probable predicate offence from available data.

26. All the Kosovo law enforcement agencies have a responsibility for ensuring that ML offences are investigated, however there is a specialised unit within Kosovo Police (KP) – the Financial and Money Laundering Investigation Unit within the Directorate against Economic Crimes and Corruption. ML prosecutions are a competence reserved for the Special Prosecutors Office (SPRK). ML investigations are prosecutor-led with law enforcement acting as "the right hand" of the prosecutor. Law enforcement must notify the prosecutor of any and all new information discovered in the course of a ML investigation. Article 87 of the CPC describes the range of techniques available to law enforcement. These include amongst others the interception of communications, undercover operations, co-operating agent, the controlled delivery of postal items and the disclosure of financial data. There are no statistics available on the instances where special

10. The assessment team has expressed concern on the validity of some Directives that had been issued under UNMIK Regulation No. 2004/2 on the Deterrence of ML and related Criminal Offences which has been repealed by the AML/CFT Law without any provisions retaining Directives issued thereunder as applicable.

investigative techniques have been used in the investigation of ML or TF cases. The postponement of an arrest as a measure when, for example further evidence gathering is required is not fully available to Kosovo law enforcement authorities. Article 119 of the new CPC gives the Prosecutor the right to request all documentary evidence including financial records. Article 121 of the CPC lists the non-exclusive range of evidence that can be obtained by the prosecutor during the investigation stage and prior to the pre-trial testimony. According to Article 67 of the CPC, confidential data held by non-parties to the investigation can only be obtained through Court orders. This provision seems to cover the full range of the types of documents required under FATF Recommendation 28. Articles 70 to 73 of the new CPC give the law enforcement agencies the powers to collect information to investigate crime at the initial investigative phase. This includes the interviewing of witnesses and the taking/seizure of evidence. Covert and technical measures of surveillance and investigation can also be undertaken (Articles 86 to 96 of the CPC) by the KP at the authorisation of a pre-trial judge, or as is in the exclusive case of ML – of a prosecutor, in case the circumstances call for urgency. The evidence and materials gathered with the use of such measures, including financial records are admissible if collected in accordance with criminal procedure. However, the lack of indictment and of convictions for ML cases does not permit to consider that, when conducting investigations of ML and underlying predicate offences, the power for competent authorities to obtain documents and information for use in those investigations and in prosecutions and related actions is fully effective. In addition, there are significant capacity and staffing issues within the KP, as well as instances of political interference.

27. At the time of the Cycle 1 on-site visit, the statistics and records kept by the KP and the Prosecutors did not match, both in terms of the criteria and the ultimate numbers. It is expected that this will improve with the first introduction in 2013 and follow-up in 2014 of the inter-institutional mechanism for the harmonisation of statistical reports for characteristic criminal offences between the State Prosecutor, law enforcement agencies and the courts. The statistics given by prosecutors indicate a gradual increase in the case load for ML offences handled by them, and the growing backlog of cases. Since ML crimes belong to the exclusive competence of the SPRK, which deals with a large number of other offences with only 10-15 prosecutors at its disposal, it is apparent that a change in approach should be eventually considered. Also, SPRK lack of capacity to deal with a growing number of ML cases could be demotivating to law enforcement, who would be reluctant to seek out criminal proceeds even when there is an obvious proceeds-generating predicate offence in play. The increasing case-load of prosecutors coincided with a sharp drop in the number of ML cases reported to them by the KP in 2012 (according to KPC statistics). If one takes the KP statistics for ML cases investigated, the same sharp drop in investigations is recorded, but in 2011. Putting aside the issue of conflicting statistics, it can nevertheless be deducted that there has been a decrease in KP activity to investigate and refer ML cases to prosecution in the recent years. It is unclear what the cause for this situation is but it is a clear indicator of decreasing effectiveness. This is also confirmed by the fact that there is no increasing rate of convictions (which could have pointed to an increase of quality while sacrificing quantity).

28. In 2013, the number of ML cases reported by the KP increased. However, during this year, according to the KPC statistics, 45.61% of the AML criminal reports were dropped or closed before investigation and for 52.63% the investigations were ceased, leaving only 1.76% of cases ending with an indictment being filed. No statistics were provided to the assessment team on the reasons why no further action was taken for so many reports and why so few cases ended in an indictment being filed. During the interviews in the course of both on-site visits, it also appeared that the level of awareness of prosecutors on ML matters could be significantly improved as, for example, some considered that tax evasion is not a predicate offence for ML. From a general perspective, the assessment team urges the Kosovo authorities to greatly strengthen their commitment to prosecute ML cases.

29. The KC Service has implemented a system of cross border currency and negotiable instruments control which envisages that every person entering or leaving Kosovo and carrying monetary instruments of a value of ten thousand euro (€10,000) or more must declare the amount of the monetary instruments and the source of such monetary instruments in writing. A declaration is considered to be false if it contains incorrect or incomplete information. In case this occurs, the KC has the power to seize and detain monetary instruments which have been falsely declared or undeclared. KC authorities also have the power to question and search natural persons and their baggage. The powers to restrain currency, as well as to question and search persons apply equally when there is a reasonable suspicion that monetary instruments are the proceeds of crime or were used or intended to be used to commit or facilitate ML or the predicate criminal offence from which the proceeds of crime were derived or are related to TF. KC authorities have indicated that on the occasion of a declaration or confiscation, the forms have to be filled-in, thus creating a hard copy

which is then forwarded to the KC Intelligence Sector for further supplements. It is then saved in the electronic database of the Intelligence Sector and in the meantime it is forwarded through the goAML system to the FIU for further processing and analysis. KC also report all suspicious ML/TF incidents to the FIU in the form of an STR. KC successfully co-operates with KP, FIU, Integrated Border Management agencies and EULEX. Joint operational exercises are held on all cross border irregularities and all forms of crime which includes cash couriers. These exercises have led to specific results. KC has the power to investigate customs offences and are to be considered as having the competencies and responsibilities of police or judicial police for these investigations. The KC can apply sanctions to persons who make a false declaration or disclosure. These sanctions vary from referral for investigation/prosecution of a criminal offence, and the confiscation of the entire sum of currency to an administrative penalty amounting to 25% of the value.

**Preventive Measures – Financial Institutions**

30. The prevention of ML and the FT regime in Kosovo is mainly based on the Law on the Prevention of Money Laundering and the Financing of Terrorism (Law No 03/L-196 of 2010).[11] The main law is supplemented by Rule X and Advisory Letter 2007-1 of May 2007 both issued by the CBK. The Advisory Letter, providing guidance to the industry, and Rule X providing principles to be followed by the financial sector in fulfilling their AML/CFT obligations are issued on the basis of UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation and on the basis of UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. Both UNMIK Regulations have been repealed with the coming into force of the AML/CFT Law and the Law on Banks. The assessment team therefore questions the current validity of these two documents within the context of the AML/CFT Law. The assessment team however acknowledges that Rule X is more harmonised with international standards than the Law itself and hence considers it appropriate in practice that banks and financial institutions still follow its requirements. Notwithstanding, some of the essential criteria for the key Recommendations – in particular Recommendation 5 - that should be required by law or regulation are however found in Rule X which does not meet the definition of regulation for the purposes of this assessment.

31. The AML/CFT Law is further supplemented by various Administrative Directives and Administrative Instructions and Guidance issued by the FIC as the forerunner of the FIU. With the exception of Administrative Directive 014 of December 2011 and Administrative Guidance FICAD 49/2011 issued on the basis of the AML/CFT Law, all Administrative Directives and Guidance were issued on the basis of the now repealed UNMIK Regulation 2004/2. The assessment team therefore questions the legal validity of these Directives since in repealing and replacing UNMIK Regulation 2004/2 the AML/CFT Law does not provide for the continuation of any rules and directives issued there-under. In the meantime the FIU has issued further Administrative Directives, Administrative Instructions and guidance under the AML/CFT Law.

32. Since the repeal of UNMIK Regulation 2004/2 and the revisions to the AML/CFT Law the CBK, which now has a delegated supervisory remit for the purposes of the AML/CFT Law for the entire financial sector, intends to issue a new Regulation which will incorporate and update the current provisions of the Advisory Letter and Rule X together with two Administrative Directives one on Training and one on the Maintenance of Statistics.[12] Moreover the FIU has issued a number of Administrative Instructions on the basis of the revised AML/CFT Law which are applicable to all reporting subjects.

33. Although the scope of coverage for the financial sector under the AML/CFT Law meets the scope under the FATF standards, the assessment team finds that the term 'financial institution' as defined in the respective financial laws is not harmonised and could therefore create an element of legal ambiguity.

34. Kosovo has undertaken a national risk assessment (NRA) of its vulnerabilities and risks to ML and the FT. However the NRA did not include sectorial risk assessments although according to the NRA Action Plan these will be undertaken following the NRA. Consequently the CBK has not yet undertaken a risk assessment of vulnerabilities within the financial sector as a whole while it claims

11. Law No. 03/L-196 of 2010 was revised and amended in February 2013 after the first on-site visit of November 2012 through Law No 04/L-178 of 2013. The analysis of those FATF Recommendations under the first on-site visit have been updated accordingly in this Report following the second on-site visit of April 2014, including the recommendations rating as applicable.

12. At the time of the second on-site visit the proposed Regulation was still under a consultation process with other stakeholders and the industry.

it is recently requiring banks and financial institutions to undertake a risk assessment of their activities, products and services to identify their individual vulnerabilities. The assessment team is informed that this latter requirement will feature as a mandatory requirement in the proposed CBK Regulation.

35. Consequently Kosovo has not excluded any financial activity from the obligations under the AML/CFT Law. It should be noted, however, although remotely connected, that in January 2014, the FIU issued the Administrative Instruction No.02/2014 on Excluding Certain Transactions from Reporting.

36. CDD measures under the AML/CFT Law are subject to various shortcomings the main of which being the ambiguity of a legal obligation to apply the full CDD measures as opposed to the identification and verification processes, and the lack of legal clarity on the continued application of CDD for beneficial owners. Whereas the AML/CFT Law defines what constitutes CDD measures in accordance with international standards it creates an ambiguity in the timing for applying them.

37. The AML/CFT Law specifically prohibits the opening or maintenance of anonymous accounts and requires customer identification *before opening an account.* The Law however is silent on opening and maintaining accounts in fictitious names, although the CBK confirmed that such accounts do not exist.

38. The AML/CFT Law requires reporting subjects to determine the risk level presented by their individual customers and to apply enhanced due diligence to customers in the presence of a higher risk of ML or TF. It also requires this obligation in specific situations in which case it specifies the enhanced measures to be applied. The AML/CFT Law however does not specify the type of enhanced measures to be applied in other situations and relationships that present a higher risk. The lack of guidance and the uncertainty on the application of a risk based approach are concerns expressed by the industry itself and therefore it is clearly shown that this is having a negative impact on the effectiveness of the system. It is understood that the risk based approach will be addressed in a more comprehensive manner under the proposed CBK Regulation giving more practical guidance to the industry for the full application of a risk based approach.

39. Although the notion of high risk for customers identified as PEPs is addressed by the AML/CFT Law, various shortcomings are identified relating to: the definition of a PEP is incomplete and not fully consistent with the FATF definition with reference to the exclusion of middle ranking and more junior officials; there is no obligation to have appropriate risk management systems in place although this is implied; the obligation to determine if a person is a PEP does not require the identification of the PEP status of the beneficial owner; the obligation for senior management approval for the continuation of relationships with customers who are eventually identified as PEPs is missing; and the obligation to establish the source of wealth in the AML/CFT Law is not clear.

40. While in general correspondent banking relationships are covered under the AML/CFT Law, some shortcomings in definitions, and in particular the absence of a definition of correspondent banking, at times create legal uncertainty.

41. The AML/CFT Law is not clear on non-face-to-face business relationships and transactions which consequently lends itself to interpretation. While it does not prohibit such relationships, neither does it specifically allow them but the fact that the Law requires and specifies additional enhanced due diligence measure to be applied in such cases, indicates that the Law may be allowing non-face-to-face business relationships. This is given different interpretations both within the financial sector and by the relevant competent authorities and hence could negatively affect the effectiveness of the implementation of the preventive system.

42. The AML/CFT Law is silent on reliance on third parties without either prohibiting it or allowing it outright. This has lent itself to interpretation particularly as banks that are subsidiaries in Kosovo of foreign international banks interpret this silence that at least they are allowed to place reliance on third parties if this is done within the group to which they belong. Consequently the fact that subsidiary banks in Kosovo place reliance within the group to which they belong raises concerns as, in the absence of conditional criteria in accordance with the provisions of the FATF Recommendation 9, such reliance, including reliance on sister-institutions that may be based in countries which do not adequately implement the FATF Recommendations can be made without any criteria at all.

43. Although in principle the provisions of the AML/CFT Law reflect the main criteria for record keeping under FATF Recommendation 10 there are serious weaknesses that, if left unattended,

could develop into concerns on the effective implementation of the Law. These include among others inconsistencies in the AML/CFT Law on the commencement period for the retention of identification records and lack of guidance.

44. While the AML/CFT Law requires all reporting subjects to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose, there are no requirements to examine the background and purpose of these transactions and to document findings. Likewise, while the same Article 20 of the Law requires reporting subjects to pay special attention to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently apply the relevant international standards to combat ML and FT, the provisions under the Law are limited and fall short from providing for the reporting subjects under the Law to adequately fulfil all the obligations under the FATF Recommendation.

45. The reporting obligation is intrinsically linked to the definition of a *suspicious act or transaction.* Consequently, while covering attempted transactions, the reporting obligation does not cover instances where information available indicates links to ML. More seriously, the obligation does not cover transactions or acts that may be linked to the FT. Although no such evidence is available to the assessment team, the low number of STRs that are filed with the FIU, while raising concerns on effectiveness, when compared to the number of CTRs raise questions whether transactions reported under the CTR regime are also being reported under the STR regime if they are suspicious.

46. The safe harbour and disclosure ("tipping off") provisions in the AML/CFT Law within the context of FATF Recommendation 14 are inadequate and do not meet the necessary criteria. The safe harbour provisions, as defined in Article 35 of the AML/CFT Law, are not clearly extended to directors, officers and employees (temporary or permanent) while the disclosure prohibition does not apply to the banks and financial institutions themselves as corporate bodies.

47. Kosovo has implemented a system for reporting all transactions in currency above a fixed threshold of €10,000. Banks and financial institutions, lawyers, notaries, certified accountants, licensed auditors, tax advisors, casinos and licensed objects of games of chance shall report to the FIU all single transactions in currency of €10,000 or more. Multiple transactions shall be treated as a single transaction if banks and financial institutions or the professional (DNFBP) has knowledge that the transactions are linked. Those reports are maintained in a computerised data base by the FIU and are at the disposal of the relevant competent authorities in Kosovo for combating ML/TF purposes.

48. While a certain level of guidance is or is being issued there is an absence of general guidance within the context of the FATF Methodology assisting reporting subjects in fulfilling their obligations under the Law – such as the application of CDD and record keeping and the application of a risk based approach. While it is understood that for the financial sector this will be addressed through the proposed CBK Regulation which will reflect the current legal provisions, the FIU should issue such guidance to all other reporting subjects. Moreover, it appears that feedback to the industry is limited and there are no legal provisions governing the provision of feedback.

49. Although most criteria of FATF Recommendation 15 on internal controls are adequately addressed for the financial sector, there remain certain concerns on implementation and consistency which impact on the effectiveness of the system due to identified gaps and weaknesses. Consequently while all financial institutions have appointed an AML/CFT Compliance Officer there is no guidance or criteria on the appointment requisites. Likewise while all financial institutions are required to develop internal programmes for the prevention of ML and FT, the industry is concerned due to lack of guidance and hence lack of harmonisation in implementation. Likewise there is no guidance and criteria for banks and financial institutions to apply their internal procedures to their foreign branches and subsidiaries because currently banks in Kosovo do not have foreign operations even though this is not prohibited by Law.

50. The licensing procedures applied by the CBK for the licensing of banks and other financial institutions adequately cover the prohibition for the establishment of shell banks. There is however lack of legal clarity in the AML/CFT Law in distinguishing between correspondent and respondent institutions in the absence of a definition of correspondent banking relationships.

51. The CBK is mandated by the Law on the CBK and the Law on Banks to license, regulate and supervise banks and other financial institutions for prudential purposes. The CBK fulfils this responsibility through on-site visits and off-site examinations through its Banking Supervision

Department. The Law on Banks adequately provides for the licensing of banks and financial institutions. The CBK carries out thorough due diligence procedures which includes the fit and proper tests for shareholders, directors and senior management.

52. A separate Division that is responsible for ensuring compliance with the AML/CFT Law and regulations has been recently established within the CBK reporting directly to the Deputy Governor responsible for banking supervision. At the time of the on-site visit the Division however lacks resources for a full AML/CFT supervisory function although it has established a Strategy and an Action Plan which will see the recently set up Division develop to meet its full responsibilities for the purposes of the AML/CFT Law.

53. The AML/CFT Law however does not directly designate the CBK as the supervisory authority for the purposes of the Law. Previously the AML/CFT supervisory power was assumed by the CBK as part of its prudential supervisory mandate under the Law on the CBK and the Law on Banks. The 2013 amendments to the AML/CFT Law provided for this weakness through a new Article 36A which empowers the FIU as the recognised competent supervisory authority under the AML/CFT Law to delegate supervisory powers to other competent authorities for particular sectors. Within this context the FIU and the CBK have entered into a MoU through which the FIU delegates supervisory powers to the CBK for the purposes of the AML/CFT Law for the entire financial sector. The separate Money Laundering Prevention Division was established within the CBK for this purpose.

54. The absence of a direct supervisory legal mandate carries with it the absence of a legal mandate for the CBK to apply its prudential supervisory powers under the Law on the CBK and the Law on Banks, for AML/CFT purposes. The delegated supervisory mandate to the CBK does not provide a mandate for the CBK to apply its prudential supervisory powers under the Law on Banks and the Law on the CBK for the purposes of the AML/CFT Law, particularly since such supervisory powers are in relation to the prudential supervision for the purposes of the Law on Banks. Thus the supervisory powers of the CBK under the delegated authority are limited to those of the FIU under the AML/CFT Law. However, although in general the FIU is provided with supervisory powers under the AML/CFT Law for all other reporting subjects yet it is not provided with the powers to undertake off-site examinations and to demand documents for such purposes. The authorities claim that the FIU has off-site powers by virtue of paragraph (1.4) of Article 14 of the AML/CFT Law which defines the duties and competences of the FIU but which is not linked to Article 30 of the AML/CFT Law which deals with the powers of the FIU to undertake compliance inspections. The assessment team does not concur. The Report makes various recommendations in this regard.

55. The AML/CFT Law provides for criminal offences within the jurisdiction of the Courts and for sanctions for reporting subjects who fail to comply with the AML/CFT Law. Although the Law further provides for 'administrative' sanctions of a pecuniary nature for specific breaches of the AML/CFT Law there is no authority designated under the Law to apply these sanctions, although it appears that in practice the FIU assumes such authority. The authorities claim that the FIU has such powers by virtue of Administrative Instruction No. 03/2014 on Procedures for Applying Administrative Sanctions for Non-compliance of Reporting Subjects with the AML/CFT Law issued in terms of paragraph (2) of Article 31 of the AML/CFT Law. The assessment team does not entirely concur as the AML/CFT Law does not provide power to the MoF to appoint an authority to impose sanctions but only to define the administrative offence procedure. Moreover, there is no graduated administrative sanctioning regime to be applied proportionately and according to the severity of the offence.

56. Although the CBK now has a delegated mandate for the supervision of the entire financial sector, sanctions contemplated by the Law on Banks should not be applicable for breaches of the AML/CFT Law. Indeed no sanctions have ever been imposed either by the FIU or the CBK.

57. Wire transfers are governed both by the AML/CFT Law with some additional guidance in the CBK Advisory Letter and Rule X which, as this Report has identified, do not appear to have a legal basis. The analysis of obligations to implement SR VII has identified various gaps and weaknesses in the legislation and the consequent regulations that need to be addressed. First and foremost, the provisions of the AML/CFT Law under Article 19 are too limited to implement the full provisions of SR VII and thus create legal uncertainty and render themselves subject to interpretation.

58. Money or value transfer (MVT) service providers are subject to the obligations under the AML/CFT Law which further imposes upon them certain obligations relevant to SR VII. The Law on Banks is not clear on the appointment of agents by financial institutions and therefore there are no obligations for MVT service providers to maintain lists of agents. However this appears to be partly

covered by the provisions of the Law No. 04/L-155 on Payment System which clarifies the appointment of agents but limited to financial institutions and which requires the CBK to maintain a register of such agents. Moreover, the lack of harmonisation on the definition of a "financial institution" raises questions on the licensing regime.

59. Kosovo has a cash based economy. The Law on Tax Administration requires that *Any transaction in excess of five hundred (500) euro, made between persons involved in economic activity, after 1 January 2009 is required to be made through bank account.* Although an interbank payments system is operative within Kosovo, the CBK is in the process of introducing electronic means of payment and other retail payment systems to reduce the use of cash. Statistics provided by the CBK show huge divergences in cash issued in and cash withdrawn from circulation that could indicate possible illegal importation of cash which is placed in the banking system. However, statistics provided by the KC indicate otherwise as huge amounts of currencies, including euro cash, is exported more than what is imported. Apart from raising the question as to the source of this excess cash, this raises concerns on KC checks at the borders on the objective for the import and export of huge amounts of cash and the effective implementation of the provisions under the Law on Tax Administration.

**Preventive Measures – Designated Non-Financial Businesses and Professions (DNFBPs)**

60. Customer due diligence (CDD) and record keeping obligations for DNFBPs are to a large extent affected by the same weaknesses and shortcomings identified for the financial sector in addition to other identified ones that are specific to the DNFBPs sector. Although some training has been provided, for example to notaries and accountants, it appears however that there is a general need for more awareness and training for DNFBPs who at times are not aware of their obligations under the AML/CFT Law as they fulfil their obligations under the governing laws for their specific profession, for example notaries. Moreover, in the absence of guidance, it is not clear as to who would constitute a customer for the purposes of the AML/CFT Law for the new types of categories such as NGOs and Political Entities.

61. With some minor exceptions, DNFBPs as defined in the Glossary to the FATF Methodology are broadly covered by Article 16 of the AML/CFT Law. Yet there are some divergences some of which are worth mentioning for the sake of clarity: while only casinos (including internet casinos) are recognised as reporting subjects the AML/CFT Law speaks of Licensed Objects of Games of Chance and other Gaming Houses creating ambiguity on the application of obligations; it is not clear whether certified accountants and licensed auditors are captured as reporting subjects for the specified activities attributed to the legal profession; there is legal ambiguity on the application of a threshold for dealers in special metals and precious stones and while there are references to trust and company service providers (TCSPs) there is no legal framework for the establishment, registration and legal status of trusts or other similar legal arrangements.

62. On the other hand the AML/CFT Law recognises other businesses and professions as reporting subjects in addition to the listed DNFBPs according to the FATF Methodology.

63. Since the AML/CFT Law specifies obligations for different types of categories and consequently at times it refers to specific categories of reporting subjects while at other times it refers to all reporting subjects, there are various legal ambiguities, inconsistencies and uncertainties on the application of obligations. For example for some categories of DNFBPs the application and timing of application of all CDD obligations, including enhanced measures for PEPs is not clear. For the same reasons, there is a lack of legal clarity on the obligations for the retention of records and the analysis of large complex transactions.

64. DNFBPs (with the exception of real estate agents and TCSPs) are required to report suspicious transactions. As such the deficiencies already outlined also apply in relation to DNFBPs. However there is an inconsistency on the timing of reporting between DNFBPs and the financial sector, including casinos.

65. DNFBPs are also required to apply other preventive measures but with significant shortcomings, particularly with regard to prohibition of disclosure, internal procedures, compliance management arrangements, audit function and training. In particular there is no obligation on DNFBPs to appoint a compliance officer in accordance with the AML/CFT Law and as provided for the financial sector.

66. In addition, the extremely low number of STRs submitted by DNFBPs, their very low level of awareness and the lack of supervision do not allow to consider that preventive measures and reporting obligation regarding DNFBPs are being effectively implemented.

67. The AML/CFT Law designates the FIU as the regulatory and supervisory authority for all categories of DNFBPs with the exception of building construction companies which therefore are not subject to any supervision or monitoring under the Law for the purposes of compliance thereto. To this effect it appears that the FIU lacks the necessary adequate resources to fulfil this obligation and this is manifested in the low number of on-site compliance visits by FIU. Moreover, although the AML/CFT Law empowers the FIU to delegate its supervisory remit to other relevant competent authorities for specific categories of reporting subjects it has only done so for the financial sector through its agreement with the CBK. The FIU claims it has adequate resources to undertake compliance visits as staff at Department for Operations and Analysis also undertake compliance visits.

68. Notwithstanding the legal powers provided for the FIU to fulfil its supervisory mandate, there are various shortcomings which reflect on the effectiveness of the regime to ensure compliance with the AML/CFT Law. Thus there are no legal powers for the FIU to apply a risk based approach; there is no range of sanctions to be applied proportionately to the severity of an offence; indeed there are no adequate powers of enforcement and sanctions against directors or senior management of DNFBPs for failure to comply with some of the provisions of the AML/CFT Law; there is legal uncertainty on the general powers of the FIU to undertake unconditioned on-site examinations; and there is no legal mandate for the FIU to undertake offsite examinations.

69. The analysis of the preventive measures for DNFBPs raises certain concerns on the effectiveness of the regime. Within this context the Report makes various recommendations which should be adopted by the Kosovo authorities in order to continue to enhance harmonisation with international standards.

70. With Kosovo having a high cash based economy, statistics on currency in circulation and statistics on the incoming and outgoing of currency cross-border raise certain concerns on the movement of cash within and outside of Kosovo, notwithstanding that the CBK is taking measures to reduce the use of cash while the KC ensure that cash transferred cross-border is detected and declared. However, the assessment team was not provided with any explanations supporting these movements.

**Legal Persons and Legal Arrangements**

71. Kosovo applies an upfront system through the business registration system governed by the Law on Business Organisations (Law No 02/L-123) of September 2007 as amended in 2011. Various types of business organisations can be registered in Kosovo. Currently, the Business Register contains 133,612 companies in total. The KBRA, within the Ministry of Trade and Industry (MTI), is the authority responsible for implementing the Law and maintaining the business register. In practice the KBRA aims to provide a 'one stop shop' for business registration. To this effect the Agency operates through 28 Municipal Centres. There is no need for intermediaries (lawyers, accountants, etc) to register a business organisation. All forms for registration are available online and registration can be done online.

72. The registration system for business organisations appears adequate although some weaknesses can be identified mainly in relation to the maintenance, updating and timely availability of information, and information relating to beneficial ownership.

73. In the case of joint stock companies and limited liability companies, although the Law requires that any changes in any of the information contained in the registered charter of a JSC or a LLC is reported to the KBRA, and notwithstanding the obligation of joint stock companies to maintain a list of shareholders, there is no direct obligation to immediately inform KBRA upon changes in shareholders. KBRA informed that in order to try to obtain such information earlier than the annual report, the Agency insists on business organisations to appoint a person with the responsibility to inform the Agency immediately any changes occur.

74. The accuracy of the information available is also questioned due to the provisions under the Law that the registration of a document does not constitute any type of legal determination or presumption on its validity or that any information contained therein is accurate or inaccurate. There is therefore lack of due diligence at least on the founders of a business organisation.

75. The system does not provide procedures for the KBRA or any other person or authority to identify whether a number of business organisations belong to the same individual – except for TAK through the tax registration number. Furthermore, the system does not identify inter-connections between business organisations where, through layers of ownership, some companies might own each other.

76. The Law on Business Organisations provides that all records, documents, filings, forms, rules and other materials required under the Law to be submitted to the KBRA or prepared by the KBRA relating to its operations or procedures or to any business organisation are, without exception, public documents and the KBRA is to have them readily and routinely available to any person, upon such person's request or demand, for review and copying. In this regard the Agency shall mark any copies requested by any person as 'true copies'.

77. The Law further requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site the relevant details and information including names of founders, directors and other authorised persons and any changes thereto within one month after the registration of such company or any change to such information. Access to this information is available to the public in general through the web-site of the Agency. In order to access such data a person must have information on either of the business registration number, business name, personal ID of authorised person, owners' personal ID, main activity or other activities. As changes to shareholders and directors are reported through the annual reports, there is a time-lag when the information available may not be timely and accurate.

78. The recent amendments to the Law have reduced capital needed for a JSC or a LLC with the registration period being also reduced to three (3) days. Although from an economic perspective the above changes may contribute positively, from an AML/CFT perspective these may raise concerns as they make the registration of business entities easier unless strictly monitored at the registration stage, considering the lack of due diligence.

79. While the Law on Business Organisations prohibits joint stock companies from issuing bearer shares or bearer securities, the assessment team noted legal ambiguity in that the respective national legislation is not clear as to whether a foreign business organisation that allows the issue of bearer shares and/or securities can be a shareholder of a JSC registered in Kosovo and also whether such a foreign business organisation can register a branch in Kosovo.

80. The circumstances relating to the establishment and registration of trusts and legal arrangements in Kosovo consists of pointless and inapplicable legal provisions that could contribute negatively to the efficiency and effectiveness of AML/CFT preventive system due to the legal inconsistency and ambiguity. Consequently, in the absence of a formal legal framework for the establishment, registration and legal status of express trusts or other similar legal arrangements there are no procedures in place as required under FATF Recommendation 34.

**Non Profit Organisations**

81. Non-profit organisations (NPOs) or non-government organisations (NGOs) as referred to in Kosovo are governed by the Law on NGOs (Law 04/L-057 of 2011). The Law on NGOs sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organised as NGOs. The Law however does not apply to political parties, trade unions and unions' organisations and religious centres or temples and other fields regulated by special laws. The Department for Registration and Liaison with NGOs (DRLNGO) within the Ministry for Public Administration (MPA) is the authority competent to implement the Law on NGOs.

82. An NGO registered under the Law may apply for public beneficiary status if it is organised and operated to undertake as its principal activities one or more of the specified operations such as humanitarian assistance and relief, support for disabled persons, and educational, health and charity activities or any other activity that serves the public beneficiary. According to the Law, NGOs with a public beneficiary status shall be entitled to tax and fiscal benefits, except those which are essentially charges for municipal public services.

83. NGOs were for the first time regulated under UNMIK Regulation 1999/22 and later under the law adopted as Law No 03/L-134 in 2009 which was reviewed and replaced in 2011 by the present Law No 04/L-057. Since then a Regulation on compliance has been adopted by Government while a Regulation on registration is to be adopted soon. Notwithstanding, the review of the law was not intended to assess the AML/CFT vulnerabilities of the sector.

84. Although registration procedures appear adequate, it is only recently that DRLNGO has introduced due diligence procedures on the founders but these are applied only to new registrations. Indeed DRLNGO is not in a position to indicate the FT risks and vulnerabilities to which NGOs, and in particular those registered prior to the recent due diligence measures on founders, may be exposed to as, according to it, this issue does not fall within its mandate under the Law on NGOs, which mandate is limited to registration. Notwithstanding, and as indicated above, DRLNGO has informed that since the Cycle 1 assessment recommendations it has introduced procedures for due diligence on the founders. Since 1999 till October 2014 according to the information provided by DRLNGO 7,909 NGOs have been registered of which 7,401 are domestic and the other 508 international. Up to the time of drafting this Report 102 NGOs were dissolved voluntarily while another 14 have had their activities suspended pending final decision.

85. There is no specific legal obligation on any authority to undertake outreach to the NGO sector within the context of AML/CFT. The FIU has informed that in 2007 it had conducted several training sessions for the NGOs regarding their obligations under the AML/CFT Law and regarding compliance inspections. Training sessions for NGOs were also held in 2014. There is however a definite need to identify responsibilities and to better formalise and structure outreach to the sector to strengthen awareness on vulnerabilities and risks to NGOs posed through the misuse of such organisations. To this effect there is a need for more cooperation, coordination and information sharing between the relevant authorities, such as the DRLNGO, the FIU, TAK and other authorities who can contribute to the raising of awareness.

86. In practice adequate supervision or monitoring of any category of NGOs is absent. The TAK undertakes examinations of the sector only for the purposes of tax liabilities which, according to TAK, are low. DRLNGO claims it has no monitoring mandate under the Law on NGOs and hence it does not undertake oversight of the sector which, it further claims, should be within the remit of other competent authorities – notwithstanding that the Law provides the DRLNGO with adequate powers to take corrective measures and impose administrative sanctions such as the suspension or withdrawal of the public beneficiary status.

87. The FIU now has a clear mandate under the AML/CFT Law to monitor NGOs for the purposes of the AML/CFT Law. Moreover the AML/CFT Law gives the authority to DRLNGO to suspend or revoke the registration of an NGO for violation of any provision of Article 24 of the AML/CFT Law pursuant to Article 21 of the Law on NGOs, yet it does not provide mechanisms how this can be done in the absence of a supervisory mandate to DRLNGO.

88. There are no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require with the exception of documents retained by NGOs for the purposes of paragraph (4) of Article 24 of the AML/CFT Law.

89. Likewise, and notwithstanding that NGOs are obliged to report any suspicious acts or transactions to the FIU and the supervisory powers of the FIU for the sector, the AML/CFT Law does not empower the FIU to demand any information from NGOs except for the Annual Reports drawn up under Article 18 of the Law on NGOs and the records maintained under paragraph (4) of Article 24 of the AML/CFT Law.

90. On 16 December 2011 the FIU entered into a co-operation agreement with DRLNGO for the exchange of information. The MoU establishes the procedures, conditions and criteria for the exchange of information and the obligations of each party on the treatment of information exchanged and compliance functions.

91. Notwithstanding that if an NPO were to be investigated then the normal investigative processes and criminal sanctions would apply, there is a serious problem if NGOs that should be investigated cannot be identified. The absence of due diligence measures on founders at registration stage – at least for those NGOs registered prior to the claim by DRLNGO that it has now introduced due diligence on founders - the fact that DRLNGO is not in a position to indicate whether an NGO that is being registered could be related to the FT and the lack of supervision in practice for AML/CFT purposes negatively impact the investigative process.

**National and international cooperation**

92. At the policy level the most important development is that of an AML/CFT strategy, that was adopted in January 2014 abrogating the previous strategy that had been adopted in September 2012. There is a cross-agency working Group on its implementation. When and if completed, this will have a major impact on Kosovo's ability to organise and inform itself to better

tackle the threats from ML, economic crime and TF. Under the September 2012 strategy a recently established National Office for Economic Crimes Enforcement is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF.

93. The Kosovo Prosecutorial Council (KPC) has recently developed a Strategic Plan for Inter-Institutional Cooperation in the Fight against Organised Crime and Corruption for 2013-2015. This document is aimed at improving interagency cooperation and information exchange on cases of corruption and organised crime. It is clear that the KPC and AML/Economic Crime strategies cover a number of the same issues. This leads to a concern as to how the KPC and AML strategies will correlate in terms of practical implementation. According to the KPC the Strategic Plan foresees among others the enhancement of coordination and cooperation between the institutions and law enforcement agencies in Kosovo. This coordinaton and cooperation should be based on legal provisions in CPC with regard to their mutual cooperation. The Plan also envisages that the State Prosecutor treats the cases indicated in the Plan with priority, including the training and specialisation of prosecutors in these fields. The Strategic Plan is in full harmony with the obligations that derive by the CPC.

94. As regards operational coordination it is clear that law-enforcement agencies are still at the initial stage of creating proper and systematic mechanisms for interagency information exchange and cooperation. The KP, KC, FIU and Prosecutors have signed a number of MoUs to this effect, however several key arrangements, such as an FIU-Prosecutors MoU have not yet been considered.

95. Kosovo is able to provide a wide range of the possible forms of international cooperation in criminal matters including procedural legal assistance in criminal matters in general, extradition or transfer of proceedings. As for the procedural legal assistance, foreign requests are filed via the MoJ which forwards them to the local judicial authority (as a general rule, no direct cooperation with foreign judicial authorities is foreseen). No restrictive grounds for refusal were detected in the respective legislation. While cooperation is said to be conducted in a reasonable time and is constructive and effective in its implementation, the assessment team was made aware of lengthy delays and long backlogs of proceedings that go through the Courts and therefore urged clear service standards on turnaround times for foreign MLA requests. Arrangements for coordinating seizure and confiscation action with other countries should be established and consideration should be given to establishing an asset forfeiture fund as well as to sharing confiscated assets with other countries when confiscation is a result of coordinated law enforcement action. While the extradition regime is technically in line with the FATF standards, its effective application is paralysed by a recent legal provision that allows the final ministerial decision on granting extradition to be appealed by initiating an administrative conflict procedure with an apparent delaying effect to the extradition procedure.

96. Non-MLA international cooperation in the AML/CFT area is carried out by the FIU and the KP. Paragraph (1.17) of Article 14 of the AML/CFT Law allows the FIU to spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and which are subject to similar obligations in terms of preservation of confidentiality, regardless of the nature of agency which is subject to reciprocity. The information provided shall only be used upon approval by the agency and solely for purposes of combating ML, and related criminal offences and TF. The FIU is able to make enquiries on behalf of foreign counterparts of publicly available information and its own databases (STR related information). The FIU is entitled to request and receive from public or governmental bodies, or international bodies or organisations or intergovernmental organisations (in Kosovo), data, information, documents related to a person, entity, property or transaction, and may spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and that is subject to similar obligations for protection of confidentiality, regardless of the nature of the agency which is subject to reciprocity. At the same time, the AML/CFT Law does not allow the FIU to make enquiries to financial institutions or other reporting subjects for information, based on a request from a foreign FIU. In the case of requests referred to the FIU, Article 37 of the AML/CFT Law states that professional secrecy cannot be used as a ground for rejecting a request for information that should be provided by law or has been collected in compliance with the AML/CFT Law. KP and KC must comply with the requirements of the Kosovo Data Protection Agency. Requests for information to be released must comply with the minimum standards.

97. Since 2011 the KP has created an International Law Enforcement Co-operation Unit (ILECU) within the framework of a regional project aimed at facilitating international information exchange between law enforcement authorities. Exchange of information with non-counterparts will go via indirect channels. Either ILECU or Interpol will channel the request but in the case of

Interpol there must also be a request through diplomatic channels within 30 days (the same deadline was only 18 days under the old MLA Law) – thus an indirect routing. In either case the positioning of ILECU or Interpol means there is an intermediary in the process. Kosovo authorities have provided some statistics with regard to international information exchange by the KP, either through ILECU or otherwise, however the data provided are not detailed enough to judge about the effectiveness.

# AML/CFT DETAILED ASSESSMENT REPORT

## 1. GENERAL

### 1.1. General Information on Kosovo and its economy

98. Kosovo is located in south-eastern Europe in the central Balkan Peninsula, and it covers 10,908 km$^2$. Kosovo has an estimated resident population of 1,815,606,[13] of which approximately 92% is Albanian and 8% from Serb and other minorities. The Kosovo population is one of the youngest in Europe with an estimated 40% of its citizens being below the age of 20. The official languages in Kosovo are Albanian and Serbian. At the municipal level, the Turkish, Bosnian and Roma languages have the status of official languages.

99. From 2006 until 2011, Kosovo's Gross Domestic Product (GDP) annual growth rate averaged 4.5% reaching an all-time high of 6.9% in December 2008 and a record low of 2.9% in December 2009.[14] According to a survey conducted by the International Monetary Fund (IMF), there was real GDP growth of 2.5% in 2012 and 2013, down from 4.4% in 2011.[15] The growth outlook over the medium term remains moderately buoyant, with 2014 growth forecasts slightly exceeding the average.[16] Robust domestic demand is funded by transfers and capital inflows that originate, to a large extent, with the Kosovo diaspora.[17] According to various assessments there is still a high risk in doing business in Kosovo.[18] The informal economy is still large.[19] Kosovo is still an import-based economy; forced to import goods and raw materials not offered by the local market. The main imported goods include manufactured goods, machinery and equipment, prepared foodstuff, beverages and tobacco, and fuels. Kosovo uses the euro as the official currency since 1 January 2002.

100. On 10 June 1999 the UN Security Council adopted Resolution (UNSCR) 1244. This resolution, while confirming Serbia's international borders, removed Kosovo from the jurisdiction of Serbia, replacing it with a temporary solution of an internationally supervised administration, aiming to support the development of operational autonomous institutions in Kosovo. Based on UNSCR 1244 the United Nations Interim Administration Mission in Kosovo (UNMIK) was created. It was vested with administrative, legislative and judicial powers in Kosovo.

101. Kosovo declared independence from Serbia on 17 February 2008. In April 2008, Pristina authorities adopted a Constitution, which came into force in June 2008. Kosovo is not a member of the United Nations.[20]

102. Almost 4,882 troops out of 31 contributing countries from the Kosovo Force (KFOR) deployed under UNSCR 1244 are still stationed in Kosovo to help maintain a safe and secure environment. KFOR cooperates with and assists the UN and the European Union Rule of Law mission (EULEX) and other international actors, as appropriate, to support the development of a stable, democratic, multi-ethnic and peaceful Kosovo. EULEX began its operations in the area of

13. This is an estimate of December 2012. The last census was carried out on 1 April 2011 and counted 1,739,825 residents without including an additional estimated number of 40,196 citizens that belong to north communes (Leposaviq, Zubin. Potok, Zvecan and Northern Mitrovica) that were not initially included in the census. See also http://esk.rks-gov.net/ENG/pop

14. Bertelsmann Stiftung Transformation Index (BTI) 2014: Kosovo Country Report found at http://www.bti-project.org/ - p 19.

15. IMF World Economic Outlook 2014. According to the same source, the GDP of Kosovo for 2013 amounted to around USD 6.827 billion.

16. The World Bank Group in Kosovo, Country Snapshot, October 2014; http://www.worldbank.org/ - p. 3.

17. *Ibid*. According to the CBK, the income from remittances has a positive trend of around €606.6 million in 2012 and €620.8 million during 2013.

18. Kosovo is ranked at the 126$^{th}$ place out of 183 economies according to Doing Business 2012. However, it is better ranked in Doing Business 2013 (98$^{th}$ rank out of 185 economies) and 2014 (86$^{th}$ rank out of 189 economies).

19. See below at Section 1.2 of this Report.

20. Kosovo became a member of the World Bank and the International Monetary Fund on 29 June 2009. Furthermore it became the 66$^{th}$ member of the European Bank for Reconstruction and Development (EBRD) on 16 November 2012, and has been invited by the Committee of Ministers of the Council of Europe on 11 June 2014 to become a member of the Venice Commission.

rule of law on 9 December 2008 within the framework of UNSCR 1244 (1999) and became operational in April 2009.[21] EULEX's central aim is to assist and support the Kosovo authorities in the rule of law area, specifically with regard to the police, judiciary and customs. Its mandate has been extended until 14 June 2016.[22]

103. Kosovo has a civil law based legal system, where the Constitution is the highest legal act and all other laws and other legal acts must be in accordance with the Constitution.

*Transparency, good governance, ethics and measures against corruption*

(see also PECK assessment report on the anti-corruption component)

104. In recent years, media, civil society and some other stakeholders have often reported about corruption-related issues that are considered to be a serious challenge in Kosovo. There have also been occasional allegations of officials having links with organised criminal activities. Transparency International's 2013 and 2014 Corruption Perception Index rate Kosovo at 33 (scores range from 0 (highly corrupted) to 100 (very clean)), almost the lowest rating in the Balkans and without improvement from 2012 (34).[23] According to the World Bank's Worldwide Governance Indicators, Kosovo's control of corruption has shown little improvement since 2003, and remains low at more or less 30% in 2012 (100% corresponding to the highest rank), with no clear tendency since 2005.[24] Different important legal and institutional interventions have taken place during the last years and legal standards have been adopted in relation to corruption and ML-related areas, judicial system, criminal issues, good governance, public administration and transparency.

105. During the last 6-7 years the Council of Europe (CoE) has carried out in Kosovo and the region a number of interventions through technical assistance and cooperation programmes. These interventions were focused in the field of economic and serious crime i.e. ML, FT and international cooperation in criminal matters. More specifically, these activities were carried out through PACO Impact, CARDS and PROSECO projects. Other technical assistance projects were provided within Instrument for Pre-Accession Assistance (IPA) programming of the European Commission. For the purposes of this Report, it is worth mentioning the EU-funded projects on "Support to Kosovo Institutions for Combating Financial and Economic Crime" and on "Support to the Agency for Managing of Sequestrated and Confiscated Assets (AMSCA)", both implemented by B&S Europe, and the EU-funded Twinning Project on "Strengthening Criminal Investigation Capacities against Organised Crime and Corruption". Other projects funded by EU Member States, other European States and the United States are the CRINIS-Shining a light on money in politics funded by the Norwegian Ministry of Foreign Affairs, and the technical assistance provided by the US Department of the Treasury – Office of Technical Assistance (OTA), and the Support to Anti-Corruption Efforts in Kosovo (SAEK) implemented by UNDP.

106. Cooperation between the authorities and the private sector is at an early stage. Privatisation of strategic economic sectors is still ongoing under a background of very sound criticism regarding lack of transparency and consultations, alleged abuses and lack of sufficient preparatory economic and financial justifications. There are not yet sound structural reforms to improve the business environment and attract Foreign Direct Investment (FDI) according to competitive and streamlined processes. While the (FDI) in Kosovo represented in 2013 around €258.9 million (13.1% higher compared to 2012), the FDI compared to the GDP has a decreasing trend due to the global financial crisis since 2008

21. The EU Joint Action (JA) of February 2008 (2008/124/CFSP amended by the JA 2009/445/CFSP) and Council Decision 2010/322/CSFP of June 2010. Moreover 2012/291/CFSP of June 2012 and 2014/349/CSFP of June 2014 provide the legal basis for the Mission. EULEX is supported by all 28 EU Member States and five contributing States (Canada, Norway, Switzerland, Turkey and the United States).

22. Composed of around 2,000 international and local staff, EULEX is divided into two 'divisions': the 'Executive Division' and the 'Strengthening Division'. The Executive Division investigates, prosecutes and adjudicates sensitive cases using its executive powers whereas the Strengthening Division monitors, mentors, and advises local counterparts in the police, justice and customs fields. Law 04-L-273 on amending and supplementing the laws related to the mandate of the European Union Rule of Law Mission in Kosovo and Law 04-L-274 on ratification of the International Agreement between Kosovo and European Union on the EU Rule of Law Mission in Kosovo have been adopted in April 2014.

23. http://www.transparency.org/research/cpi/overview/

24. World Bank, http://info.worldbank.org/governance/wgi/

## 1.2. General Situation of Money Laundering and Financing of Terrorism

*Proceeds-generating predicate offences*

107. The extent of ML is related to the extent of informal black economy (drug dealing, prostitution, smuggling of illegal goods and other criminal activities), excluding, in this context, tax evasion, as part of the grey economy. A study assessing the extent of informal economy in 2013 concluded that the informal economy in Kosovo occupies 34.4% of GDP.[25] There are no accurate assessments of the extent of informal economy.[26] According to some other researches the extent of informal economy goes even beyond 40%.[27]

108. According to the recent report by Europol on "EU Serious and Organised Crime Threat Assessment 2013", Albanian speaking groups continue to be very active in trafficking activities of heroin as well as of synthetic drugs.[28] The income from these criminal sources is subject to ML activities. This situation has not changed that much up to date.

109. Kosovo has porous borders which facilitate an active black market for smuggled consumer goods and pirated products largely along the Kosovo - Serbian border. Illegal proceeds from domestic and foreign criminal activity are also generated from official corruption, tax evasion, customs fraud, organised crime, contraband, and other types of financial crime.[29] On 30 January 2013, the Kosovo Government adopted the decision to establish a task force against counterfeiting and piracy. The establishment of the task force was foreseen by the National Strategy for combating counterfeited and pirated products, adopted on 4 October 2012.[30]

110. The table below contains statistics provided by authorities on the offences that are major sources of illegal proceeds in Kosovo:

25. According to the survey that was conducted with 600 Kosovo businesses, business managers and owners believe that businesses in their industry report about 65.6% of their sales: http://www.riinvestinstitute.org/

26. According to the Summary of the Situation Report 01/2014 "Prevention of Informal Economy, Money Laundering, Terrorist Financing and Financial Crimes in Kosovo (2014-2018, May 2014, p.8), an EU funded Project evaluated that the extent of informal economy during 2004 - 2006 in Kosovo was 26.67 to 34.75 % of the Kosovo GDP. In absolute value this would have meant in 2013 between EUR 1.37 to 1.78 billion. See the abovementioned survey on the extent and prevention of the illegal economy and ML in Kosovo at http://www.eulex-kosovo.eu/. According to this survey, the informal grey economy (legal activities that are deliberately hidden in order to avoid taxation, compliance with regulations and/or social security contributions) results worth annually from 85.8% to 87.5% whereas the informal black economy (proceeds of tax evasion/frauds and smuggling of goods and other criminal activities) constitutes 13.1% to 13.5%. 50% is calculated to be tax frauds and the rest fiscal evasion due to smuggling. Furthermore, pursuant to the Working Paper "Shadow Economies All over the World" (World Bank, Friedrich Schneider, Andreas Buehn and Claudio E. Montenegro July 2010,) that estimates the proportion of shadow economy (informal grey economy without including the black economy) in 162 countries from 1999 to 2007 (Kosovo is not included in this paper), the estimated average of shadow economy in neighbour countries is as following: Albania – 34.30%, Bosnia and Herzegovina – 33.60%, FYROM – 37.60%, Bulgaria – 35.30%, Croatia – 32.10%. See for further information: http://www-wds.worldbank.org/

27. http://koha.net/

28. https://www.europol.europa.eu/

29. See US Department of State, Country reports on terrorism 2013 – Kosovo and International Narcotics Control Strategy Report (INCSR) at http://www.state.gov/j/ct/rls/crt/2013/224822.htm and http://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/227910.htm.

Smuggling of goods circulating in the part of northern Kosovo but not only has been a challenge in the past although there has been clear reduction during last two years due to measures undertaken by KFOR, EULEX and Kosovo authorities. An Integrated Border Management (IBM) agreement with joint checkpoints signed between Kosovo and Serbia started to be implemented in 2013. Despite implementation of IBM, however, much of the traffic into northern Kosovo enters through illegal bypass roads that circumvent the official checkpoints.

30. Anti-counterfeiting and Piracy Task Force established in Kosovo, 27 February 2013: http://sdpkosove.com/

***Table 1: Offences that are major sources of Illegal Proceeds (the economic damage caused by these offences was not specified by Kosovo authorities)***

| Type of Crime | Year | Registered crime | Concluded investigation | Persons charged |
|---|---|---|---|---|
| **Drug related offences** | | | | |
| | 2010 | 314 | | 461 |
| | 2011 | 407 | | 547 |
| | 2012 | 517 | | 575 |
| | 2013 | 513 | 477 | 433 |
| **Robbery** | | | | |
| | 2010 | 432 | 516 | |
| | 2011 | 486 | 608 | |
| | 2012 | 152 | 410 | |
| | 2013 | 509 | 339 | |
| **Customs and tax crimes** | | | | |
| | 2010 | | 21 | 15 |
| | 2011 | | 14 | 11 |
| | 2012 | | 9 | 14 |
| | 2013 | | | |
| **Theft through abuse of office** | | | | |
| | 2010 | | 281 | 142 |
| | 2011 | | 40 | 151 |
| | 2012 | | 37 | 130 |
| | 2013 | | | |
| **Fraud** | | | | |
| | 2010 | | 132 | 68 |
| | 2011 | | 12 | 45 |
| | 2012 | | 15 | 37 |
| | 2013 | 31 | 31 | 101 |
| **Circulating falsified currency** | | | | |
| | 2010 | | | |
| | 2011 | | | |
| | 2012 | 205 | 108 | 25 |
| | 2013 | 407 | 236 (sent to Prosecutor's office) | |

*Money Laundering*

111. There is little shared knowledge, recognised information or any publicly available statistical data on the phenomenon of ML or FT in Kosovo.[31] Since 2011 the FIU produces annual reports that are made available to the wider public through the FIU web-site since 2013 but only reports of 2011 and 2012 are available. The FIU has also published on its website a typologies report on ML and FT in Kosovo. Moreover the FIU has participated in various national and international fora on ML/TF. At the same time, the quantity and quality of data from law enforcement and judicial authorities has been regarded, in the past, as not sufficient to evaluate the number and

31. UNOCD, "Technical Assessment Report", April 2010: www.unodc.org/, at p. 26.

characteristics of ML crimes investigated, prosecuted and processed in the courts.[32] The average annual number of financial crimes recorded by the KP and KC has increased in 2012-2013 from 2,184 up to 3,537.[33]

112. A large amount of money is invested in real estate, restaurants, bars and games of chance operations such as casinos, slot machines and sports betting facilities, and there is no capacity to supervise this movement. There is also a tendency to conduct business and to engage in business transactions on private accounts without business registration. Therefore, it does not come as a surprise that according to statistics in the Performance and Resource Plan of the FIU for the period 2010 – 2013 an average of 481,967 cash transactions (above €10,000) are reported to the FIU each year, a number which is extremely high compared to the size of Kosovo's population and economy – refer to the analysis and comments for FATF Recommendation 19 and Recommendation 20 (EC 20.2) in this Report.

113. In 2007 Kosovo and international police arrested two people; a political adviser to the then Prime Minister, and the director of one of the banks operating in Kosovo on suspicion of ML. According to allegations, the bank was the administrator of the special fund of the former Prime Minister. The adviser to the then Prime Minister was accused of having a role in this ML affair. To add to the list, the then Governor of the Central Bank of Kosovo (CBK) was arrested for ML, as well as a Senior Adviser to the then Minister of Health was charged with tax evasion. The then Minister of Transportation and Telecommunication had also been accused of ML and taking kickbacks from contractors, but these charges were dropped due to the lack of evidence. As recently as August 2012, the Special Anti-Corruption Unit has arrested four persons in the municipality of Klina, suspected of ML. According to the KP, these arrests resulted from arrests for the same case that occurred in 2009 and 2011, where 26 persons were arrested.[34] It was alleged that the accused persons benefited from €1,257,928 by cheating a rent-a-car company.

114. On February 2014 an international prosecutor in the Special Prosecution Office in Kosovo (SPRK) conducted an arrest and search operation against ten (10) defendants allegedly involved in an organised criminal group suspected of committing various offences.[35] Large ML schemes were identified by the FIU, where foreign companies in cooperation with local companies, in at least 19 cases, were detected conducting ML activities through banks, insurance companies, casinos, real estate and prostitution.[36] The FIU investigations over a suspected fund of €280,000 for foreign language courses and the withdrawal of €70,000 in cash by a restaurant worker resulted in investigations against over 12 suspects.[37]

*Terrorism and terrorist financing*

115. The threat of TF has been confirmed by various authorities in Kosovo met in the course of the two on-site visits. The FIU also reports that it has observed several suspicious transactions with regards to TF.

116. Within the constraints posed by its financial situation, the Government of Kosovo has expanded its efforts to cooperate with international partners to address the flow of individuals illegally transiting Kosovo and to identify and screen potential threats both domestically and from abroad.[38]

117. In late 2013, the KP arrested seven (7) individuals who were suspected of preparing terrorist acts and other acts against law and order in Kosovo. The arrested people have been remanded in custody for 30 days. Two of them are being investigated on suspicion of instigating

32. B&S Europe, 2007 "Survey on the extent and the prevention of the illegal economy and money laundering in Kosovo. Report prepared for the European Agency for Reconstruction", p. 21: www.eulex-kosovo.eu/

33. *Supra* second footnote to *Proceeds-generating predicate offences*. The annual number of basic court convictions concerning financial crimes (commonly abuse of official duty, smuggling of goods, tax offence, unlawful occupation of real property and bribery) has remained stable varying between 1,296 and 1,541. Moreover, the total value for annually seized assets has varied during 2012-2013 from around 28,000 EUR to 86,000 EUR.

34. http://www.kosovapress.com/

35. http://www.eulex-kosovo.eu/en/pressreleases/

36. http://www.zeri.info/

37. http://gazetajnk.com/

38. http://www.unhcr.org/refworld/

hatred in relation to a physical attack against two US citizens on 3 November 2013. Media have reported that the two American women were part of the Evangelist Church and that they were attacked when they were distributing religious pamphlets.[39] In 2013, the Directorate against Terrorism opened 10 cases. Most were for terrorism-related offences, and one was related to the preparation of a terrorist act. In two cases, the Directorate filed criminal proceedings against six individuals, resulting in their detention.

118. Furthermore, hundreds of people from Kosovo, Albania and "the former Yugoslav Republic of Macedonia" are reported to have gone to fight in Syria.[40] Kosovo does not have a specific statute that criminalises participation in or support for a military group that operates outside of Kosovo.

### 1.3. Overview of the Financial Sector

119. According to the High Level Financial Sector overview performed in October 2011, macro-economic stability in Kosovo is weak by global standards, with particular challenges reflected in the large current account deficit and fiscal deficit. While the financial sector is small and unsophisticated, the banking sector remains sound. It is majority foreign-owned and highly concentrated in a few banks. The depth and sophistication of financial services is poor, with banks and MFIs mainly providing only basic credit products.[41]

120. A similar, though improved, situation seems to prevail presently. According to the CBK, economic activity during 2013 was characterised by positive trends and the growth rate reached 3.1%. Improvements in the net exports position in goods and services resulted in a positive contribution of this component. Banking sector assets have continued to grow. The most significant growth within assets was marked by securities investments, while the bank lending, despite the positive growth rate, continues to be characterised by a slower growth trend. Treasury bond market continued to be characterised by high bidding and low interest rates, but in the recent months, the demand for securities by primary dealers shifted towards securities with longer term maturities. However all indicators within this market reflect financial and fiscal stability in Kosovo.

121. Excluding the CBK, the total financial sector assets reached €4.2 billion during 2013 and grew by 31.3% compared to 2010 and by 8% compared to 2012. Banking sector assets at €3.06 billion, with an annual growth rate of 8%, comprised around 72.3% of total financial sector assets. Pension funds under trust management amounted to €0.9 billion with a growth rate of 23.4% and comprised 21.7% of total financial assets. MFIs managed assets to the value of €0.113 billion, declining by 2.3% and representing 2.7% of the financial sector, following the insurance companies with assets of €0.132 billion (€0.119 billion in non-life and €0.013 billion in life) representing 3.1% of the financial sector assets.[42]

122. Excluding the CBK, net foreign assets (NFA) of financial corporations reached around €1.2 billion. NFA of commercial banks in Q4_2013 marked an annual growth of 16.8%. Claims on non-residents marked an annual increase of 18% with the largest part of claims on non-residents comprised of securities, deposits and loans. Meanwhile, liabilities to non-residents were characterised with an annual growth of 25.5%. Liabilities to the external sector mainly consist of non-resident deposits and loans most of which commercial banks in Kosovo have borrowed from parent banks.[43]

123. Currently, there are 9 commercial banks licensed and operational in Kosovo,[44] 1 representative office of a foreign neighbour bank, 2 licensed pension funds, 16 licensed insurance companies, 18 MFIs, 5 insurance intermediaries (1 revoked license), 5 NBFIs (1 registration has been withdrawn for inactivity), 5 money transfer agencies, and 33 foreign exchange bureau.[45]

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39. See more information reference at: http://www.balkaneu.com. See also US Department of State, Country reports on terrorism 2013 – Kosovo at http://www.state.gov/j/ct/rls/crt/2013/224822.htm

40. *Ibid*.

41. Kosovo High Level Financial Sector Overview prepared by Partners for Financial Stability Program, Deloitte Consulting LLC for USAID, October 2011 (http://www.pfsprogram.org.)

42. *Source*: Quarterly Assessment of the Economy, Central Bank of Kosovo, No. 5 QIV/2013 pp. 10 and 17; Monthly Statistics Bulletin, Central Bank of Kosovo, No. 150, February 2014; CBK Annual Report 2013 (p. 35): http://www.bqk-kos.org/

43. *Ibid*

44. The license of one bank has been revoked in 2006.

45. *Source:* Central Bank of Kosovo (CBK) information and statistics at: http://www.bqk-kos.org.

124. The following table sets out the types of financial institutions that can engage in the financial activities that are within the definition of "financial institutions" in the FATF Recommendations:

***Table 2: Types of Financial Institutions that can engage in Financial Activities***

| Type of financial activity (See glossary of the 40 Recommendations) | Type of financial institution that performs this activity |
|---|---|
| 1. Acceptance of deposits and other repayable funds from the public (including private banking) | 1. Banks |
| 2. Lending (including consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfeiting) | 1. Banks<br>2. MFIs<br>3. NBFIs |
| 3. Financial leasing (other than financial leasing arrangements in relation to consumer products) | 1. Banks<br>2. NBFIs |
| 4. The transfer of money or value, including financial activity in both the formal or informal sector (e.g. alternative remittance activity), but not including any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds) | 1. Banks<br>2. NBFIs (Money remitters)<br>3. Postal services that perform payment services |
| 5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders, and bankers' drafts, electronic money) | 1. Banks<br>[2. Any other physical / legal entity that issues/manages payments] |
| 6. Financial guarantees and commitments | 1. Banks<br>2. NBFIs |
| 7. Trading in:<br>(a) money market instruments (cheques, bills, CDs, derivatives etc.;<br>(b) foreign exchange;<br>c) exchange, interest rate and index instruments;<br>(d) transferable securities;<br>(e) commodity futures trading | 1. Banks<br>2. (b) Foreign Exchange Offices<br>3. NBFIs |
| 8. Participation in securities issues and the provision of financial services related to such issues | 1. Banks<br>2. NBFIs |
| 9. Individual and collective portfolio management | 1. Banks |
| 10. Safekeeping and administration of cash or liquid securities on behalf of other persons | 1. Banks<br>2. NBFIs |
| 11. Otherwise investing, administering or managing funds or money on behalf of other persons | 1. Banks |
| 12. Underwriting and placement of life insurance and other investment related insurance (including insurance undertakings and to insurance intermediaries (agents and brokers)) | 1. Life insurance companies / agents / intermediaries / pension funds |
| 13. Money and currency changing | 1. Banks<br>2. NBFIs<br>3. Foreign exchange offices |

*Banking sector (banks and non-bank financial institutions)*

125. By the end of 1999, there were no banks operating in Kosovo. One bank, the Micro-Enterprise Bank of Kosovo (MEB-Kosovo), with EBRD and IFC being equity participants, received approval to commence operations in January 2000. A second financial institution (technically a "non-bank"), the Grameen-Missione AMF, also obtained a licence to operate as a MFI, although it was not active as of the second quarter of 2000. Preliminary licenses were approved by the licensing and supervisory authority in spring 2000 for four banks with a history of operations in Kosovo. In early 2000, deposit mobilisation and lending were virtually nonexistent in the banking sector apart from the 2,000 or so accounts that had been opened with MEB-Kosovo. Basic transfers through the banks had been virtually stopped so the payment system could be reorganised. However, in the absence of a functioning banking system, these services were generally provided by travel companies at a 5% to 7% charge per transfer.

126. The banking sector in Kosovo consists of two levels where the CBK operates as the first level bank and the commercial banks as the second level banks.

127. Banking products and services are grouped into: (1) Deposits; (2) Loans; (3) Other products, (4) services payments and transfers, and (5) Securities. Banks in Kosovo offer a considerable number of products and banking services. Although most of these products enter in the group of classical banking services, in time banks have begun expansion of their services, with some innovations for the market, such as: leasing, electronic banking services (mobile banking) and other services. In general, products and services offered by banks include:

- Deposit,
- Loans,
- Service of payment /transfers internal and external,
- Business documentary (Guarantees and letters of credit),
- Electronic services,
- Other products.[46]

128. In recent years the banking system was characterised by variations in the expansion of infrastructure, with the number of branches and agencies (sub-branches) of the commercial banks going down to 57 branches and 247 agencies (total 298) by 2013.[47] Since 2009 eight (8) commercial banks have been operating in the Kosovo banking market, increasing to 9 in 2012, out of which seven are owned by foreign capital (Austria, Germany, France, Turkey, Slovenia, Serbia), whereas two of them are in local ownership.

129. Foreign owned banks have dominated the Kosovo banking system managing 89.9% of the total assets of the banking system in December 2013 (89.5% in 2012). The remaining part of the assets (10.1% in December 2013) is managed by the local ownership. The banking system in Kosovo continues to be characterised by a high level of market concentration, where 67.8% of the total bank assets are managed by the three largest banks, compared to 69.3% in 2012 while the asset concentration of the foreign owned banks stood at 90.4%.[48,49] In credit portfolios they participate with a total of 90.26% of the total sector, whereas in deposits in total these banks participate to a level of 89.23%.

130. As of 2011, based on the Law on Competition Protection, none of the foreign banks have a dominant position since no one exceeds the 40% limit of the market share. However, it should be mentioned that the continuous increase of activities of the smaller banks resulted in the continuous decrease of the concentration level in the banking system as of last quarter of 2012.[50]

46. http://ak.rks-gov.net.

47. The number of branches and agencies (sub-branches) of the commercial banks varied from 287 in 2009, 303 in 2010, 311 in 2011, 310 in 2012 to 298 at the end of 2013.

48. *Source*: CBK Financial System Monthly Information Report, March 2014

49. *Source*: CBK Annual Report 2013 (in Albanian: http://www.bqk-kos.org.)

50. http://ak.rks-gov.net. p.9

***Table 3: List of Reporting Subjects licensed by Central Bank of Kosovo since 2009***

| No. | Subjects | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|---|
| 1 | Banks and foreign branches | 8 | 8 | 8 | 9 | 9 |
| 2 | Non-bank financial institutions | 5 | 4 | 5 | 4 | 4 |
| 3 | Micro-financial institutions | 14 | 13 | 15 | 14 | 14 |
| 4 | Insurance companies | 11 | 11 | 13 | 13 | 13 |
| 5 | Insurance intermediaries | 8 | 4 | 3 | 3 | 5 |
| 6 | Pension funds | 2 | 2 | 2 | 2 | 2 |
| 7 | Foreign exchange bureaux | 23 | 26 | 30 | 31 | 33 |
| 8 | Money Transfer services | 3 | 3 | 4 | 5 | 6 |

131. In addition to commercial banks, MFIs represent another important factor in the lending market in Kosovo. In 2013 there were 14 MFI's (103 branches) and 4 other NBFIs (12 branches) operating in Kosovo, besides another 6 NBFIs providing money transfer services. The MFIs sector continues to be dominated by foreign-owned companies, whose assets constitute 91.6% of total sector assets. The degree of market concentration in this sector is lower compared to the banking sector (46% in December 2013, 45% in 2012). The value of MFIs assets in December 2013 amounted to €112.9 million, marking an annual decline of 2.5%. The portfolio of loans issued by MFI's during 2013 reached €72.3 million an annual decrease of 6.7% compared to 2012. In December 2013, total MFI loans and leasing marked a decline of 4%. A more significant annual decline was marked in loans to businesses at 17.4%, followed by loans to households with 0.6%. Leasing, on the other hand, continued to increase in December 2013 recording an annual growth rate of 6%.[51] The main beneficiaries of MFI loans are small enterprises and households (services - 46.3%, business - 16.4%, agriculture – 27%, the rest – construction, industry and energy). Leasing marked an annual increase reaching 19.5% of total assets.[52]

*Securities sector and stock-exchange*

132. There is no securities market in Kosovo. There are no securities laws and there is no licensed market where securities can be publicly traded. The first securities' trading in the form of treasury/government bonds has been carried out during 2012. There is no stock-exchange in Pristina.

*Insurance (life insurance) sector*

133. Insurance companies in Kosovo are relatively small and few, with combined assets worth €46.2 million in 2005, €70.8 million in 2007 and €132.5 million in 2013. In 2007, the share of total assets of insurance companies of the total financial sector assets in Kosovo was about 5% whereas in 2013 it represented 3.1%. Currently Kosovo has 13 insurance companies (425 offices and branches) and 5 insurance intermediaries operating, from which 10 are non-life insurance companies and 3 are life insurance companies. Nine of the insurance companies in Kosovo are of foreign ownership and managed around 64.5% of total assets of this sector in 2013 (72.2% in 2012).[53] In December 2013 the share of assets of the three largest insurance companies was 35.6% of total assets of the insurance sector. Deposits dominated the assets of insurance companies in 2013, representing 58% of insurance companies' assets. Life insurance has existed as a product since 2010.

134. The core activity of insurance companies is third party liability, namely vehicle insurance policies which generated 73.1% of all premiums in 2013, while the remaining part of the received premiums came from voluntary insurance policies (health and properties insurance).[54]

51. *Source*: Quarterly Assessment of the Economy, Central Bank of Kosovo, No. 5 QIV/2013

52. *Source:* Central Bank of Kosovo (CBK) information and statistics at p. 54: http://www.bqk-kos.org.

53. *Source:* Central Bank of Kosovo (CBK) information and statistics at pp. 52-53: http://www.bqk-kos.org.

54. *Source*: Quarterly Assessment of the Economy, Central Bank of Kosovo, No. 5 QIV/2013 - p. 17.

135. As at the fourth quarter of 2013, total assets of the insurance sector in Kosovo amounted to €132.5 million (€119 million of non-life insurance and €13 million of life insurance), marking an annual growth of 1.41%. The value of premiums written during this period amounted to €79 million (€77 million of non-life and €2 million of life insurance), compared with the last quarter of 2012, representing an annual growth of 11.8%. Total claims paid by the sector were characterised with an annual growth of 24%, which in the fourth quarter of 2013 reached a value of €38.5 million (€31 million in same period 2012).[55]

136. Net profit of insurance companies in 2010 was €1.5 million, compared to the net loss of €4.9 million in 2009. The number of the insurance policies issued by insurance companies operating in Kosovo in 2010 reached 540,700 which represents an annual increase of 5.7%. The premiums received increased by 5.1%, reaching the amount of €71.3 million as at the end of 2010. However the growth rate of the value of the received premiums was lower in 2010 compared to the growth rate of 2009, where the annual growth rate was 20.0%. In 2010 insurance companies generated the largest share of the received premiums (57% of total premiums).[56]

137. In 2013 the insurance sector was characterised with losses of €337,000 (non-life insurance loss of €624,000 and a profit of life insurance of €287,000) registered up to the fourth quarter of 2013. However, this was a significantly lower loss compared to the loss of €3.1 million in the same period 2012.[57]

138. Insurance companies in Kosovo continue to be criticised by the industry regulator, the CBK, and policyholders for their failure to pay claims swiftly.[58] However claims paid by the insurance sector in 2013 amounted to €38.5 million marking an annual increase of 24%.

*Money or value transfer sector*

139. Financial intermediaries in Kosovo include exchange bureaux and Money or Value Transfer Agencies (MVTs). By 2009, there were 3 MVT operators, also called financial intermediaries, active in Kosovo. These have increased to 6 operators by 2013 (287 offices and branches in 2011 growing up to 352 in 2013). There were 33 foreign exchange bureaux as at the end of 2013. Emigrants prefer this payment method for sending financial support to their relatives in Kosovo, because it is made very easy for the customers. It is also very attractive because the users do not need to open an account and because the transfer is made within minutes. During 2013, income of this sector amounted €5.6 million compared to €5.2 million in 2012. Transfers represent 80% of total income.[59]

140. According to the CBK Monthly Statistics Bulletin No. 152 of April 2014 international transfers through money transfer agencies in 2012 amount overall to about €185 million, of which about €20 million were outward transfers.

## 1.4. Overview of the Designated Non-Financial Businesses and Professions (DNFBP) Sector

141. The categories of DNFBPs, as defined in the AML/CFT Law are real estate agents and brokers, public notaries, attorneys/lawyers, and other legal representatives; independent certified accountants, licensed auditors and tax advisers and financial consulting offices; dealers in precious metals and stones; traders in goods when receiving payments in cash in excess of €10,000, entities engaged in the administration of third parties' assets (trusts and company services providers), and casinos including internet casinos; NGOs; political parties and building construction companies.

55. *Source*: Quarterly Assessment of the Economy, Central Bank of Kosovo, No. 5 QIV/2013 – p. 17.

56. Boga & Associates, Investment in Kosovo, January 2012: http://www.bogalaw.com/, p.31.

57. *Source*: Quarterly Assessment of the Economy, Central Bank of Kosovo, No. 5 QIV/2013.

58. *Source*: Balkan Insight (http://www.balkaninsight.com).

59. *Source:* Central Bank of Kosovo (CBK) information and statistics at p. 55: http://www.bqk-kos.org.

***Table 4: The number of entities by authorities in each DNFBP sector***[60]

| DNFBP | Number of licensed entities | Supervisory Body |
|---|---|---|
| Notaries | 73[61] | Chamber of Notaries / Ministry of Justice |
| Attorneys (Advocates) | 568[62] | Chamber of Advocates / Ministry of Justice |
| Independent auditors and auditing firms | 102 auditors[63] including 62 legal auditors (53 local, 9 foreign)<br>20 auditing firms (out of which 14 local and 6 foreign) | Kosovo Financial Reporting Council[64] / Ministry of Finance |
| Independent accountants and accounting firms | 111 accountants[65] | Kosovo Financial Reporting Council / Ministry of Finance |
| Persons and casinos organising prize games including persons organising internet prize games | Currently there are no casinos in Kosovo (the license was revoked for one previous casino). | Games of Chance Division / Kosovo Tax Administration[66] |
| Real estate agents/agencies | 60 | FIU |
| Trust and company service providers | Unknown | |
| Dealers in precious metals; dealers in precious stones | 118 | Metrology Department / MTI |
| Traders in goods receiving payment in cash over €10,000 | Unknown | FIU |
| NGOs | 7,658 | DRLNGO/MPA |
| Political parties | 63[67] | Central Election Commission |
| Building construction companies | 932 | Tax Administration of Kosovo |

*Casinos (including internet casinos)*

142. Games of Chance have been legalised in Kosovo with the entry into force of the Law No. 2004/35 on Games of Chance but they are currently regulated by the Law No. 04/L-080 of 6 April 2012. The law regulates the method of organisation and functioning of Games of Chance, types of games of chance, licensing the subjects and registration of employees of Games of Chance, establishment of the Authority of Games of Chance and their supervision. It also regulates the status, governance, management and transferable and assignable rights of the Lottery of Kosovo. Games of Chance in Kosovo are realised through the Lottery of Kosovo which is a public-legal entity and through other legal entities, registered and licensed for the practice of games of chance. The following games of chance are governed by the law:

- Lottery games;
- Casino games;
- Sport Betting;
- Slot-Machine games;
- Tombola Bingo in closed premises.

60. For the purposes of the AML/CFT Law the supervisory body is the FIU

61. http://noteria-ks.org/noteret/

62. http://www.oak-ks.org/

63. http://scaak.org/

64. http://mf.rks-gov.net/

65. http://scaak.org/

66. http://www.atk-ks.org/, p. 20.

67. The Central Election Commission refers to 63 registered political parties and 2 political movements (see for further information http://www.kqz-ks.org/). In the general elections of June 2014, out of 31 political parties and two political movements only 14 political parties and one political movement succeeded to have elected MPs in the Parliament (5 main entities and 10 other parties representing different minorities).

143. Tax Administration of Kosovo (TAK) is the regulatory authority of Games of Chance with the FIU assuming supervisory responsibilities under the Law for the purposes of the AML/CFT Law.

144. The enactment of the legislation on games of chance was not welcomed by Kosovo citizens, and a number of NGO's organised protests asking government to abrogate the law as it harms family economies which are anyway poor. Even the media published articles alleging that government officials and politicians are owners of many casinos and sport betting facilities in Kosovo. These articles raised concerns that the games of chance in Kosovo are widespread and are becoming a criminal phenomenon.[68]

145. There is currently a new law being drafted which will provide more power to the authorities to close down gaming houses and licensed objects of games of chance that do not comply with or that do not achieve the level of compliance expected under the new criteria. The amendments to the Law have been initiated by Parliament. The proposal for a change in the Law has been approved by Parliament and Parliament is now working on the draft law.

146. Out of 360 games of chance's operators that are registered in the Business Registry, 261 are personal business enterprises or general partnerships, 70 others include 56 limited liability corporations, 6 joint stock corporations. The Games of Chance's Division within TAK has issued 5 new licenses during 2013 as well as 36 new units functioning under already licensed operators due to extension of activity and 42 extensions of licences. A total of 1,053 visits have been carried out during 2013 and 1,291 during 2012. The total of fines imposed has been €111,000 (59 fines) during 2013 and €68,000 (23 fines) during 2012.[69]

*Real estate agents and Real estate brokers*

147. The AML/CFT Law covers the residential and commercial real estate sector. The real estate sector in Kosovo is regulated by: Law No. 03/L-154 of 25 June 2009 on "Property and Other Real Rights"; Law No. 04/L-013 of 29 July 2011 on "Cadastre"; Law No. 2002/05 of 20 December 2002 on "the Establishment of the Immovable Property Rights Register" (as amended); Law No. 03/L-139 of 26 March 2009 on "Expropriation of Immovable Property". The land in Kosovo and relevant transactions should be notarised and subsequently registered with respective Municipal Cadastral Offices (MCOs). The Kosovo Cadastral Agency (KCA) has the authority for overall administration of the register in Kosovo.

148. It is not possible to perform any transaction regarding real estate electronically or to electronically access the information on the ownership of registered real estate.

149. As mentioned above the real estate sector is considered as high risk for ML. In addition, use of cash is very common in real estate transactions. It should however be noted that any transation for the sale/purchase of property over €10,000 in value has to be settled through a bank transfer as otherwise it would not be registered by the KCA. The effectiveness of this requirement depends on the general average cost of property in Kosovo. The assessment team has been informed that the real estate and construction sector will be the first sector to be assessed in the second phase of the NRA which will undertake a sectorial risk assessment.

150. There are currently 60 real estate agents/agencies according to the replies to the Cycle 2 Questionnaire provided by the Kosovo authorities.

*Lawyers, notaries, other independent legal professionals and accountants*

151. Lawyers in Kosovo are organised through the Kosovo Chamber of Advocates (KCA) (Bar) which has a total of 577 registered lawyers. There are 6 societies/common offices and 54 junior

68. http://www.botasot.info/

69. See 2013 Annual Report of TAK, Table 19, page 20. According to the most updated statistics that have been forwarded by TAK to the assessment team, there are altogether 37 games of chance subjects operating in Kosovo as a result of extension of licenses (10 subjects operating lottery and casino games, 17 sport betting subjects, and 10 subjects operating Tombola Bingo in closed premises). No extensions of activities or new licenses issued were recorded in 2014. In addition, 557 units of existing subjects were closed due to lack of observance of distance limits with educations institutions, religious and historical settlements and municipal property.

lawyers under the internship period. The activity of the chamber and its organisation is governed by the Law on Bar No. 04/L-193, Statute of KCA and Code of Ethics for Lawyers.

152. The MoJ is responsible for ensuring that the legal profession is exercised normally and in compliance with the law. The FIU is responsible under the AML/CFT Law to supervise advocates for AML/CFT purposes.

153. In the time of Yugoslavia there was no notary system and consequently there has been no notary expertise available in Kosovo. Simple transactions, such as buying and selling of property have been overseen by municipal courts. In the beginning of November 2011, the MoJ certified the first 48 Kosovo notaries.[70] The Law on Notary (03/L-10) approved in 2008, and the administrative instructions governing application procedures and territorial expansion of notary services comprise the legislative framework for notary services in Kosovo. Notaries in Kosovo are organised through the Kosovo Chamber of Notaries (KCN) that is a very recent body. There are currently 73 certified notaries in Kosovo.

154. The Minister of Justice determines the general number of notaries and the relative coverage for each municipality. Notaries are involved in all transactions related to the sale of moveable and immoveable property including real estate or goods such as cars. The FIU is responsible under the AML/CFT Law to supervise notaries for AML/CFT purposes.

*Accounting, financial reporting and auditing*

155. Accounting, financial reporting and auditing in Kosovo is governed by the Law on Accounting, Financial Reporting and Auditing (Law No. 04/L-014). The law governs the accounting and financial reporting system of business organisations, competences and responsibilities of the Kosovo Council for Financial Reporting, audit requirements, qualifications for professional accountants, licensing of auditors as well as foreign and local audit firms. Accounting and Financial Reporting for Financial Institutions is regulated by the CBK. The Society of Certified Accountants and Auditors in Kosovo (SCAAK) is a non-governmental and non-profitable association that provides trainings in the field of accounting and auditing in both public and private sectors.[71]

156. Based on this Law, large business organisations and all business organisations registered as limited liability companies or shareholder companies in Kosovo, should apply International Financial Reporting Standards (IFRS), including International Accounting Standards (IAS) as well as interpretations, recommendations and guidance issued by the International Accounting Standard Board, which shall be approved by the Kosovo Council for Financial Reporting (KCRF).

157. The Law requires that financial statements of large business organisations be audited by statutory audit firms that are licensed to carry out statutory audits in Kosovo, while the financial statements of medium-sized organisations are required to be audited either by statutory audit firms or auditors that are licensed to carry out statutory audits in Kosovo. Large business organisations are those that fulfill two out of three of the following criteria: (1) Net annual turnover higher than €4 million; (2) Gross Assets at balance sheet date higher than €2 million; and (3) Average number of employees during the financial year higher than 50.

158. There are currently 111 certified accountants and 102 auditors with 20 auditing firms (14 local and 6 foreign), together with 62 legal auditors (53 local and 9 foreign).

*Dealers in precious metals and stones*

159. Dealers in precious metals and stones are individuals or legal entities. As informed through the Cycle 2 Questionnaire, according to the Commercial Register there are 108 entities as registered dealers from this sector. Their activity is specifically regulated among other common laws by the Law No. 04/L-154 on Precious Metal Works. According to this law precious metal products undergo obligatory examination and marking prior to being placed into the market. They should be certified by the Legal Metrology Institute of Kosovo (LMIK) seal – currently the Metrology Agency within the MTI. The examination is done in the Precious Metal Products Laboratory.

70. http://www.swisscooperation.admin.ch/kosovo/

71. http://www.scaak.org/

160. There are currently 118 registered and authorised dealers in precious metals and dealers in precious stones.

*Trust and company service providers*

161. Although these providers are considered as reporting subjects for AML/CFT purposes by the law, it seems that trusts do not currently exist in Kosovo. However, some company formation services such as acting as the formation agent of legal persons, providing a registered office, business address or accommodation for companies are offered by lawyers, notaries or accountants. Notwithstanding, even this legal possibility is very limited in practical terms.

162. As the trust and company services activity is not a regulated activity it is not known how many persons practice this activity.

*Other DNFBPs*

163. In 2013 the AML/CFT Law has also been extended to apply to other 'non-financial businesses and professions' such as NGOs, political entities and construction companies.

## 1.5. Overview of Commercial Laws and Mechanisms Governing Legal Persons and Arrangements

164. The following profit making entities can be registered under the Kosovo Law No. 02/L-123 on Business Organisations, as amended and supplemented by the Law No. 04/L-006. Business entities that may be registered with the Business Registry in Kosovo are: personal business enterprises or individual business; general partnerships; limited partnerships; limited liability companies and joint stock companies.

165. Apart from the above entities, foreign entities may also register a branch office in Kosovo (it must be registered with the Registry as a foreign business organisation according to the Law). A branch office is not a separate legal entity. Consequently, its rights and obligations pertain to the "parent" company and not to the branch office.

166. Individual Business ("IB") – is an entity that can be formed and owned by only one natural person and does not have a separate legal status. The owner of such an entity has unlimited personal liability for the debts and obligations of the IB. Although the IB is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner. A personal business enterprise for the purpose of conducting an economic activity may choose to register or not with the Registry.

167. General Partnership ("GP") – is a partnership formed by two or more natural or legal persons, who undertake business activity for profit pursuant to the partnership agreement. The owners of such entities are jointly and severally liable for the debts and obligations of the GP. Such liability is unlimited. The GP is not a legal person, but may be formed by legal persons who become general partners of the GP. The GP is managed by its general partner(s). Although the GP is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner.

168. Limited Partnership ("LP") – is a partnership formed by at least one general partner and at least one limited partner. The LP may be formed by natural persons or business organisations, who can serve either as general or limited partners. Although similar to the GP, the LP has at least one limited partner, whose personal liability is limited to the investment made by him/her into the LP. The limited partner is also limited as to his ability to manage or represent the LP. The LP is managed by its general partner(s). Although the LP is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner. The Registry has no authority to review a limited partnership agreement for legal or formal sufficiency and/or to refuse to register a limited partnership for any reason that relates to the form, content or terms of the limited partnership agreement.[72]

72. *Id*. Article 31.

169. Limited Liability Company ("LLC") – is a legal person formed and owned by one or more natural or legal persons, excluding NGOs. The LLC is legally separate and distinct from its owners. The personal liability of the owners is limited to the capital they invested in the LLC. The LLC is governed by the Shareholders Assembly and the Managing Director (or a Board of Directors). The shares of a LLC are distributed only to its founders and the company cannot conduct a public offering of its shares. Previously the number of the shareholders could not exceed 50 while the charter capital of a LLC was set at least at €1,000. With the coming into force of Law No. 04/L-006 amending Law No. 02/L-123 on Business Organisations the minimum capital of €1,000 and the limit on shareholders have been removed. Foreign entities are permitted to own and participate in a LLC. Registration in the Registry is mandatory for a LLC to come into existence.

170. Joint Stock Company ("JSC") – is a legal person owned by its shareholders but is legally separate and distinct from its shareholders. Thus the shareholders have limited personal liability for the debts and obligations of the JSC. An initial capital of at least €25,000 was required to form a JSC which has now been reduced to €10,000 with the coming into force of Law No. 04/L-006 amending Law No. 02/L-123 on Business Organisations. The JSC's shareholders may be natural persons, business organisations and/or other organisations. A JSC may have a single shareholder. The shares of a JSC may be transferred by the owner(s) without the approval of other shareholders or the company. Shareholders elect the Board of Directors, which manages the JSC. The Board of Directors hires the officers, namely the senior managers of the JSC. A JSC may come into existence only by registering with the Registry.

171. The address of a business organisation's registered office and the name and address of its registered agent must be clearly specified in a business organisation's registration documents. Every business organisation shall have a continuing and strict obligation to ensure that (i) a registration document is updated within ten (10) calendar days of an event affecting its accuracy – now reduced to three (3) days with the coming into force of Law No. 04/L-006 amending Law No. 02/L-123 on Business Organisations, and (ii) the person or business organisation named as its registered agent is routinely available at the physical premises identified as its registered office.[73]

172. A foreign business organisation, as defined in the Law on Business Organisations, may engage in business activity in Kosovo to the same extent as a local business organisation. First it has to register with the Registry as a "foreign business organisation" and comply with the requirements of the Law. A foreign business organisation is subject to the registration if it, or any agent, employee or representative acting on its behalf, engages in any type of business activity in Kosovo. It shall not be required by Law to register in the Registry if its business activities are exclusively limited to exporting products or services to Kosovo that are imported by a consumer or purchaser established or residing in Kosovo. To establish a branch, an authorised person of the foreign business organisation must sign and submit a standard application form, a "foreign business organisation memorandum", containing information and details about the organisation, capital structure and purpose of the parent company, structure and purpose of the branch, the registration certificate of the parent company in the jurisdiction of incorporation and the charter of the parent company.

173. In the case of a wholly owned subsidiary in Kosovo, a new company incorporated under the provisions of the country's legislation must be established.

174. Certain pieces of Kosovo legislation, most notably the AML/CFT Law make clear and direct references to entities apparently falling under the scope of FATF Recommendation 34 regarding trusts and other similar legal arrangement. The said Law refers to "trust and company service providers" and "trustee of an express trust" (Article 16 paragraph (1.8)); "legal persons, trusts and similar legal arrangements" (Article 17 paragraph 1.2); as well as "companies, trusts or similar structures" (Article 26 paragraph (8.1.5)) and similar, but sporadic, references can be found in other laws too.

175. Notwithstanding that, the assessment team, having examined the entire *corpus iuris* of Kosovo to the extent it was available to them and particularly the legislation relevant to the establishment and registration of business entities, the Law on Business Organisations, came to the conclusion that express trusts or other similar legal arrangements in the sense of FATF Recommendation 34 currently do not exist in Kosovo and hence all references and cross-references to such entities can be considered as examples of legislative error which the Kosovo authorities are urged to address without undue delay.

73. *Id.* Article 23.

176. The Business Registry is a central register that maintains the records of all registered companies. The Business Registry is responsible for: registration of new companies; registration of trade names; registration of branch offices of foreign companies; receipt of a copy of the annual financial statements and business reports of LLCs and JSCs. Following the coming into force of Law No. 04/L-006 amending and supplementing the Law No. 02/L-123 on Business Organisations, a copy of the financial statements is also filed with the MoF.

177. Currently, the Business Registry contains 133,612 companies in total. Of these, 116,412 are registered IBs, 3,533 GPs, 86 LPs, 12,337 LLCs, 422 JSCs, 662 foreign business organisations, 83 agricultural cooperatives, 27 Social Enterprises, 10 Public Enterprises, with 33 companies under the jurisdiction of the Kosovo Privatisation Agency.

## 1.6. Overview of Strategy to Prevent Money Laundering and Terrorist Financing

*AML/CFT Strategies and Priorities*

178. At the policy level the most important development is that of an AML/CFT strategy that was adopted in January 2014 abrogating the previous strategy that had been adopted in September 2012. A cross-agency Working Group has been working on its implementation, which, when and if completed, will have a major impact on Kosovo's ability to organise and inform itself to better tackle the threats from ML, economic crime and TF. Most particularly the September 2012 Strategy foresaw the establishment of a National Office for Economic Crimes Enforcement, which is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF (see also Section 6.1 of this Report).

179. In September 2012 the Kosovo Government also adopted four related strategies for the period 2012-2017 namely, a strategy against organised crime, a strategy against drugs, a strategy for fighting terrorism and a strategy for protection of borders. These four strategies were approved in the meeting of the cabinet of the Government, and were sponsored by the MIA.

180. A strategic plan for inter-institutional cooperation in the fight against organised crime and corruption has been prepared and adopted by the KPC. Its main aim is to improve the cooperation of the prosecutorial system with other institutions, particularly law enforcement authorities (see also Section 6.1 of this Report).

181. The National Office for Economic Crimes Enforcement was established with a Prosecutor being appointed as the National Coordinator in January 2014 (referred to as: The National Coordinator for the Fight against Economic Crime). The establishment and operations of the National Co-ordinator are governed by the KPC Regulation of December 2013 on the establishment and functionalisation of the National Coordinator with the aim of increasing the efficiency in prosecution of crimes, sequestration and confiscation of material benefits deriving from crimes.

182. Although following the on-site visit in April 2014 the assessment team was informed that the National Coordinator had given a four weeks' notice of resignation, his resignation was eventually withdrawn and implementation of the functions of the National Coordinator is in progress.[74]

183. In January 2014, on the basis of the NRA document, the Government of Kosovo published the National Strategy of Kosovo and its Action Plan for the prevention of and the fight against the informal economy, ML, TF and other economic and financial crimes for the period 2014-2018, abrogating the Strategy that had been adopted in September 2012.

184. The goals, objectives and actions of the National Strategy and the Action Plan 2014-2018 are based on the NRA 2013. The policy documents constitute a mechanism of managing risks in the informal economy, ML, FT and other economic and financial crimes in Kosovo. The primary goal

74. By its decision No. 13/189 of 23 May 2014, the Government decided to retroactively allocate for 2014 additional monthly remuneration for the Unit against Economic Crime (the National Coordinator and 6 supporting staff).

of the National Strategy and the Action Plan 2014-2018 is to provide support in achieving the following objectives of the programme of the Government of Kosovo.[75]

- Sustainable economic development;
- Good governance and strengthening the Rule of Law;
- Human capital development; and
- Social welfare.

*The Institutional Framework for Combating Money Laundering and Terrorist Financing*

185. There are several institutions that are involved in the fight against economic and financial crime whose responsibilities, duties and legal framework are summarised hereunder.

Joint Rule of Law Co-ordination Board

186. Priorities in the fight against economic crime are regularly discussed at the Joint Rule of Law Co-ordination Board which co-ordinates national policies and initiatives between Government Departments. This Board is co-chaired by the Deputy Prime Minister/Minister of Justice and the EU Special Representative in Kosovo. The Board meets quarterly and minutes are released to participating parties.

Management Board of the Financial Intelligence Unit

187. The Management Board of the FIU is established pursuant to the AML/CFT Law. Its mandate is to oversee and ensure the independence of the FIU. The Board has no executive or enforcement powers with respect to the FIU. The Management Board is comprised of the Minister of Finance who serves as Chair, the Minister of Internal Affairs, the Chief Prosecutor of Kosovo, the Director General of the Kosovo Police, the Director of the Tax Administration, the Director General of the Customs of Kosovo, and the Managing Director of the Central Bank of Kosovo (see also Section 2.6 of this Report)

Ministry of Finance

188. The Ministry of Finance (MoF) formulates and implements the policy of the Government regarding the financial, tax and customs matters. Its primary functions related to AML/CFT include the overall responsibility for legislation in the AML/CFT area as well as the chairmanship of the Management Board of the FIU. The MoF also carries out the licensing and supervision of activities of private auditing companies, auditors and accountants as well as operators of games of chance through the specific division under the TAK.

189. The Ministry sponsored the drafting of the new law on prevention of ML and FT which was adopted by the Kosovo Assembly on 30 September 2010. However, this law has been criticised as flawed by stakeholders, prompting the Ministry to initiate amendments. Various amendments to the Law were in fact initiated by the MoF following consultation with stakeholders and approved and enacted in February 2013.

Ministry of Justice

190. The Ministry of Justice (MoJ) was established in 2006 pursuant to UNMIK Regulations 2005/53 and 2006/26. Its structure is an amalgamation of structures from other ministries and from UNMIK structures. The above mentioned UNMIK Regulations laid down the legal mandate of MoJ. Currently, the MoJ mandate is regulated by Government Regulation No. 02/2011 on the Areas of Administrative Responsibility of the Prime Minister's Office and Ministries, Article 18, paragraph 1.1, Appendix 1, pp.39-42. Additionally, a number of regulations and laws promulgated by the Kosovo Assembly before and after the declaration of independence i.e. the one related to the Bar Exam, Notary, Mediation, Legal Aid, Judicial Institute, as well as the law on Courts, Prosecutors, KJC and KPC have expanded the Ministry's legal mandate. The Ministry has different structures that in other countries are organised as separate agencies such as Correctional and Probation services, Forensic Medicine etc.

75. Refer to National Strategy 2014-2018, page 28.

191. The MoJ is responsible for the development of policies, the facilitation, preparation and the implementation of the legislation in the field of judiciary, including the prosecutorial system, as well as for the system of free legal professions, penitentiary system and international judicial cooperation. In the meantime, the law explicitly excludes the possibility for the Ministry to be involved in any way on the matters related to the administration of the judiciary/courts and prosecutorial system.

192. In the meantime the KJI is responsible to provide training, including professional and vocational training, of prosecutors and judges and organises examinations for qualification of prosecutors and judges, lawyers (including trial attorneys) and other legal professionals.

193. The MoJ through its Department of International Legal Cooperation performs its responsibilities respectively in supporting the judiciary and acting as a coordination authority in international judicial cooperation on criminal matters, including MLA and extradition. As mentioned above the MoJ is also responsible for licensing and the supervision of Notaries, private bailiffs, bankruptcy administrators and mediators.

Financial Intelligence Unit

194. The FIU is established pursuant to the AML/CFT Law. The director of the FIU is appointed by the Management Board of the FIU and all the roles, responsibilities and competences have been transferred from EULEX to the FIU by the virtue of an agreement signed on 15 July 2012. As an administrative type, the FIU does not conduct its own investigations, but rather provides other investigative bodies with intelligence/information to be used to initiate or proceed with investigations (see also Section 2.6 of this Report for FATF Recommendation 26).

195. The 2013 amendments to the AML/CFT Law have given supervisory powers to the FIU for all reporting subjects. In accordance with the new provisions of the Law the FIU has entered into a supervisory agreement (MoU) with the CBK through which the latter has been delegated supervisory powers for the purposes of the AML/CFT Law for the entire financial sector (see also Section 3.17 of this Report for FATF Recommendation 23 and Section 3.18 for FATF Recommendation 29).

Kosovo Police

196. Kosovo Police (KP) is responsible *inter alia* for ensuring public order and safety, fighting organised crime and guaranteeing the integrity of borders. KP has established within the Investigation Department a Directorate against Economic Crime and Corruption Investigation (DECCI). DECCI deals with all types of financial crime and includes three units: Anti-corruption Unit, Financial Crimes Unit and Money Laundering Unit (see also Section 2.7 of this Report). EULEX Police component is assisting KP through monitoring, mentoring and advising. EULEX Police officers are co-located with their KP counterparts, however EULEX police officers act mainly in a supportive role, with KP being operationally in lead.[76]

197. The KP is overseen by the Ministry of Internal Affairs (MIA). KP investigation department is composed of the Division against Organised Crime and the Division of Serious Crime Investigation.

198. The Division against Organised Crime is divided into four Directorates: the Directorate for Investigation of Organised Crimes, the Directorate for Investigation of Trafficking with Narcotics, the Directorate for Investigation of Trafficking with Human Beings and the Directorate for Investigation Support. Within the Directorate for Investigation of Organised Crime there is the Sector of Integrated Financial Investigations, which performs investigations of all integrated financial cases of organised crime, all the cases which are structured and are spread within and outside of the territory of Kosovo. The named sector does the identification of the assets acquired through criminal activities, as well as freezing, sequestration or confiscation of all assets that are acquired by a criminal offence. In most of these cases, investigation reveals ML cases.

199. Whereas the Division of Serious Crime Investigation includes the Directorate for Economic and Corruption Crimes Investigation (DECCI), the Directorate for Investigation of Serious Crimes, the Anti-Terrorism Directorate, the Forensic Directorate and the Directorate for Intelligence and Analysis, within the DECCI there is the Sector for Financial Investigations which has three units:

76. www.eulex-kosovo.eu/en/police/

Financial Investigation Unit, Money Laundering Unit and the Unit for Investigation of Criminal Assets. These units are at the disposal of other directorates regarding the investigation of independent cases.

200. The KP Counter-terrorism Unit (CTU), formerly in the Investigation Department shed some of its personnel and responsibilities and was renamed the Department of Counter-terrorism (DCT). The DCT is also operational on an intelligence-gathering level.

State Prosecutor's Office

201. The State Prosecutor' Office (SPO) is a constitutional independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts or other acts as specified by law. The SPO is a unified system empowered to: initiate criminal proceedings, ensure the investigation and prosecution of criminal offences in a timely manner against persons suspected or accused of committing criminal offences; represent charges before the court; exercise regular and extraordinary legal remedies against court decisions; protect the legal rights of victims, witnesses, suspects, accused and convicted persons; cooperate with police, courts, and other institutions; undertake all other actions specified by law.

202. The Chief State Prosecutor is appointed and dismissed by the President of Kosovo upon the proposal of the KPC. The mandate of the Chief State Prosecutor is seven years, without the possibility of reappointment. The Chief State Prosecutor is the head of the SPO and has overall responsibility for the management of the SPO and the supervision of all prosecutors.

203. A Special Prosecution Office (SPRK) within the SPO has been established by the Law on the SPRK No. 03-L-052 that governs its territorial jurisdiction, scope, powers, composition and appointment of its Chief Prosecutor. The SPRK has exclusive competence to investigate and prosecute inter alia ML, terrorism offences, organised crime (Article 5) as well as a subsidiary competence for offences defined in Article 9 of the Law (trafficking offences, counterfeiting money, corruption and fraud offences and other serious offences)

Kosovo Customs

204. Kosovo Customs (KC) Service is competent for collecting customs duties such as customs duty, value added tax; control of import and export, protection of intellectual property rights, and provision of trade statistics. Besides the collection of revenues, KC carries out measures to prevent the smuggling of drugs and other prohibited goods by the prejudicial effect of economic crime and evasion in revenue.

205. Customs Service of UNMIK was established in August 1999 by the pillar of the EU, to ensure the application of fair and uniform customs regulations and other provisions applicable to goods, which are subject to customs supervision. On 12 December 2008 Customs Service of UNMIK became Kosovo Customs (KC). The new Customs Code was adopted on 11 November 2008 by the Kosovo Assembly.

206. Since 2004, KC has started to implement the system for cross-border transportation of currency and bearer negotiable instruments. KC conduct searches for cash transit at the border. Citizens submit a completed standard form defined by KC providing information and any transferred amount over €10,000. The data collected is recorded and forwarded to the FIU. KC is also subject to a reporting requirement of suspicious transactions under the AML/CFT Law (Article 29) and cooperates with the FIU and other enforcement authorities.

Tax Administration of Kosovo

207. Tax Administration of Kosovo (TAK) was established on January 17, 2000 under the guidance and administration of UNMIK. The first TAK director was an international expert employed by a USAID contractor. From October 2001 until February 2003, there were two co-directors in the TAK with USAID and a local representative sharing the role. On February 18, 2003 authority for tax administration was transferred from UNMIK to the MoF (former Ministry of Economy and Finance), and the local director assumed the duties of the Director of TAK.

208. TAK has a centralised document processing center through which all returns are processed, although VAT processing is being decentralised to facilitate earlier compliance intervention. A large taxpayer unit has been established to deal with the larger taxpayers in Kosovo.

209. TAK cooperates closely with the KC, KP, MTI, prosecution service, Statistics Entity and the FIU.

210. TAK is responsible for the control and monitoring of games of chance in Kosovo (there is a Division of the Games of Chance within it). It supervises and manages the registration process for organisers of interconnected systems and contracted independent laboratory for testing slot machines and employees of Games of Chance. It also issues and manages the licensing process of operators of Games of Chance in accordance with the law. TAK is entitled *inter alia* to supervise and control the activities of entities that organise games of chance in Kosovo, to decide the amount of fines in case of infringement, to check and verify the certification of games of chance's equipment, to maintain the register of entities that operate in this sector, to determine the list of persons who are excluded from the locations of games of chance, to force the closure of entities operating without licence and/or to confiscate all the associated devices.

211. In carrying out its duties, TAK co-operates with other institutions, especially with the KP and KC prosecution service and the FIU.

Kosovo Intelligence Agency

212. The Kosovo Intelligence Agency (KIA) is established pursuant to the Law on the Kosovo Intelligence Agency (Law No. 03/L-063) as the security and intelligence service in Kosovo. It has a legal personality and has a mandate to operate throughout the territory of Kosovo. Financial means for the operation of KIA are provided from the Kosovo consolidated budget. KIA collects information concerning threats to the security in Kosovo i.e. terrorism, organised crime, trafficking etc. KIA has no executive powers.

213. The Director of KIA is jointly appointed and dismissed by the President and the Prime Minister. The Director can have a deputy Director, and the President and the Prime Minister appoint an Inspector General for KIA who is mandated to conduct inspections of KIA activities.[77]

Central Bank of Kosovo

214. The Central Bank of Kosovo (CBK) is the prudential supervisor and regulator of banks and financial institutions in Kosovo in accordance with the Law on the CBK and the Law on Banks. The CBK, a successor to the Banking and Payments Authority of Kosovo (BPAK) since
1999 and to the Central Banking Authority of Kosovo (CBAK) since 2006 was established on June 2008 with the adoption of the Law No. 03/L-074 on the CBK by the Kosovo Assembly.

215. The CBK is an independent legal entity with full authority as a legal person according to law in force in Kosovo, and reports to the Kosovo Assembly.

216. By virtue of the MoU with the FIU in accordance with the provisions of the AML/CFT Law, the CBK together with the FIU monitors and ensures AML/CFT compliance by banks, micro-financial institutions, NBFIs (including foreign exchange bureaux and money transfer agencies) as well as insurance, securities, private pension funds markets and operators and other non-bank financial activities. In order to fulfill its delegated supervisory remit the CBK has restructured its supervisory framework by creating a new Money Laundering Prevention Division which reports directly to the Deputy Governor responsible for Financial Supervision - (see also analysis of FATF Recommendation 23 in Section 3.17 and FATF Recommendation 29 in Section 3.18 of this Report).

Kosovo Chamber of Advocates

217. The Kosovo Chamber of Advocates (KCA) is a self-governing organisation of Kosovo advocates which acts independently from state bodies. It is responsible for the regulation and control of the legal profession in Kosovo.

218. The KCA is responsible to monitor the compliance with the law, KCA Statute and Code of Professional Ethics by lawyers and to impose disciplinary sanctions when applicable. In regulating and controlling the law practice, the KCA may issue normative acts aiming to regulate and organise the law practice. It also defines measures for continuous vocational training for lawyers. The KCA is organised in seven branches.

77. Law on the Kosovo Intelligence Agency (Law No. 03/l-063): http://www.gazetazyrtare.com/

219. KCA is the only authority for the licensing of advocates in Kosovo as an integral part of the legal system. Before the conflict in 1999, KCA had around 600 members. After the establishment of the UN Mission in Kosovo (UNMIK), it had 106 members and this number increased in 2001, 2004, 2007 and 2011. In 2011, KCA had 603 licensed advocates who passed the bar examination which is one of the preconditions for becoming a KCA member.[78] According to the latest information provided to the assessment team there are currently 577 registered lawyers.

220. The KCA is responsible for ensuring compliance with AML/CFT requirements in the legal profession but does not undertake AML/CFT examinations which responsibility under the AML/CFT Law falls within the remit of the FIU.

Kosovo Chamber of Notaries

221. Under the Yugoslav rule there was no notary system and consequently there has been no notary expertise available in Kosovo. Simple transactions, such as buying and selling of property have been and still are being overseen by municipal courts. Within this context, Kosovo courts were overburdened with thousands of backlogged non-contentious cases.

222. With the assistance of the Swiss Agency for Development and Cooperation (SDC) in 2011 Switzerland supported a functionalisation of the notary system and its overall consolidation, primarily ensuring the service runs itself sustainably and without major problems.

223. The Kosovo Chamber of Notaries (KCN) was subsequently established. It has its functions in the notarial sector and its highest body is the Assembly which then appoints the 5 member board, including the Chairman and the Deputy Chairman. The KCN has various committees: Discipline Committee, Inspectorate Committee, the Internal Audit Committee, the Law Committee and the Training Committee. These are the bodies through which it establishes and preserves relationship with notaries. The activities are presented in the Annual Report which is adopted and presented to the MoJ which is the supervisory body of the KCN.

224. Although the KCN ensures that notaries fulfill their obligations under the AML/CFT Law it does not have a supervisory function under the AML/CFT Law which supervisory remit lies with the FIU.

225. There are currently 68 authorised notaries in Kosovo.

National Coordinator for Combating Economic Crime

226. Pursuant to the signing of an MoU between the KPC, KJC, MoJ, MoF, MIA, CBK, KIA and KAA on 22 November 2013 establishing the basic principles for the setting-up and functioning of the National Coordinator for Combating Economic Crime (NCCEC) in December 2013, the KPC issued a Regulation for the establishment and functioning of the National Coordinator with the aim of increasing the efficiency in prosecution of crimes, sequestration and confiscation of material benefits deriving from crimes (referred to as: The National Coordinator for Fight against Economic Crime). In January 2014 a Prosecutor was appointed as the National Coordinator.

227. According to the Regulation, which also provides for the office of the NCCEC, the objective of the NCCEC is to promote, coordinate, monitor, evaluate and report activities of all public and private institutions which are concerned with prevention, detection, investigation, prosecution and adjudication of crime that generates material benefits by protecting the Kosovo financial system from the risk of ML, FT and tax evasion.

Agency for Managing Seized and Confiscated Assets (AMSCA)

228. The Agency for Managing Seized and Confiscated Assets (AMSCA) has been established in June 2010 as a body attached to the MoJ, following the promulgation of the Law on Management of Sequestrated and Confiscated Assets (Law No. 03/L-141). AMSCA's mandate is purely administrative and involves among other responsibilities: managing, administering, and/or selling seized or confiscated assets. The functional and organisational structure of AMSCA is regulated with special sub-legal acts issued by the MoJ.

78. http://www.oak-ks.org/

229. AMSCA exercises its activities in cooperation with other institutions involved in the process of administration of the seized confiscated assets, such as the courts, prosecutor's office, banks, municipalities as well as the Municipal Cadastral Offices (MCOs).

Ministry of Trade and Industry (MTI)

230. The Ministry of Trade and Industry (MTI) is responsible for the establishment and supervision of the Registry of Business Organisations and Trade Names. This function is ensured through the Kosovo Business Registration Agency (KBRA) since 2011 – former Registry Office - that is attached to the MTI in accordance with the requirements of Law No. 02/L-123 on Business Organisations. The KBRA maintains the Registry, establishes and publishes relevant forms and procedures for operations in the Registry and ensures registrations, publication and free of charge access through internet to the data contained in the Registry in accordance with the law. All records, documents, filings, forms, rules and other materials required by law that are submitted to the Registry or prepared by the KBRA in the Registry are public documents (see also Section 5 of this Report).

Kosovo Cadastral Agency

231. Kosovo Cadastral Agency (KCA), established by UN-Habitat in 2000, is the government agency under the Ministry of Environment and Spatial Planning. KCA is the highest authority of Cadastre, Geodesy and Cartography in Kosovo whereas Municipal Cadastral Offices (MCO) operate at the municipal level. KCA and MCOs perform their duties in accordance with the Law No. 04/L-013 on Cadastre and the Law No. 2002/5 on the Establishment of the Immovable Property Rights Register.

232. KCA is implementing the Information System of Land and Cadastre as well as Registry of Immovable Property Rights in Kosovo.

233. Within this context, the KCA is established in the Support Program for Kosovo Cadastre-SPKC (2000-2003), financially supported by Sweden, Norway and Switzerland. SPKC main goal has been to develop and manage the registration of cadastre and land at the central level.[79]

EULEX - European Rule of Law mission in Kosovo (see also section 1.1)

234. EULEX became fully operational in April 2009. The EU Joint Action of February 2008 and Council Decision of June 2010 and June 2012 provide the legal basis for the Mission. EULEX works within the framework of UN Security Council Resolution 1244.

235. The Mission is divided into two 'divisions'; the 'Executive Division' and the 'Strengthening Division'. The Executive Division investigates, prosecutes and adjudicates sensitive cases using its executive powers. The Strengthening Division monitors, mentors, and advises local counterparts in the police, justice and customs fields. EULEX has a total of around 2,250 international and local staff.

236. The mandate and powers of EULEX prosecutors and judges is regulated by the Law No. 03-L/053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (amended by Law No. 04/L-273). According to this Law, EULEX prosecutors are competent to investigate and prosecute the crimes that fall under the exclusive competence of the Special Prosecutor's Office of Kosovo (SPRK).

### *Approach concerning risk*

237. Kosovo authorities have not implemented a risk-based approach with regard to any components of the AML/CFT regime. Notwithstanding that the AML/CFT Law, for example, requires all reporting subjects to determine, on an ongoing basis, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services, there is no specific legal requirement for the implementation of a risk based approach and it is only through the proposed CBK Regulation that the financial sector will be provided with guidance while such guidance remains lacking for other reporting subjects and in particular for DNFBPs. The FIU claims that

79. http://mmph.rks-gov.net/

based on the Standard Operation Procedures (SOP) for the Compliance Supervision,[80] respectively Article 2 of the SOP on the Risk-Based Approach Supervision, clearly specifies that FIU applies the risk-based approach supervision and this is attested by other inspections performed during 2014, where this approach has been continuously followed. The SOP was not made available to the assessment team who therefore cannot confirm the extent of any risk based approach. At the time of the on-site visit the CBK has informed that it is its intention to introduce this in due course as detailed in its supervisory Action Plan although it later claimed to have introduced such procedures.

238. In November 2013 the Government of Kosovo published a document[81] on the 'National ML and TF Risk Assessment of Kosovo 2013' (NRA). The document is complemented by two Annexes: Annex 1 providing an analysis and evaluation matrix for individual identified risks and Annex 2 providing an Action Plan for the treatment measures to be applied for the risk assessment. The document is part of the EU funded project for support to Kosovo institutions in combating financial and economic crime.[82] The NRA document was endorsed by the Government in December 2013.

239. The document identifies threats and vulnerabilities to which Kosovo is exposed while analysing and evaluating them to provide mitigating measures to be applied accordingly. The results indicate that ML, TF and other financial and economic crimes are considered to be mostly hidden crimes.

240. The NRA identifies a series of vulnerabilities in the preventive mechanisms. These are grouped under five factors:

- Political;
- Economic;
- Social;
- Effectiveness of prevention and detection of ML and TF;
- Legislative.

241. While it is not the scope of this Report to go into the details of the NRA, it is worth mentioning some key findings under the specific factors which could impact on the assessment of compliance with international standards.

- *Political*: lack of transparency and accountability in the public administration; lack of national and sector-specific risk based approach; and inefficient enforcement of confiscation judgments, administrative sanctions and insolvency procedures.
- *Economic*: cash-based economy; high unemployment rate; high interest rates in the official banking system.
- *Effectiveness*: inefficient asset recovery and confiscation procedures; inappropriate reporting by reporting subjects under the AML/CFT Law about suspicious and cash transactions; lack of national, regular, analytical and accurate situational reporting mechanism on ML, FT, economic crime, financial crime and informal economy; insufficient human, technical and other resources at FIU; inefficient internal regulations and control mechanisms and their poor implementation in the public and private sectors complemented with insufficient support for their establishment; inefficient information exchange, feedback mechanisms and other cooperation arrangements between public and private sector; inefficient international cooperation; inefficient compliance supervision functions; and inappropriate capacity/skills to criminal procedures on ML, corruption and other financial crimes by judiciary.
- *Legislative*: insufficient implementation of legal framework for ML and TF; lack of secondary legislation and standard operating procedures; national legal framework on ML and FT is not fully in compliance with the international standards.

242. While positively acknowledging that Kosovo has established an Action Plan to address these findings, the assessment team expresses concerns in particular over the main findings on the

80. SOP for the compliance supervision adopted by FIU on 14/01/2014.

81. In September 2013, the Minister of Finance issued Administrative Instruction No. 04/2003 on National Money Laundering and Terrorist Financing Risk Assessment that tasked the FIU with its implementation in cooperation with concerned institutions and reporting entities.

82. The project is managed by the EU office in Kosovo and implemented by B&S Europe.

effectiveness of the prevention and detection of ML and the FT. Some of these findings are separately addressed in this Report in the respective FATF Recommendations.

243. In January 2014 the NRA document was followed by the National Strategy of Kosovo and its Action Plan for the prevention of and fight against the informal economy, ML, TF and other economic and financial crimes for the period 2014-2018 replacing the previous strategy that had been adopted in September 2012.

244. It is the intention of the Government of Kosovo to follow the NRA with a sectorial risk assessment. It is understood that at the time of the on-site visit in April 2014 procedures had already been put in place to initiate the risk assessment of the construction sector.

# 2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

## 2.1. Criminalisation of Money Laundering (R.1)

### 2.1.1. Description and Analysis

245. Recommendation 1 treats the scope of the criminal offence of ML. It requires countries to criminalise ML on the basis of the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organised Crime, 2000 (the Palermo Convention). It thus requires countries to apply the crime of ML to all serious offences with a view to including the widest range of predicate offences. Where a threshold approach is applied this should at least cover all offences which fall under the category of serious offences under domestic law but in any case should at all times cover as a minimum the designated categories of offences under the Glossary of the Methodology. Moreover predicate offences should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Finally, where required by fundamental principles of their domestic law, countries may provide that the offence of ML does not apply to persons who committed the predicate offence.

***Criminalisation of money laundering – Physical and material elements of the offence - Essential Criterion 1.1)***

246. EC 1.1 requires the criminalisation of ML on the basis of the Vienna Convention (Article 3(1)(b) & (c)) and the Palermo Convention (Article 6(1)) dealing with the physical and material elements of the offence.

247. In the criminal substantive law applicable in the territory of Kosovo, whether being a legislation issued in a UNMIK regulation or the one adopted by the Assembly of Kosovo, the criminal offence of ML has always been provided separately from the body of the respective Criminal Code, being specifically defined within the AML/CFT preventive legislation. ML was first rendered a criminal offence by paragraphs (2) to (4) of Article 10 of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, being in force as from March 2004 up to November 2010. This UNMIK Regulation was then replaced by Law No. 03/L-196 (2010) on the Prevention of Money Laundering and Terrorist Financing (hereafter "AML/CFT Law") which has since been providing for the criminalisation of ML in its paragraph (2) to (4) of Article 32 quite similarly, if not identically, to the definition previously provided by the UNMIK Regulation (the main improvement being the addition of two new paragraphs to cover the various factors of concealment/disguise and the ancillary offences applicable to ML).

248. The fact that the offence of ML is defined in the preventive legislation is thus to be acknowledged as a legal tradition in Kosovo, which in itself cannot be considered a deficiency as long as the location of the ML offence does not cause any difficulty for the practitioners in applying other, general provisions of the criminal substantive or procedural legislation to this specific criminal offence. In this respect, the tendency is positive.

249. In the beginning, the UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related Criminal Offences, the forerunner of the current AML/CFT Law, contained a specific set of provisions on ML-related confiscation and provisional measures (Articles 11 to 12) regardless of the existence of similar provisions in the Provisional Criminal Code (UNMIK Regulation 2003/25 hereafter – "Prov.CC") and Provisional Criminal Procedure Code (UNMIK Regulation 2003/26 hereafter "Prov.CPC") then in force. This duplicative approach was then abandoned in the new AML/CFT Law which no longer provides for confiscation and related temporary measures as these can be found in the respective Codes. On the other hand, Article 34 of the AML/CFT Law still provides for the criminal liability of legal persons specifically for the offence of ML even if this issue has since been regulated in a general sense by virtue of Law No. 04/L-030 (2011) on Liability of Legal Persons for Criminal Offences.

250. Finally, the offence of ML was formally included among the other "ordinary" criminal offences listed in the Specific Part of the new Criminal Code (Law 04/L-082 (2012) being in force from 01 January 2013 (hereafter "CC"). As a result, the offence of ML is officially criminalised by Article 308 within Chapter XXV of the CC (Criminal Offences against the Economy) but this article only provides that *"whoever commits the offence of money laundering shall be punished as set*

*forth in the Law on the Prevention of Money Laundering and Terrorist Financing"* and hence the actual definition of the ML offence as well as the criminal sanctions applicable thereof continue to be regulated exclusively by the AML/CFT Law.

251. While the anti-ML criminal legislation of Kosovo had always been significantly in line with the wording of the Vienna and Palermo Conventions, this standard has been followed even more closely since the adoption of the new AML/CFT Law in which the core ML offence can be found in paragraph (2) of Article 32 as follows:

> **"Money Laundering**
>
> 2. Whoever, knowing or having cause to know that certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime, or whoever, believing that certain property is proceeds of crime based on representations made as part of a covert measure conducted pursuant to Chapter XXIX of the Criminal Procedure Code of Kosovo:
>
> 2.1. converts or transfers, or attempts to convert or transfer, the property for the purpose of concealing or disguising the nature, source, location, disposition, movement or ownership of the property;
>
> 2.2. converts or transfers, or attempts to convert or transfer, the property for the purpose of assisting any person who is involved in, or purportedly involved in, the commission of the criminal offence that produced the property to evade the legal consequences, or apparent legal consequences, of his or her actions;
>
> 2.3. converts or transfers, or attempts to convert or transfer, the property for the purpose of avoiding a reporting obligation under this Law;
>
> 2.4. converts or transfers, or attempts to convert or transfer, the property for the purpose of promoting the underlying criminal activity; or
>
> 2.5. acquires, possesses or uses, or attempts to acquire, possess or use, the property;
>
> 2.6. conceals or disguises the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, or from an act of participation in such activity;
>
> 2.7. participates in, associates to commit and aids, abets, facilitates and counsels the commission of any of the actions mentioned in sub-paragraphs 2.1 to 2.6 of this paragraph,
>
> 2.8. commits a criminal offence punishable by a term of imprisonment of up to ten (10) years and a fine of up to three (3) times the value of the property which is the subject of the criminal offence."

252. As opposed to the definition of the offence in the now repealed UNMIK Regulation 2004/2, the main development was the addition of paragraphs (2.6) and (2.7) above, as a result of which the ML offence now reflects much of the inner structure and terminology of the model ML offence as defined in paragraph (1) of Article 6 of the Palermo Convention. The main types of laundering activities listed in subparagraphs (a/i), (a/ii) and (b/i) of paragraph (1) of Article 6 of the Palermo Convention are addressed and adequately covered by the following paragraphs of Article 32 of the AML/CFT Law above:

- subparagraph (a/i) is met by paragraphs (2.1) and (2.2)
- subparagraph (a/ii) is met by paragraph (2.6)
- while subparagraph (b/i) is met by paragraph (2.5).

253. These paragraphs represent a remarkable level of similarity with the wording of the Convention which, at certain points, amounts to full identity particularly as the conducts themselves (i.e. the activities that may establish the ML offence) are concerned. This aspect of the material (physical) elements of the offence thus adequately reflects the international requirements defined by paragraph (1) of Article 6 of the Palermo Convention as well as paragraph (1) of Article 3 sub-paragraphs (b) and (c) of the Vienna Convention.

254. In addition to that, however, the ML offence in paragraph (2) of Article 32 does contain a number of provisions that apparently go beyond the scope defined by the above mentioned Conventions. Certainly, in general terms, it should not be objectionable if a national legislation

exceeds the minimum requirements when implementing international standards as long as these extra provisions have no negative impact on the compliance with the standards themselves.

255. The first of these provisions can be found in paragraph (2.3) of Article 32 of the AML/CFT Law which criminalises the (completed or attempted) conversion or transfer of proceeds of crime specifically "*for the purpose of avoiding a reporting obligation under this Law."* This is beyond doubt a unique sort of ML offence in which the specific mental element is formulated quite clearly but, on the other hand, the actual implementation of this provision might be more problematic.

256. In the AML/CFT Law, the basic rules on the obligation to report to the FIU can be found in Article 22 (in relation to banks and financial institutions). The reporting obligation might arise in case of any suspicious acts or transactions (paragraph (1.1)) or cash transactions meeting or exceeding the amount of €10,000 in a single day (paragraph (1.2)). Nonetheless, the offence in paragraph (2.3) of Article 32 above does not specify which sort of reporting obligation is relevant in this context. If it refers to the obligation to report suspicious transactions, the offence will necessarily be in overlap with the one in paragraph (2.1) considering that in this case, the conversion or transfer would serve to conceal or disguise the true (that is, suspicious) nature of the property involved in the transaction. If it refers to the avoidance of reporting large-scale cash transactions (e.g. by performing such a money transfer in multiple transactions below the threshold or in a timeframe of more than one day to avoid the daily summary of the transferred amounts) it will also come back to the offence in paragraph (2.1) as such transactions would serve to conceal or disguise the location, disposition or movement but, eventually, also the ill-gotten nature of the respective property. That is, the offence in paragraph (2.3) appears redundant.

257. The second "extra" ML offence is provided by paragraph (2.4) by which the (attempted) conversion or transfer of proceeds of crime is penalised also if it is committed "*for the purpose of promoting the underlying criminal activity".* In fact, such an act should not be classified as the criminal offence of ML which would normally consist of the legalisation of proceeds derived from an underlying predicate offence that had previously been committed (hence its commission could result in material gain that constitutes proceeds). In other words, the predicate offence must be committed and completed before the related laundering activity can take place. Once the predicate offence has already been committed, it cannot be further "promoted" by a subsequent laundering activity.

258. Notwithstanding that, there might indeed be cases where there is not a single predicate offence but a continuous criminal activity the proceeds of which are to be laundered so that the legalised assets can be used to promote the criminal activity. Even in such cases, however, the main goal of the laundering activity must be the legalisation of the proceeds i.e. the concealment or disguise of their ill-gotten origin, nature or source – which, again, leads to the offence in paragraph (2.1).

259. Another country-specific characteristic of the ML offence in paragraph (2) of Article 32 is the recurrent reference to "covert measures" that is, the explicit extension of the ML offence to laundering activities attempted or committed as a result of covert measures where the assets subject to laundering were not actual proceeds of crime and hence it is only the perpetrator who believes (or has been made to believe) that the assets were obtained from a criminal offence. Reference to such cases can be found in the preliminary part of paragraph (2) (…"*or whoever, believing that certain property is proceeds of crime based on representations made as part of a covert measure conducted pursuant to Chapter IX of the Criminal Procedure Code of Kosovo")* as well as in paragraph (2.2) *("…for the purpose of assisting any person who is (…) <u>purportedly</u> involved in the commission of the criminal offence that produced the property to evade the (…) <u>apparent</u> legal consequences of his or her actions").*

260. This issue clearly goes beyond what is required by the relevant AML standards that constitute the scope of the present assessment and therefore it is not necessarily a subject of assessment. Nonetheless, the assessment team needs to note that whereas paragraph (2) of Article 32 is *per definitionem* a provision of criminal substantive law (defining the basis of criminal accountability) the reference to covert measures mixes it with a component of criminal procedural law which may be, from the aspect of legal dogmatics, a rather unfortunate combination. Beyond the fact that it is not made clear exactly which sort of covert measures listed in Chapter IX of the CPC[83] are meant here (only a few of them appear applicable in this context) it is not clear why the

83. Before the latest amendment to the AML/CFT Law, Art. 32.2 gave reference to the respective chapter of the Prov.CPC (Chapter XXIX).

offence of ML is the only one where such a direct reference to representations made as part of covert measures can be found while such representations (as a result of which the perpetrator will somehow be deceived by the authorities) may take place in respect to other criminal offences too (reference can be made, for example, to the covert measure of "simulation of a corruption offence" defined in paragraph (9) of Article 87 of the CPC[84]). The assessment team has the opinion that covert measures should ideally be regulated exclusively in criminal procedural legislation however, as noted above, this issue has no impact on the outcome of the present assessment.

261. It should be noted that the AML/CFT Law provides, for reasons unknown to the assessment team, two alternative definitions for ML. The first is the criminal offence itself in paragraph (2) of Article 32 that is discussed more in detail above but there is another one in Article 2 ("Definitions") under paragraph (1.23) of the AML/CFT Law as follows:

> "*paragraph (1.23)*. Money laundering - any conduct for the purpose of disguising the origin of money or other property obtained by an offence and shall include:
>
> *paragraph (1.23.1)*. conversion or any transfer of money or other property derived from criminal activity;
>
> *paragraph (1.23.2)*. concealment or disguise of the true nature, origin, location, movement, disposition, ownership or rights with respect to money or other property derived from criminal activity."

262. The assessment team could not find the actual reason why the legislators deemed it necessary to introduce two alternative definitions for "money laundering" in the very same law. It occurs in other jurisdictions that while the offence of ML (as the basis of criminal accountability) is defined in criminal substantive legislation (typically in the CC) one can find another definition for ML in the preventive legislation that serves for the purposes of the preventive (reporting) regime (what is to be reported etc.) and indeed, in many cases the latter definition is more in line with the respective international standards than the offence itself.

263. This is not the case in Kosovo. Here, there are two definitions for ML in the very same piece of preventive legislation – and while it can be assumed that the definition in paragraph (1.23) in Article 2 serves for the purposes of reporting suspicious transactions, one cannot make sure about this considering that both this definition and the one in paragraph (2) of Article 32 are equally labeled as "money laundering" without any clear provision as to which one should be used under which circumstances. Furthermore, the definition in paragraph (1.23) of Article 2 is rather incomplete or deficient as compared to the ML offence in paragraph (2) of Article 32 both in terms of conduct and purposive elements. Application of such "duplicate definition" has always been a point of criticism in every country involved and this particularly refers to this case where the scope of the "additional" definition is significantly narrower than that of the ML offence.

### *Laundered property - Essential Criterion 1.2, and CETS 198 Article 9(6)[85]*

264. EC 1.2 establishes that the offence of ML should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime.

265. Paragraph (6) of Article 9 of CETS 198 requires that each Party to the Convention ensures that a conviction for ML is possible where it is proved that the property used in the offence originated from a predicate offence, without it being necessary to establish precisely which offence.

266. Turning to the object of the ML offence, that is, the property that represents proceeds of crime, the AML/CFT Law provides for detailed definitions as regards "proceeds of crime" and "property or funds" in Article 2 paragraphs (1.29) and (1.30) respectively.

267. Pursuant to this definition "proceeds of crime" means *"any property derived directly or indirectly from a predicate criminal offence"* (where "predicate offence" is defined by paragraph (1.28) somewhat redundantly as *"any offence which generates proceeds of crime"*). As for the

84. Article 256(8) of the Prov.CPC.

85. Council of Europe Treaty Series (CETS) 198 refers to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed in Warsaw on 16 May 2005 to which Kosovo is not a signatory – see analysis of Recommendation 35 and Special Recommendation I.

scope of "property" there is a remarkably broad and detailed definition under paragraph (1.30) of Article 2 of the AML/CFT Law as follows:

> "*paragraph (1.30)*: Property or Funds - assets of every kind, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets, including but not limited to bank credits, traveler's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, and any interest, dividends or other income on or value accruing from or generated by such assets;"

268. The definition of "property" appears to be almost fully in line with the standards set by the relevant UN Conventions (Article 2(d) of the Palermo Convention and Article 1(q) of the Vienna Convention) with the only, rather formal, difference that it does not include the "tangible or intangible" features. This deficiency, however, cannot be considered as a serious shortcoming that would limit the applicability of the definition, considering that reference is given to the very similar terms "corporeal and incorporeal" the scope of which meets (or at least overlaps to a large extent) the scope of "tangible or intangible" and thus the same effect can be achieved. (Certainly, the Conventions make reference both to "corporeal/incorporeal" and "tangible/intangible" features in the respective definitions nonetheless one must not forget the actual meaning of these terms where the notion of "tangible" is practically the same as that of "corporeal".) Furthermore, the definition in paragraph (1.30) generally refers to "*assets of every kind*" and contains an open-ended list of intangible examples of assets.

269. According to paragraph (1.29) of Article 2 of the AML/CFT Law as mentioned above, the term "proceeds of crime" refers to property derived "*from a predicate criminal offence"* in which context the term "criminal offence" must obviously be applied to denote a concrete act rendered punishable by criminal substantive law which was committed at a certain time and place. In other words, there must be a specific criminal offence by which the assets were generated (predicate offence) and the prosecution has to prove the link between this offence and the related ML offence.

270. Notwithstanding this, the issue of predicate criminality is put in a different context by the preliminary paragraph of the ML offence in paragraph (2) of Article 32 of the AML/CFT Law which defines the object of the offence by making reference to the knowledge that "*certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime".* The second part of this sentence (referring to property that is "in fact" proceeds of crime) would in itself be fully in line with the definitions discussed above but the first part (that refers to property being proceeds of "*some form of criminal activity*") disrupts the inner logic and harmony of the provision. That is, while the first part of the sentence opens the ML offence towards proceeds derived from any sort of criminal activity without any apparent need to specify exactly which criminal offence is the source of the proceeds (as if it would be enough to prove that the laundered property was derived from "drug crimes" or "trafficking" in general, regardless of whether any specific criminal act can be identified within this "activity" and if yes, when and where this predicate act had been committed) this extensive approach is opposed by the second part of the sentence where the scope of the offence is clearly restricted to "proceeds of crime" which term denotes, by virtue of the above mentioned Article 2 paragraph (1.28) property derived from a predicate criminal offence.

271. In this context, the reference to "some form of criminal activity" in paragraph (2) of Article 32 of the AML/CFT Law is entirely controversial and misleading. This deficiency was also recognised by the Kosovo authorities, as a result of which the last amendment to the AML/CFT Law (Law No. 04/L-178 on Amending and Supplementing the Law No. 03/L-196 on the Prevention of ML and FT, adopted on 11 February 2013) addressed this issue by inserting a new paragraph (1.40) into Article 2 to introduce a definition for "criminal activity" which had not yet been properly defined by the law. According to the new provision "criminal activity" means *"any kind of criminal involvement in the commission of a criminal offence as defined under the Laws of Kosovo"*.

272. Certainly, this explanation eliminates the apparent self-contradiction within the preliminary paragraph of paragraph (2) of Article 32 since both parts of the problematic sentence would eventually refer to the concept of "criminal offence" (and not to the more generic notion of "criminal activity"). On the other hand, introduction of the new paragraph (1.4) appears to have led to some unnecessary redundancy considering that the preliminary part of paragraph (2) of Article 32 now covers:

> (i) property that is proceeds of some form of [criminal activity]

- property that is proceeds of some form of [any kind of criminal involvement in the commission of a criminal offence]
- property that is proceeds of any kind of involvement in the commission of a criminal offence
- property that is proceeds of a criminal offence

(ii) property that is in fact [proceeds of crime]

- property that is in fact [any property derived directly or indirectly from a predicate criminal offence]
- property that is in fact proceeds of a predicate criminal offence
- property that is proceeds of a criminal offence

273. As a result, it can be concluded that the object of ML can be any property (as defined by paragraph (1.30) Article 2 of the AML/CFT Law) that is derived from the commission of one or more concrete criminal offences, including any sorts of offences that may generate proceeds but not a broader concept of "criminal activity" in terms of indefinite criminality (drug crimes, trafficking crimes etc. in general). No conviction for ML appears therefore possible where it is proved that the property that constitutes the object of ML originated from a predicate offence but it cannot be established precisely which offence (CETS 198 paragraph (6) of Article 9).

274. The definition of proceeds of crime in paragraph (1.29) of Article 2 of the AML/CFT Law clearly encompasses both direct and indirect proceeds as follows:

> "(…) Property derived indirectly from a predicate criminal offence includes property into which any property directly derived from the predicate criminal offence was later converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the commission of the predicate criminal offence;"

275. No monetary threshold is specified by the definition of "proceeds of crime" and hence any property may be subject of ML offence regardless of its value. The assessment team was not made aware of any opposite practice in concrete ML cases.

***Proving property is the proceeds of crime - Essential Criterion 1.2.1, CETS 198 Article 9(5)***

276. EC 1.2.1 requires that when proving that property is the proceeds of crime, at any stage of the proceedings, it should not be necessary that a person be convicted of a predicate offence.

277. According to paragraph (5) of Article 9 of CETS 198 a prior or simultaneous conviction for the predicate offence should not be a prerequisite for a conviction for ML.

278. The assessment team noted an overall uncertainty among practitioners regarding the level of proof of the predicate offence as required to prove that the property had actually been proceeds of crime, that is, whether the commission of a specific predicate offence had to be proven and if yes, whether or not a prior conviction for the predicate crime was necessary. Despite the legislators' efforts to settle this issue in positive law, the existing provisions have so far been insufficient to eliminate this controversy.

279. The legal background consists of Article 32 paragraph (4.1) of the AML/CFT Law which provides that:

> "(…) a person may be convicted of the criminal offence of money laundering, even if he or she has not been convicted at any time of the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived"

280. While some of the authorities the assessment team met (the representatives of the KP and the MoJ) were confident that the provision quoted above makes it unnecessary to obtain a prior or simultaneous conviction for the predicate offence in order to prove that property is the proceeds of crime, the prosecutors appeared to have a completely opposite opinion. The replies the SPO gave to the Cycle 1 Questionnaire as well as the oral statements the representatives of the prosecution service and particularly the SPRK repeatedly provided during both on-site visits contained

complaints that the provision in Article 32 paragraph (4.1) is to a large extent not understandable and therefore it requires additional clarification.

281. At this point, the assessment team notes that this paragraph cannot be considered a novelty in Kosovo law that still needs some introductory explanation so it can be properly implemented by the practitioners. The same provision could already be found in the predecessor legislation with the same wording as Article 32 paragraph (4.1) of the present AML/CFT Law being literally the same as Article 10 paragraph (4(a)) of the now repealed 2004/2 UNMIK Regulation.

282. During and subsequently to both on-site visits, the assessment team put efforts into exploring what problems the Kosovo prosecutors might actually have with paragraph (4.1) of Article 32 and in which points they would require further clarification or explanation but no definite answers could be achieved. In their written replies to the Cycle 1 Questionnaire, the SPO indicated that the main problem they had was that "*the criminal offence of money laundering should be underlying with the predicate criminal offence. As a result there can be no separate conviction only for criminal offence of money laundering.*" As it was further explained on-site, the prosecutors have the firm opinion that ML is always an accessory criminal act that is, it does not exist, and therefore it cannot be prosecuted, as a *sui generis* separate offence. In line with this approach, the prosecutors that the assessment team met expressed that a previous or at least parallel conviction for the predicate offence would likely be a precondition to achieve a conviction of the related ML offence. This is a principal standpoint which appeared to be practically incompatible to the probable meaning of paragraph (4.1) quoted above.

283. During the Cycle 2 on-site visit, the assessment team attempted to further explore this issue which actually appears to be one of the major practical impediments to effectively prosecute ML cases in Kosovo. Unfortunately, the controversies and the uncertainty appear to have remained in this field. The representatives of the prosecution service explained that whereas the predicate offence as the origin of the laundered assets must be established beyond any reasonable doubt, it depends to what extent it must be proven in a ML case and therefore a conviction for the predicate offence is not a prerequisite.

284. The KP, however, observed that the prosecutors demanded that the law enforcement provide a higher level of evidence regarding the predicate crime, even in the preliminary stage of proceedings, unless a conviction for the predicate offence was available or if the latter was investigated together with the ML offence. On the other hand, the prosecution does not communicate clear evidential standards to the law enforcement in this respect (particularly not in written form) and the interpretation of the necessary level of proof appears to vary in different cases (depending on which prosecutor is in charge of the case). This prosecutorial approach was reported to be the main problem in most of the rejected ML cases.

285. In fact, the formulation of paragraph (4.1) of Article 32 of the AML/CFT Law does not at all facilitate the understanding of its actual meaning. It only provides that the perpetrator can be *convicted of the ML offence even if he/she has not been convicted of the related predicate criminal offence.* But this is not what is required by FATF Recommendation 1. While paragraph (4.1) is clearly restricted to the perpetrator of the ML offence (whether he/she can be convicted of ML if not convicted for the predicate crime) FATF EC 1.2.1 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. For this reason paragraph (4.1) is, from a formalistic point of view, too restrictive to meet FATF EC 1.2.1 although the assessment team remains uncertain as to the actual intent the legislators might have had with this provision – bearing in mind that some authorities (e.g. the MIA) appeared to interpret it broadly enough to encompass the general concept of FATF EC 1.2.1.

286. In any case, there have been no conviction for ML in Kosovo and thus it cannot be known what the courts would actually apply in this context. The lack of relevant information on pending cases prevented the assessment team from drawing further conclusions in this field.

***The scope of the predicate offence & threshold approach for predicate offences - Essential Criterion 1.3 and Essential Criterion 1.4***

287. According to EC 1.3 the predicate offences for ML should cover all serious offences and countries should extend this to the widest range of predicate offences, at a minimum covering a range of offences in each of the Methodology designated categories of offences.

288. Moreover, according to EC 1.4 where countries apply a threshold approach or a combined approach that includes a threshold approach, predicate offences should at a minimum cover offences which fall within the category of serious offences under their national law; or offences which are punishable by a maximum penalty of more than one year imprisonment; or offences which are punishable by a minimum penalty of more than six months' imprisonment.

289. The Kosovo legislation applies the principle of the universality of the predicate offences as the ML offence clearly provides for an "all-crime approach" instead of using any further threshold or categorisation.

290. Reference was made above to the detailed (though redundant) definitions the AML/CFT Law provides for terms such as "proceeds of crime" and "predicate criminal offence". As a result of these definitions, it can be concluded that the offence of ML covers proceeds of crime which means any property derived directly or indirectly from a predicate criminal offence where the latter term denotes any offence, which generates proceeds of crime. As a result, any act the Kosovo criminal legislation renders a criminal offence that may generate material gain can be a predicate offence to ML.

291. The Kosovo legislation covers the FATF (and CETS 198) designated categories of offences as indicated in the table below.

***Table 5: Designated categories of offences***

| **Designated categories of offences (based on the FATF Methodology and CETS 198)** | **Offence in domestic legislation according to the new CC** | **Corresponding articles of the old CC** |
|---|---|---|
| Participation in an organised criminal group and racketeering | Article 283 – Participation in or organisation of an organised criminal group | Article 274 |
| Terrorism, including terrorist financing | Article 136 – Commission of the offence of terrorism and the subsequent offences in Articles 137 to 144 including Article 138 – Facilitation of the commission of terrorism | Articles 110 to 113 |
| Trafficking in human beings and migrant smuggling | Article 171 – Smuggling of persons<br>Article 170 – Smuggling of migrants<br>Article 172 – Withholding identity papers of victims of slavery or trafficking in persons | Articles 138 to 140 |
| Sexual exploitation, including sexual exploitation of children | Chapter XX – Criminal offences against sexual integrity (more) | Chapter XIX |
| Illicit trafficking in narcotic drugs and psychotropic substances | Chapter XXIII – Narcotic drug offences (more) | Articles 229 to 231 |
| Illicit arms trafficking | Article 372 – Unauthorised import, export, supply, transport, production, exchange, brokering or sale of weapons or explosive materials (further offences in Chapter XXX) | Articles 327 and 330 |
| Illicit trafficking in stolen and other goods | Article 345 – Purchase, receipt or concealment of goods obtained through the commission of a criminal offence | Article 272 |
| Corruption and bribery | Chapter XXXIV – Official corruption and criminal offences against official duty (more) | Chapter XXIX |
| Fraud | Article 335 to 337 – Fraud (various sorts)<br>Article 288 – Fraud in bankruptcy<br>Article 310 – Fraud in trading with securities | Articles 261 to 262 |
| Counterfeiting currency | Article 302 – Counterfeit money<br>Article 293 – Counterfeit securities and payment | Article 239 |

| Designated categories of offences (based on the FATF Methodology and CETS 198) | Offence in domestic legislation according to the new CC | Corresponding articles of the old CC |
|---|---|---|
| | instruments<br>Article 294 – Counterfeiting stamps of value | Article 244 |
| Counterfeiting and piracy of products | Article 295 – Violating patent rights<br>Article 296 – Violation of copyrights | Article 240-241 |
| Environmental crime | Chapter XXVIII – Criminal offences against the environment, animals, plants and cultural objects (more) | Chapter XXIV |
| Murder, grievous bodily injury | Article 178 to 179 – Murder<br>Article 189 – Grievous bodily injury | Articles.<br>146 to 147<br>Article 154 |
| Kidnapping, illegal restraint and hostage-taking | Article 194 – Kidnapping<br>Article 196 – Unlawful deprivation of liberty<br>Article 175 – Hostage-taking | Article 159<br>Article 162<br>Article 143 |
| Robbery or theft | Article 325 to 327 – Theft<br>Article 328 – Theft in the nature of robbery<br>Article 329 – Robbery | Articles<br>252 to 256 |
| Smuggling | Article 317 – Smuggling of goods | Article 273 |
| Extortion | Article 340 – Extortion<br>Article 341 – Blackmail | Article<br>267 to 268 |
| Forgery | Article 398 to 399 – Falsifying documents<br>Article 434 – Falsifying official document and other specific offences (e.g. Articles 314, 376, 403) | Articles<br>332 to 335<br>Article 348 |
| Piracy | Article 168 – Piracy | Article 136 |
| Insider trading and market manipulation | Article 311 – Abuse of insider information | (not covered) |

292. Thus, the criminal legislation of Kosovo covers all but one of the 20 categories of predicate offences for ML required under the Glossary to the FATF Recommendations. More precisely, the Prov.CC had already covered 19 of these categories entirely, except for the offences of insider trading and market manipulation. Since Article 311 of the new CC rendered insider trading a *sui generis* criminal offence as from 1 January 2013 now the only exception is the offence of market manipulation which, as it was confirmed by the MoJ, has not yet been covered by criminal legislation.

293. Notwithstanding all these, the assessment team noted a rather peculiar approach the Kosovo prosecutors appeared to follow in ML cases related to proceeds derived from tax evasion. Tax evasion is a crime under Article 313 CC consisting of the provision of false information or failure to provide information regarding one's income, property, economic wealth or other relevant facts for the assessment of such obligations with the intent that the perpetrator or another person conceals or evades, partially or entirely, the payment of taxes, tariffs or contributions required by the law. It is thus an ordinary criminal offence which, besides, goes beyond the classic concept of tax evasion and contains elements of tax fraud and, obviously, it is a crime that generates proceeds. Tax crimes are normally considered as predicate offences to ML and in a number of jurisdictions (also in some of the neighboring countries) the majority of ML prosecutions are actually related to tax evasion/fraud proceeds.

294. This is why the assessment team was surprised when the representatives of the prosecution service explained during the Cycle 2 on-site visit that tax evasion (Article 313 of the CC) is actually considered as a *de facto* exception to the all-crimes approach. That is, tax evasion is the only criminal offence in the CC or elsewhere the proceeds of which the prosecutors consider not to constitute criminal proceeds. The reasoning is that the proceeds of tax evasion consists of assets that had originally been obtained in a lawful manner as part of one's income or property and should have been paid as taxes but, as a result of the tax evasion, these assets were concealed from the

tax authority and thus kept by the perpetrator. The basically lawful origin of these assets seems to make them exempt from being subject to ML which is basically related to illicit assets.

295. As a result, the laundering of proceeds from tax crimes i.e. the commission of any of the acts under paragraph (2) of Article 32 of the AML/CFT Law in relation to proceeds derived from tax evasion would not constitute a ML offence in Kosovo, which can be illustrated by one of the recent indictments that was provided to the evaluation team in English translation.[86] Here, defendant #1 was prosecuted for laundering money that he had obtained, first, from fictitious economical activities the commission of which had constituted an offence itself (misuse of economic authorisations, see below more in detail) and second, from actual economic activities in relation of which, however, he failed to pay taxes and thereby committed the crime of tax evasion. The perpetrator thus laundered (i) illicit assets derived from an economic crime and (ii) a part of his lawful incomes that should have been paid as taxes. As far as the latter is concerned, the perpetrator was only indicted for tax evasion whence the laundering of (the amount of) the non-paid taxes was considered not to constitute a ML offence.

296. The assessment team could not find any legal basis to support this restrictive interpretation either in the CC or elsewhere in the laws of Kosovo. Indeed, the representatives of the tax authority did not share the prosecutors' opinion in this field and claimed they had always considered tax evasion as a potential predicate offence to ML. They mentioned that they had already submitted a number of reports on tax crimes together with related ML offences to the prosecutors (as from 2014 the tax authority is authorised to investigate tax evasion related ML cases too but no information on such cases could so far be obtained). Since customs and tax crimes were mentioned amongst the offences representing major sources of illegal proceeds in Kosovo (see Chapter 1.2 of this Report) this approach is not only unfounded by law but also highly ineffective for which reason it needs urgent reconsideration.

***Extraterritorially committed predicate offences - Essential Criterion 1.5 and Additional Element 1.8, and CETS 198 Article 11)***

297. EC 1.5 requires that predicate offences for ML should extent to conduct occurred in another country and which constitutes an offence in that country and which would constitute an offence had it occurred domestically.

298. AE 1.8 then seeks to establish whether where proceeds of crime are derived from conduct that occurred in another country and is not an offence in that country but would constitute an offence if occurred domestically then the offence of ML is committed.

299. In terms of Article 11 of CETS 198 legislative and other measures should be in place for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another country that is a signatory to the Convention in relation to offences established in accordance with the Convention.

300. Predicate offences for ML extend to conducts that occurred in another jurisdiction by virtue of Article 32 paragraph (4.3) which provides, that

> "…the Courts of Kosovo may have jurisdiction over a criminal offence of money laundering, even if they do not have territorial jurisdiction over the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived, since it has been committed outside Kosovo."

301. This provision is clear in that proceeds derived from foreign predicates can actually form the basis of a domestic ML offence in Kosovo. Furthermore, the provision in paragraph (4.3) of Article 32 of the AML/CFT Law does not appear to require that the foreign predicate offence meet the standard of double criminality (i.e. the same act would also have constituted a predicate offence had it occurred domestically) which feature may further facilitate the extension of the applicability of the ML offence to foreign proceeds. Notwithstanding this, the Kosovo authorities (namely the SPO) had the opinion that the offence from which the laundered proceeds were derived has to be a criminal offence stipulated in the other jurisdiction but, on the other hand, it also has to constitute a criminal offence pursuant to the law of Kosovo (hence the dual criminality applies) although this requirement does not seem to be included in paragraph (4.3) quoted above.

86. Indictment number PPS.np. 18/12 of 10.03.2014 (SPRK).

302. Because of opinions like this, the assessment team could not establish the actual admissibility of proceeds of foreign predicates that do not meet the standard of dual criminality. Consequently, it could not be determined whether or not the laundering of assets derived from a conduct that occurred in another jurisdiction, which is not an offence in that other jurisdiction but which would have constituted a predicate offence had it occurred in Kosovo, would constitute a ML offence.

303. The assessment team notes at this point that the notion of extraterritorially committed predicates did not appear clear to most of the practitioners they met. Kosovo authorities seem to consider this issue from the aspect of whether or not Kosovo has jurisdiction over criminal offences committed outside its territory which is not the issue in the context of FATF EC 1.5 and AE 1.8. That is, these standards clearly refer to the domestic laundering of foreign proceeds, in other words, to the domestic punishability of laundering activities which undoubtedly fall under the jurisdiction of the respective country (either because the laundering was committed in its territory or by its nationals) but the assets that have been laundered are proceeds of crimes committed abroad. It is not the question whether Kosovo has jurisdiction over these foreign predicate offences as this is not required by FATF standards (for which reason it is indifferent whether such a predicate offence meets the rules regarding the applicability of criminal laws of Kosovo according to the place of the commission of the criminal offence as provided in Chapter XI of Prov.CC or Chapter XII of the new CC). The real question is whether the domestic laundering of proceeds derived from these predicates would constitute a ML offence in Kosovo – and this question is positively answered by paragraph (4.3) of Article 32 of the AML/CFT Law above, according to which Kosovo courts can also have jurisdiction over the criminal offence of ML in cases when there is no territorial jurisdiction for predicate offence.

304. In lack of practice, the provisions governing the issue of foreign predicates had not yet been tested before the courts. The assessment team was however informed that there had already been some ML investigations in Kosovo in which the ML offence involved foreign proceeds and the domestic authorities had reportedly encountered problems in demonstrating the illicit origin of such funds. No indictment has taken place to date in such cases. It was made sure, however, that there is absolutely no practice with respect to laundering the proceeds of actions that do not constitute an offence when committed overseas but would constitute a criminal offence in Kosovo (i.e. ML cases related to foreign proceeds where dual criminality is not met).

305. The absence of such information does not allow for establishing if there is, or would be, any proper jurisprudence in Kosovo to provide for the possibility of taking into account, when determining the penalty, final decisions against natural or legal persons taken in another country in relation to offences pursuant to CETS 198 Article 11 (in any case, there is no specific legislation to address this issue).

***Laundering one's own illicit funds - Essential Criterion 1.6***

306. EC 1.6 requires that the offence of ML should apply to the persons who commit the predicate offence but countries may provide that the offence of ML does not apply in these circumstances where this is required by fundamental principles of the domestic law.

307. There are no specific provisions in the AML/CFT Law or elsewhere in other laws that provide for the formal coverage of the laundering by the author of the predicate offence although, on the other hand, the assessment team is not aware of any principal or fundamental legal objections to that. The language of the ML offence, as it is provided by paragraph (2) of Article 32 of the AML/CFT Law, appears to encompass predicate offences with no specific distinction or limitation depending on who the author of the predicate offence was. As there is no formal exception made in cases where the perpetrator launders the proceeds of the crime he or she has committed, most Kosovo authorities have a strong opinion that the ML offence embraces, without any further specification, the laundering of own proceeds.

308. This argumentation is supported, even if indirectly, by paragraph (4.2) of Article 32 of the AML/CFT Law which provides that:

> "(…) the same person may be prosecuted and convicted in separate proceedings of the criminal offences of money laundering and the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived"

309. According to this provision, the same person may be prosecuted for ML as well as for the related predicate offence which can only take place if laundering of one's own proceeds is covered by the AML criminal legislation. As a consequence, the assessment team is ready to accept that the criminalisation of self-laundering, as it is required by FATF Recommendation 1 is covered by the criminal legislation of Kosovo, even if the actual scope of this coverage has not yet been confirmed by relevant case law and jurisprudence.

310. Notwithstanding all these factors, the assessment team had some difficulty in comprehending the actual meaning and purpose of the above quoted paragraph (4.2). While it is clear that the same person can be held criminally responsible for the predicate crime and for the related act of ML, the structure and wording of the provision may equally mean the following:

(i) in this provision, the Law explicitly allows for the prosecution and conviction of the same person for both offences which, however, can only take place in two separate proceedings (here "may" refers to the rest of the sentence)

(ii) the prosecution and conviction of the same person for both offences is taken as provided, the Law only allows that it can also take place in two separate proceedings (here "may" refers to the optional bifurcation of the proceedings).

311. The wording of the provision allows for both interpretations because of the reference to "separate proceedings" which unnecessarily brings a confusing "procedural" component into the definition otherwise based on criminal substantive law. Once the laundering of own proceeds is rendered punishable, it should normally be prosecutable either in the same procedure or, if necessary, also in separate proceedings depending on the characteristics of the case. (It may happen, for example, that the person has already been convicted for the predicate crime when his related laundering activities are detected in which case he can only be prosecuted for ML in a separate procedure).

312. Although the assessment team was not provided with a sufficient volume of ML indictments in translation or at least descriptions of the respective cases so as to perform a more profound analysis in this field, the above mentioned indictment[87] and the explanation provided by the representatives of the prosecution service nevertheless allows for drawing some conclusions.

313. As was explained by the prosecutors and illustrated by the said indictment, whenever the perpetrator is suspected of having committed both the predicate crime and the related ML offence (self-laundering) and there is sufficient evidence that he has committed both crimes, he would only be prosecuted and indicted for the more serious offence (i.e. the one that is threatened with a more severe punishment) which would then "absorb" the other, less serious offence. In the aforementioned indictment, for example, defendant #1 was charged with ML for having laundered proceeds he himself had obtained from misuse of economic authorisations, which is a criminal offence in itself pursuant to Article 290 of the CC. Nonetheless, the defendant was only indicted for ML (being the more serious offence that "absorbed" the other one) although both offences were mentioned in the reasoning of the indictment.

314. The assessment team found this approach unreasonable and highly ineffective as it offers a unique opportunity for self-launderers to evade the legal consequences of some of their acts. An interpretation by which the more serious criminal offence, let it be the predicate crime or the ML offence (whichever is more serious) "absorbs" the other seems to be contrary to the legislation available to the assessment team. Paragraph (1) of Article 80 of the CC provides that "if a perpetrator, by one or more acts, commits several criminal offences for which he or she is tried at the same time, the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts". Following this principle, the aforementioned defendant should obviously have been indicted (and should eventually be convicted) for both the predicate crime and the ML offence.

315. The "absorption" principle thus seems not to have a firm statutory base. It is very likely, however, to have its origins in the rather peculiar concept of ML as understood by the Kosovo practitioners according to which ML is considered an accessory criminal act and not, or at least not in all aspects, a *sui generis* separate offence. This argumentation is contrary not only to the internationally accepted and acknowledged definition of ML but also to the criminal legal provisions of Kosovo and therefore it also requires a thorough reconsideration.

87. Indictment number PPS.np. 18/12 of 10.03.2014 (SPRK).

***Ancillary offences - Essential Criterion 1.7***

316. According to EC 1.7 there should be appropriate ancillary offences to the offence of ML, including association with or conspiracy to commit, attempt, aiding and abetting, facilitating and counselling the commission, unless this is not permitted by fundamental principles of the domestic law.

317. Ancillary offences to the criminal offence of ML are covered in a separate paragraph (paragraph (2.7)) within paragraph (2) of Article 32 of the AML/CFT Law. This paragraph is one of those which had not yet been included in the offence as it was criminalised by the previous AML/CFT legislation (UNMIK Regulation 2004/2 which is now repealed) and which were only added to the offence in the present AML/CFT Law:

> "*paragraph (2.7)*: participates in, associates to commit and aids, abets, facilitates and counsels the commission of any of the actions mentioned in sub-paragraphs 2.1 to 2.6 of this paragraph"

318. The ancillary conducts listed in this paragraph are formulated in full accordance with the wording of paragraph (1)(b/ii) of Article 6 of the Palermo Convention as regards participation, association, aiding-abetting, facilitating and counselling. Certainly, an approach by which the very provisions of an international convention are copied-and-pasted into the domestic legislation would undoubtedly provide for the most accurate implementation of the original, nevertheless it is also a requirement that the legislators pay attention as to whether and how such an imported provision would fit into the context of the existing legislation.

319. In this very case, one can find, on the one hand, a set of ancillary offences in the AML/CFT Law that is applicable specifically and exclusively to the offence of ML and, on the other hand, those ancillary offences that are defined in the General Part of the respective CC with a view to their general applicability to all criminal offences – including the offence of ML. The uniform applicability of criminal legislation would normally require that the same concept and terminology for general issues of criminal substantive law (such as, among others, the range and scope of ancillary offences) be used in both the CC (as *lex generalis*) and other, additional sources of criminal law such as the AML/CFT Law (as *lex specialis*). In case of ancillary offences, however, the concept and terminology applied in (either of) the CCs and the AML/CFT Law show significant differences in this field which might cause problems of interpretation to the practitioners.

320. Certainly, a more profound analysis shows that the concept of participation, association, aiding-abetting, facilitating and counselling, as referred to in paragraph (2.7) above, are all addressed by (either of) the CCs despite the apparent differences in terminology. That is, both the Prov.CC and the new CC define the act of "co-perpetration" (as it is rendered punishable by Article 23 and Article 33 respectively) that covers the notion of participation, the act of "criminal association" (as in Article 24 and Article 34) that covers association and "assistance" (as in Article 25 and Article 33) that covers aiding-abetting, facilitating and counselling. Nonetheless, such a positive conclusion can only be drawn as a result of broad interpretation of the competing legal texts (particularly that of the CCs as the AML/CFT Law provides no definitions for the respective terms) but it cannot be excluded that the significant formal differences between the two legal sources may also lead to a more restrictive interpretation.

321. Conspiracy is the only kind of ancillary offences required by the Vienna and Palermo Conventions which is clearly missing, for reasons unknown to the assessment team, from the list of ancillary acts as provided by paragraph (2.7) of Article 32 of the AML/CFT Law. Notwithstanding that, the General Part of (either) CC appears to cover this conduct in general terms, that is, with an applicability to the offence of ML too, by the use of the following provisions (with more or less overlap with the notion of "association" discussed above):

- criminal association (Article 26 of the Prov. CC / Article 34 of the CC) meaning explicitly or implicitly agreeing with one or more persons to commit or to incite the commission of a criminal offence that is punishable by imprisonment of at least five years and undertaking preparatory acts for the fulfilment of such an agreement;
- agreement to commit criminal offence (Article 35 – only in the new CC) meaning agreeing with one or more other persons to commit a criminal offence and one or more of such persons does any substantial act (i.e. a substantial preparatory step) towards the commission of the criminal offence.

322. Attempt is not specifically referred to within paragraph (2.7) of Article 32 but attempted ML is clearly criminalised in all but one of the preceding paragraphs of paragraph (2) of Article 32 of the AML/CFT Law by which the various conducts of ML are defined (such as "*converts or transfers, or attempts to convert or transfer"* in paragraph (2.1)). While this approach is consequently followed throughout paragraphs (2.1) to (2.5) it cannot be understood why the specific reference to attempt is missing in paragraph (2.6) - which was the other paragraph being only added to the offence in the present AML/CFT Law.

323. The general provisions by which attempt is criminalised can be found in the General Part of (either) CC (namely Article 20 in the Prov.CC and Article 28 in the new CC). Both CCs provide that an attempt to commit a criminal offence threatened with imprisonment of at least 3 years shall generally be punishable while in case of other (less serious) criminal offences attempt can only be punishable if expressly provided for by law. In case of the ML offence in paragraph (2) of Article 32 of the AML/CFT Law, the punishment for attempt is expressly provided by law (except in paragraph (2.6)) - nevertheless the offence itself is punishable by a term of imprisonment of up to 10 years and hence an attempted offence would be punishable anyway, even in case of the conducts under paragraph (2.6) of Article 32.

324. In other words, the attempt to commit the conducts in paragraphs (2.1) to (2.5) of Article 32 of the AML/CFT Law is rendered punishable right there by the same paragraphs while the attempt to the offence in paragraph (2.6) is only covered by the general provisions of the respective CCs. The question is whether it makes any difference. Actually, it did until the end of year 2012 considering that paragraph (3) of Article 20 of the Prov.CC provided that a person who attempted to commit a criminal offence *"shall be punished more leniently than the perpetrator, in accordance with Article 65(2) of the present Code"* the latter provision being *"no more than three-quarters of the maximum punishment prescribed for the criminal offence"* while in paragraphs (2.1) to (2.5) of Article 32 of the AML/CFT Law the attempted ML is threatened with the very same range of punishment as the completed offence. As from 1 January 2013 the sanctioning regimes in the two laws are harmonised considering that paragraph (3) of Article 28 of the new CC also applies the same range of punishment for the attempter who *"shall be punished as if he or she committed the criminal offence, however, the punishment may be reduced"*.

***Statistics and effectiveness***

325. The assessment team encountered serious difficulties when trying to obtain comprehensive and sufficiently detailed statistics in respect of the number of criminal investigations, prosecutions and convictions for ML. Until the latest stage of the assessment procedure no appropriate and reliable statistics have been provided by Kosovo authorities and the occasional statistical information the assessment team received were substantially contradictory. Different figures were provided by the SPO and the KJC while further, partial data were also provided by the MIA.

326. A recent achievement in this field was the harmonisation of criminal statistics for "characteristic criminal offences" (a range of serious crimes including ML) that was carried out by the KPC with a view to compare and harmonise the respective statistics of the law enforcement, the prosecution and the judiciary so as to achieve consistency and compatibility between the different sources and to produce single and trustworthy statistical figures in this field. Having no retroactive approach, however, this project was not adequate for reviewing and harmonising statistics for the preceding years (prior to 2013) in which respect the assessment team were thus left with unverifiable and sometimes contradictory figures as discussed below.

327. In any case, as a result of examination of the annual report on the harmonisation of statistics and repeated interviews with representatives of the prosecution service and other practitioners, it is ascertained that there has not yet been a single conviction for ML offence in Kosovo. More specifically, as it was confirmed by the KJC, there had been no final court decisions in ML cases, either convictions or acquittals.

328. As for the number of cases pending before the court (i.e. those where the prosecution has indicted someone for the offence of ML) the assessment team received various answers. The SPO claimed they had already had indictments submitted in ML cases in the relevant time period as follows:

- During 2009, prosecutors solved cases for 5 persons, whereas none was solved with indictment.
- During 2010, prosecutors solved total of 21 cases with 8 indictments filed for 8 persons

- During 2011, prosecutors solved total of 33 cases and 7 indictments were filed.
- During 2012, prosecutors solved 32 cases and filed indictments against 17 persons.
- During 2013, prosecutors solved 25 cases and 1 indictment was filed against 1 person.

329. The figures above fall out of the scope of the project for the harmonisation of statistics and therefore their accuracy could not be verified by the assessment team. In addition, there remains a major discrepancy between the number of ML investigations reported by the KPC and by the KP for these years (see Section 2.7 of this Report).

330. According to the above mentioned annual report, at the beginning of 2013 there had been 38 ML cases (against 171 persons) still pending from the preceding year while 18 new ML cases (against 36 suspects) were reported to the prosecutors throughout the year. More than 61% of these reports had been issued by the KP while the rest by the EULEX (22.2%), the KC, the TAK and citizens (5.5% each).

331. Out of these 56 ML cases the prosecutor (which means the SPRK except for 2 cases dealt with the Basic Prosecutor's Office of Prizren) decided on the initiation of an investigation in 32 cases which is a promising sign implying that the majority of the criminal reports had actually been relevant. On the other hand, the statistics also show that the prosecutor had to request for additional information before deciding on launching the investigation in 37 cases, which raises some concerns about the quality of the initial criminal reports.

332. During 2013, there were 25 ML cases (against 116 persons altogether) that had been solved i.e. sorted out by the prosecution service. A further analysis of these cases shows that solving the case meant the following:

- criminal reports were dropped without launching an investigation against 54 persons (45.6% of cases)
- investigation was launched but ceased against 60 persons (51.7% of cases)
- while only 3 persons were actually indicted for ML (1 instantly and 2 after investigation).

333. It can therefore be concluded that whereas the greater part of the initial criminal reports were relevant enough to have them investigated, the vast majority of the ML investigations could not bring sufficient evidence so that the prosecutor can proceed with an indictment. When asked about the reasons, the representatives of the prosecution service complained about the complicated scenario of most ML cases which makes it hard to prove the illicit origin of the funds (particularly in case of foreign proceeds) to demonstrate the actual movement of assets and to explore the laundering activity.

334. The apparent lack of harmonic cooperation between the prosecutors and the KP might also have added to the low results. While the prosecutors expressed their dissatisfaction with the skills and expertise of the KP staff and the poor quality of their criminal reports, the representatives of the KP, as discussed above, complained about the overly high level of proof that the prosecutors required for demonstrating that the assets had been proceeds of crime.

335. While the assessment team maintains its request for comprehensive statistical figures (particularly from the judiciary) the team is of the opinion, even on basis of such incomplete statistics, that there are promising trends in the figures available and so there can be seen some promising signs that the prosecution will soon be able to achieve the first conviction for ML which should be followed by more and more cases to develop jurisprudence based on case law. Unfortunately, due to the lack of more detailed information regarding the characteristics of the ML offences that have so far been subject to investigation and prosecution in Kosovo, the assessment team was not able to draw general conclusions as to the typical predicate offences, the laundering methods, the occurrence of third-party ML and self-laundering or other relevant factors in this field. As a result, the effective applicability of the ML criminalisation could only be assessed to a limited extent.

336. Notwithstanding, the assessment team succeeded in obtaining some information as to how the concept of ML is actually interpreted by Kosovo practitioners and particularly by the prosecutors. As it was described above, the prosecution seems to have unusual and rather restrictive views on certain issues such as the *de facto* exclusion of tax crimes from the range of predicate offences as well as the "absorption principle" by which nobody can be prosecuted for ML together with the respective predicate offence. These interpretations seem to lack an adequate, if

any, statutory basis and are likely to limit the possibilities and thus the overall effectiveness of the ML investigations and prosecutions.

### 2.1.2. Recommendations and Comments

***Criminalisation of money laundering – Physical and material elements of the offence - Essential Criterion 1.1***

337. The assessment team has no specific comments regarding the ML offence to the extent it regulates issues within the scope of the Vienna and Palermo Conventions considering its overall compliance with the respective international standards. As regards the further provisions in Article 32 of the AML/CFT Law that apparently go beyond the scope defined by the above mentioned Conventions, however, the assessment team has some concerns.

338. The provisions in paragraphs (2.3) and (2.4) of Article 32 of the AML/CFT Law that introduce "extra" ML offences with specific purposive components appear to cause problems once applied in concrete cases because of their mainly redundant character by which they overlap with other offences provided elsewhere in the same article. For these reasons, the Kosovo authorities should revisit these provisions to reconsider whether and to what extent they might overlap with other provisions.

339. It was also discussed above that the mixture of criminal substantive and procedural law in those parts of the ML offence that refer, either directly or indirectly, to the application of "covert measures" is indefinite and illogical and so might cause problems in practice. Although this is another issue that goes beyond the scope of this assessment, the assessment team reiterates that covert measures should ideally be regulated exclusively in criminal procedural legislation in a manner by which they can easily and effectively be applicable to any criminal offences.

340. As discussed in more detail above, the duplicate definition of "money laundering" in the very same piece of legislation (paragraph (1.23) of Article 2 vs. paragraph (2) of Article 32 of the AML/CFT Law) was found very problematic by the assessment team. The legal uncertainty the bifurcation of the definitions may cause can only be eliminated by the use of one single definition of ML that is equally applicable for the purposes of criminal jurisdiction and those of the preventive regime. The assessment team thus strongly recommends deleting paragraph (1.23) of Article 2 so that there will be only one provision in paragraph (2) of Article 32 where ML is defined for any of the purposes mentioned above.

***Laundered property - Essential Criterion 1.2, CETS 198 Article 9(6)***

341. The current provisions in the AML/CFT Law that define "property", "proceeds of crime" and "predicate offence" (Article 2 paragraphs (1.28) to (1.30)) are all in significant overlap (at some points they go in circles). While the introduction of the new paragraph (1.40) practically eliminated the controversies raised by the reference to "criminal activity" in the ML offence, the legal framework continues to suffer from redundancy to which no solution has yet been offered.

342. The system and actual scope of these definitions should urgently be reconsidered. In this context the minimum requirement is that the same terminology be used to denote the same concept throughout the entire AML/CFT Law and all respective definitions should be harmonised in order to avoid confusion and redundancy.

***Proving property is the proceeds of crime - Essential Criterion 1.2.1 and CETS 198 Article 9(5)***

343. The overall uncertainty among practitioners regarding the level of proof of the predicate offence was alarming and thus it requires urgent steps from the side of Kosovo authorities. As a minimum, the MoF as the authority responsible for the drafting of the current AML/CFT legislation (and particularly paragraph (4.1) of Article 32 of the AML/CFT Law) or another competent body should issue appropriate guidance as to the interpretation and implementation of the respective provisions. It is a major deficiency of the system that practitioners, particularly the public prosecutors, appear to be left without proper guidance in such crucial issues as this one.

344. If explanatory guidance cannot remedy the unfamiliarity with and resistance to the respective provisions (and the underlying concepts in general) the assessment team recommends a discussion of this issue in the framework of a roundtable exchange among the authorities involved. In this context, it needs to be explored whether and what jurisprudence has been developed by EULEX in this area that can be made of use to Kosovo authorities (considering that EULEX officials did not appear to have any particular problem with the same provisions that had been, on the other hand, part of the respective UNMIK regulation for a considerable time).

***The scope of the predicate offence & threshold approach for predicate offences - Essential Criterion 1.3 and Essential Criterion 1.4***

345. The offence of market manipulation should be introduced in the criminal legislation of Kosovo so that the last missing category of designated predicate offences will also be covered.

346. The peculiar approach of Kosovo prosecutors by which tax crimes are practically excluded from the range of potential predicate offences is unreasonably restrictive and should therefore be urgently reconsidered. As a minimum, the legal basis for such an apparently *contra legem* interpretation should be revisited and, if it exists, amended so as to allow for the broadest concept of all crimes.

***Extraterritorially committed predicate offences - Essential Criterion 1.5 and Additional Element 1.8, and CETS 198 Article 11***

347. The current legislation in paragraph (4.3) of Article 32 of AML/CFT Law should remove all doubt whether and to what extent dual criminality is required for the predicate offence that was committed in another jurisdiction. In case there is no need to apply this standard (that is, the ML offence also encompasses assets derived from a conduct that occurred in another jurisdiction, which is not an offence there but which would have constituted a predicate offence had it occurred in Kosovo) then it should equally be specified precisely by the law so as to avoid any future problem of interpretation.

***Laundering one's own illicit funds - Essential Criterion 1.6***

348. It should be provided more expressly by positive law whether the laundering by the author of the predicate offence is covered by the ML offence. In this context, the explanatory provision in paragraph (4.2) of Article 32 does not facilitate comprehending the actual scope of the offence as regards laundering of own proceeds – instead, it makes it more difficult.

349. As a minimum, the lawmakers should decide what is to be defined by paragraph (4.2) of Article 32 of the AML/CFT Law that is, whether it allows for the prosecution of self-laundering (that is, holding someone criminally responsible for both offences) or for this prosecution to take place in two separate proceedings or, as another option, whether it does actually provide that the predicate crime and the laundering offence can only be prosecuted separately (which would otherwise make not much sense but this may also be derived from the text of the law). Generally, the reference to "separate proceedings" should be revisited and, if not indispensable, abandoned as the laundering of own proceeds should normally be prosecutable either in the same procedure or, if necessary, also in separate proceedings.

350. If there is, however, a common opinion that laundering of own proceeds is implicitly covered (because it is not excluded) by the ML offence in paragraph (2) of Article 32 then Kosovo legislators could also consider simply deleting the explanatory provision in paragraph (4.2) of Article 32 – with or without the enhancement of the formal positive coverage of self-laundering in paragraph (2) of Article 32.

351. Kosovo authorities should urgently reconsider the "absorption" principle by which nobody can be prosecuted for ML together with the respective predicate offence as only one of the competing offences i.e. the more serious one can be taken into account. While this interpretation lacks an adequate statutory basis it also appears highly ineffective so the assessment team recommends that Kosovo authorities revisit and remedy this practice as a matter of urgency.

***Ancillary offences - Essential Criterion 1.7***

352. While the ancillary offences to the criminal offence of ML as provided by paragraph (2.7) of Article 32 of the AML/CFT Law are in accordance with the international requirements and indeed they are likely to provide, even though in a different structure and logic, for the same coverage as the respective offences in the General Part of the CC (as it was demonstrated above) the use of two different sets of ancillary offences is far from being an optimal solution.

353. The duplication of terminology and the use of more or less different concepts in this field has more disadvantages than positive results. Kosovo authorities should urgently provide for the harmonic coexistence of the criminal provisions in the CC and those in the *lex specialis* AML/CFT Law in order to assure themselves that the differences in concept and terminology do not cause problems when these two legal sources are to be applied together. Specifically, it must be made clear whether the range of ancillary offences in paragraph (2.7) of Article 32 can be considered to provide for the same coverage as the respective generic provisions of the CC (as indicated) and if in the affirmative, why it is necessary to use a different terminology.

354. Ideally, the same terms and concepts should be used in any sources of criminal substantive law. Furthermore, once the ancillary offences related to ML are supposed to have the same coverage as those in the General Part of the CC it is redundant to reiterate them, even if under different terms, in the *lex specialis* particularly as ML is now formally in the new CC among the other ordinary criminal offences (Article 308). If however any of the ancillary offences in paragraph (2.7) of Article 32 of the AML/CFT Law go beyond the scope of the CC it requires a proper definition.

### 2.1.3. Rating for Recommendation 1

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.1** | **PC** | • the offence of market manipulation is not covered among predicate offences to ML;<br>• inadequate regulation of the required level of proof for the predicate crime in paragraph (4.1) of Article 32 causing uncertainty to and unfamiliarity with the respective provisions among practitioners;<br>• unclear and inadequate formulation of the provision that defines the coverage of self-laundering (paragraph (4.2) of Article 32);<br>• harmonisation required between AML/CFT Law and CC in terms of concept and terminology as regards ancillary offences; and<br>• effectiveness issues:<br>– tax evasion is practically excluded from the range of potential predicate offences to ML;<br>– self laundering is considered not to be prosecutable together with the predicate offence; and<br>– effective application of the ML offence could not be assessed due to the incomplete statistics for the years prior to 2013 and the lack of detailed additional information regarding pending cases. |

## 2.2. Liability for ML offence (R.2)

### 2.2.1. Description and Analysis

355. In summary Recommendation 2 requires countries to ensure that the intent and knowledge required to prove the offence of ML is consistent with the standards set in the Vienna and Palermo Conventions. Moreover, criminal liability, and where this is not possible, civil or administrative liability, should apply to legal persons. Finally legal persons should be subject to effective, proportionate and dissuasive sanctions.

***Liability of Natural Persons - Essential Criterion 2.1, CETS 198 Article 9(3)***
***Mental Element of the ML Offence - Essential Criterion 2.2***

356. EC 2.1 requires that the offence of ML should apply at least to natural persons that knowingly engage in ML activities. EC 2.2 further requires that laws should permit the intentional element of the offence of ML to be inferred from objective factual circumstances.
357. In accordance with paragraph (3) of Article 9 of CETS 198 Parties to the Convention should establish as an offence under domestic law all or some of the acts referred to in paragraph (1) of the same Article 9, in either or both of cases where the offender suspected or should have assumed that property was the proceeds of crime.

358. The ML offence does extend to natural persons who knowingly engage in ML activity and even goes beyond this limit. The knowledge element for paragraph (2) of Article 32 of the AML/CFT Law is the perpetrator's knowledge (*"whoever knowing"*) or the reasonable ground to know (*"having cause to know"*) that the property subject to laundering constitutes proceeds of an offence.

359. The latter element goes beyond the knowledge standard, making the ML offence applicable to anyone in case of whom the direct knowledge of guilt cannot be proven but it can nevertheless be demonstrated that they had a factual cause by which they should have known that the property was proceeds of crime. That is, the minimum requirement is lowered to the level of "should have known" standard ("ought to have assumed" in CETS 198) which approach obviously facilitates the evidence of the mental element in ML cases and hence it enlarges the scope in which paragraph (2) of Article 32 can effectively be applied in practice.

360. In this respect, Kosovo provisions appear to exceed the requirements of the Vienna and Palermo Conventions. On the other hand, the practitioners will have to pay attention to the fact that the rather common-law style "should have known" standard does not automatically fit into the civil-law shaped system of criminal liability traditionally based on the concept of intent and negligence (see paragraph (1) of Article 17 of the new CC or paragraph (1) of Article 11 of the Prov.CC which provide that persons are criminally liable if they commit a criminal offence intentionally or negligently). The "should have known" standard obviously goes beyond the scope of direct or eventual intent (see Article 21 of the CC or Article 15 of the Prov.CC). Furthermore it can be considered comparable, at least theoretically, to unconscious negligence as defined by paragraph (3) of Article 23 of the CC (paragraph (3) Article 16 of the Prov.CC):

> "A person acts with unconscious negligence when he or she is unaware that a prohibited consequence can occur as a result of his or her act or omission, although under the circumstances and according to his or her personal characteristics he or she should or could have been aware of such a possibility."

361. However, paragraph (2) of Article 17 of the new CC (paragraph (3) of Article 11 of the Prov.CC) provides that criminal liability for negligent commission of a criminal offence applies only if it is explicitly provided for by law (e.g. in case of negligent murder Article 181 of the CC; transmitting contagious diseases by negligence paragraph (3) of Article 255 or paragraph (2) of Article 258 of the CC; causing bankruptcy by negligence paragraph (3) of Article 286 of the CC etc.). In these cases, the law specifically refers to the respective negligent offences (typically in a separate paragraph) designating them by the use of the exact legal term "by negligence" or "negligent". In case of the ML offence, however, the legislators chose to apply a different concept and terminology to determine the required level of the mental element ("to have cause to know" i.e. should have known standard) which does not appear automatically interchangeable or replaceable with the respective CC term "(unconscious) negligence" even if these concepts are approximate and comparable to each other.

362. Now one can find it confusing that, from a formal aspect, there is no explicit coverage of a *per definitionem* negligent ML offence in paragraph (2) of Article 32 of the AML/CFT Law (one that would be in line with paragraph (2) of Article 17of the CC) while ML committed by kind of a *quasi*-unconscious negligence ("should have known" standard) is one of the very conducts that make part of the core ML offence. This discrepancy in terminology obviously originates in the fact that AML criminal legislation in Kosovo has always been (and is currently) developing separately from the Criminal Codes of any time, nevertheless the assessment team does not consider this issue serious enough to impede the effective applicability of the ML offence (at least the assessment team is not aware of any negative experience in this respect).

363. The requirement in FATF EC.2.2 is explicitly addressed, and also met, by Article 22 of the new CC according to which *"knowledge, intention, negligence or purpose required as an element of a criminal offence may be inferred from factual circumstances".*

364. The provision quoted above is an innovation in the new CC being in force since 1 January 2013. Until then, there was no similar provision in the predecessor legislation Prov.CC and therefore the admissibility of inferences from circumstantial evidence could only be made possible by provisions of criminal procedural law that allowed for the free evaluation of evidence (paragraph (2) of Article 152 of the Prov.CPC providing that the court, according to its own assessment "may admit and consider any admissible evidence that it deems is relevant and has probative value (…) and shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility" which issue is roughly covered now by paragraph (2) of Article 361 of the CPC).

***Liability of Legal Persons - Essential Criterion 2.3***

365. EC 2.3 obliges the extension of the criminal liability for ML to legal persons and where, for example, due to fundamental principles of domestic law, this cannot be done then civil or administrative liability should apply.

366. Criminal liability of legal persons for the offence of ML is specifically provided for by the current AML/CFT Law as follows:

> **"Article 34**
> **Criminal Liability of Legal Persons**
>
> 1. If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that:
>
> 1.1. the offence was committed without his or her consent or knowledge; and
>
> 1.2. the person took reasonable steps to prevent the commission of the offence as ought to have been exercised by that person having regard to the nature of his or her functions in that capacity."

367. As it can be seen, this provision does not directly provide for the criminal accountability of legal persons since it takes it as a fact that legal persons may commit a ML offence. Instead, it provides for the collective responsibility of natural persons participating in the direction and management of the legal entity for their collective decision as a result of which the respective criminal offence was committed (further aspects of this provision will be discussed below).

368. The broader legal background, by which criminal liability for ML is extended to legal persons in the law of Kosovo, consists of the following pieces of legislation:

- the Law No. 04/L-030 (2011) on Liability of Legal Persons for Criminal Offences (hereafter "LLP Law"); and
- the new CC (particularly Article 40 on the criminal liability of legal persons).

369. Both the LLP Law and the new CC entered into force on 1 January 2013 (even if the former had been adopted since 31 August 2011) which means that the legal framework by which legal entities can be prosecuted and convicted for criminal offences was then established (as the Prov.CC had not contained any specific provision in this respect). Considering that, up to this date, there was no actual legislation in force to provide for the criminal responsibility of legal persons, it is evident that the above-quoted Article 34 of the AML/CFT Law, which refers to the criminal liability

of legal persons, can also be considered as *de facto* applicable since 1 January 2013 (even if it had formally been in force even before).

370. Pursuant to Article 3 of the LLP Law the provisions of the CC and CPC of Kosovo are generally applicable against legal persons who may take liability for criminal offences provided for in Special Part of the CC and for other criminal offences, provided the conditions for the criminal liability of legal persons are met. Since the offence of ML is, at least formally, provided for in the new CC (Article 308) there is nothing against the applicability of the LLP Law thereto.

371. Corporate criminal liability extends to both national and foreign legal persons for criminal offences committed either within or outside the territory of Kosovo (as to foreign entities, responsibility for offences committed abroad applies as far as the offence damages Kosovo or its citizens or causes damage to national legal persons). Administrative and local governance bodies and foreign governance organisations acting in Kosovo shall not be liable for criminal offences.

372. The grounds and limits of corporate criminal liability are defined by Article 5 of the LLP Law which article is, interestingly, in all details identical to Article 40 of the new CC. (The assessment team notes at this point that the word-by-word reiteration of the very same article was perhaps an unnecessary redundancy particularly if taking into account Article 119 of the CC by which a proper connection is established between the two laws).

> **"Article 5**
> **Grounds and limit of liability of legal persons**
>
> 1. A legal person is liable for the criminal offence of the responsible person, who has committed a criminal offence, acting on behalf of the legal person within his or her authorisations, with purpose to gain benefit or has caused damages for that legal person. The liability of legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person.
>
> 2. Under the conditions provided for in paragraph 1. of this Article, the legal person shall be liable for criminal offences also in cases if the responsible person, who has committed the criminal offence, was not sentenced for that criminal offence.
>
> 3. The liability of the legal person is based on the culpability of the responsible person.
>
> 4. The subjective element of the criminal offence, which exists only for the responsible person, shall be evaluated in relation with the legal person, if the basis for the liability provided for in paragraph (1) of this Article, was fulfilled."

373. According to paragraph (1) of Article 5 of the LLP Law the basis of corporate liability is the liability of the "responsible person". In the law of Kosovo this term denotes a natural person within the legal person, who is entrusted to perform certain tasks, or who is authorised to act on behalf of the legal person and there exists high probability that he/she is authorised to act on behalf of the legal person (the latter definition can equally be found, in a practically identical wording, in paragraph (1.1) of Article 2 of the LLP Law and paragraph (5) of Article 120 of the CC). At this point, the assessment team notes that the cumulative formulation of this paragraph (the use of "and" before the last phrase) implies that the last two conditions must be met at the same time, that is, the law appears to require high probability for the authorisation in case of a person who has factually been authorised already. Considering that this additional cumulative condition might clearly limit the scope of application of both laws, the wording of this paragraph should urgently be revisited.

374. Paragraphs (2) and (3) of Article 5 of the LLP Law provide for further details as to the scope of the criminal responsibility. Paragraph (3) specifies that the legal person's liability is based on the culpability of the responsible natural person, in which context the term "culpability" necessarily means that the responsible person must be found guilty in the respective criminal offence as a precondition so that the legal person can be held liable for the same offence. This is a clear rule being in accordance (if not in overlap) with the provision in paragraph 1 quoted above.

375. Notwithstanding all this, paragraph (2) appears to run counter to what is provided in the neighboring paragraphs (1) and (3) in specifying that a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that. This rule is in an explicit contradiction with those discussed above and it goes to such an extent that already impedes the applicability of the entire article. The formulation of paragraph (2) is unlikely to be a result of wrong translation (considering that the very same wording can be found in two different pieces of legislation) but even if it was done on purpose, the

assessment team have so far failed to comprehend the actual goal the legislators had intended to achieve.

376. It could be a possible solution if "was not sentenced for that" was restricted to cases where the responsible natural person has actually committed the criminal offence nevertheless he cannot be convicted for it because of his death or absconding. In such cases, the lack of sentence would not equal to the lack of culpability and hence paragraph (2) could be applicable together with the other two paragraphs. However, if the expression "not being sentenced for a criminal offence" includes cases where the court tries the responsible natural person but finally grants him a judgment of acquittal (for any reason provided by paragraph (1) of Article 364 of the new CPC) it would definitely affect the question of culpability and hence paragraph (2) would not be applicable in its current context.

377. It is further a question whether and how the above-quoted Article 34 of the AML/CFT Law can be applied together with the generic rules of the new CC and particularly the LLP Law. That is, while the CC and LLP Law provide that a legal person is liable for the criminal offence of the responsible person (where the criminal liability of the legal person depends on the culpability of the responsible natural person) the AML/CFT Law provides that the criminal liability of a legal person brings about the liability of all its directors and those involved in its management (unless they can be exempted pursuant to subparagraphs (1.1) or (1.2) of Article 34). In other words, the *quasi* collective liability of all directors and managers for the offence of ML committed by the respective legal entity requires that the offence be committed by the legal person (see Article 34 of the AML/CFT Law) which however can only take place on the condition that one or more responsible person of the same entity (one or more of the directors and managers mentioned above) can be found personally liable, as a natural person, for the same offence (see paragraph (1) and paragraph (3) of Article 5 of the LLP Law – and the more favorable interpretation of paragraph (2) of Article 5). While these provisions are not necessarily opposite to each other, they obviously show two different approaches in connecting the legal entities to the respective natural persons being responsible for the acts committed by or on behalf of the legal entity which may raise some issues of interpretation in concrete cases, particularly as the different regime only applies to the offence of ML and not to the related predicate offences.

378. As for the compliance with Article10 paragraphs (1) and (2) of CETS 198 it can be established that paragraph (1) of Article 5 of the LLP Law covers the offence defined in paragraph (1) of Article 10 but not that one defined in paragraph (2) of Article 10. The definition in paragraph (1) of Article 10 requires that legal persons can be held liable for ML offences committed for their benefit by a natural person who has a leading position within the legal person which is roughly covered by the offence committed by the responsible natural person pursuant to paragraph (1) of Article 5 of the LLP Law. The definition in paragraph (2) of Article 10 however refers to the liability of legal persons in cases where the lack of supervision or control by the same natural person (i.e. the one who meets the conditions for "responsible person" in the LLP Law) has made possible the commission of the ML offence for the benefit of that legal person "by a natural person under its authority" that is, the ML offence itself was <u>not</u> committed by the "responsible person" but as a result of his omission – which construction clearly goes beyond the scope of Article 5 of the LLP Law as it is based on the criminal responsibility of the responsible natural person.

***Possible parallel civil or administrative proceedings - Essential Criterion 2.4***

379. According to EC 2.4 making legal persons subject to criminal liability for ML should not preclude the possibility of parallel criminal, civil or administrative proceedings in countries in which more than one form of liability is available.

380. Neither the CC nor the LLP Law contain any clear provision in relation to other (civil or administrative) forms of liability applicable to legal entities and hence it could not yet be established whether and to what extent the criminal liability of legal persons would preclude any possible parallel civil or administrative proceedings or sanctions – even if it is not unlikely that other sources of administrative legislation may contain provisions relevant in this field.

381. Furthermore, the assessment team has doubts about the general understanding of this issue considering the substantially different answers they received in this respect from various authorities. While the SPO expressed that it was possible to conduct two or more separate proceedings against the same legal person at the same time (e.g. an administrative and a criminal procedure simultaneously) the MIA had the opinion that in such cases the other civil or administrative procedures may not take place until culpability or innocence of the legal person is

announced in a final judgment. The assessment team was not provided with any further information as to what other civil or administrative procedures could be applied in this context and what sanctions could be imposed.

### *Sanctions for Money Laundering - Essential Criterion 2.5*

382. EC 2.5 requires that natural and legal persons should be subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions for ML.

383. The criminal sanctions applicable to natural persons for the ML offence, as provided by Article 32 paragraph 2.8 of the AML/CFT Law, are the following:

- a term of imprisonment of up to 10 years
- and a fine of up to three times the value of the property that is the subject of the ML offence.

384. Paragraph (1) of Article 46 of the new CC provides that the punishment of a fine may not be less than €100 or more than €25,000. However, in the case of criminal offences related, among others, to terrorism, organised crime or criminal offences committed to obtain a material benefit, the maximum amount of fine goes up to €500,000 (the range was €50 to €25,000 and €500,000 respectively in paragraph (1) of Article 39 of the Prov.CC that was in force until the end of 2012). Obviously, the latter category also refers to ML offences related to predicate offences that meet these conditions. If the convicted person remains unwilling or unable to pay the fine, the court may replace the punishment of fine with the punishment of imprisonment (see paragraph (3) of Article 46 of the CC or paragraph (3) of Article 39 of the Prov.CC).

385. This range of punishment is generally applicable to any forms of ML offences as the law does not specify any aggravated cases of ML that would be threatened with more severe sanctions. On the other hand, the sanctions are doubtlessly dissuasive (also in the context of punishments available for other serious economic crimes) and their range is wide enough to allow sufficient room for the court to deliberate on the punishment that is proportionate to the respective offence.

386. Pursuant to paragraph (2) of Article 8 of the LLP Law, the types of punishments applicable to legal persons are the fine and the termination of work. Calculation of the amount of the fine applicable to legal entities for a specific criminal offence is based on the respective range of punishment provided by CC for the same offence. The rules for the conversion of punishments imposable on natural persons to those applicable to legal entities can be found in Article 9 of the LLP Law. Since the offence of ML is threatened with 10 years of punishment, it is addressed by Article 9 paragraph (2.3) which provides that for criminal offences, where the punishment provided for is by imprisonment from 8 to 20 years, the court may impose a punishment by fine from €15,000 to €35,000. Compared to the fines applicable to natural persons for the same offence, this limit is extremely low even if taking account that the fine may also be imposed on the basis of the value of the property that has been laundered (up to three times of this value). It remained unclear to the assessment team whether these two sorts of fines can be applied cumulatively.

387. Termination of work may be imposed if a legal person (except for units of self-governance and political parties) was established for the purpose of committing criminal offences or has used its activities mainly for the commission of criminal offences (Article 11 of the LLP Law). This sanction is executed through the liquidation of the legal entity.

### *Statistics and effectiveness*

388. With regards to the mental element of the offence, the assessment team appreciates that the anti-ML criminalisation, while providing for negligent ML, actually exceeds the international standards. In contrast, and as far as the assessment team is informed, this potential of the regime has not yet been made use of, as there have been no investigations or prosecutions involving negligent ML.

389. During the Cycle 2 on-site visit, the representatives of the prosecution service and the judiciary informed the assessment team that no criminal procedure had been initiated against a legal person in Kosovo since 1st January 2013 (when the LLP Law and the new CC had entered into force). That is, no criminal offence (meaning not only ML or TF but any other offences) had been reported to have been committed by a legal person in the roughly 16-months period between the

enabling legislation came into force and the date of the Cycle 2 on-site visit, which is rather disappointing.

### 2.2.2. Recommendations and Comments

***Liability of Natural Persons - Essential Criterion 2.1, CETS 198 Article 9(3)***
***Mental Element of the ML Offence - Essential Criterion 2.2)***

390. Similarly to the issue of ancillary offences, the ML offence applies a language and concept that is, on the one hand, in line with the respective international standards (even goes beyond them) but, on the other hand, it does not fit easily into the context of the CC because of the different approach and terminology used in the two pieces of legislation. The knowledge element for paragraph (2) of Article 32 of the AML/CFT Law (knowledge or reasonable ground to know) can be converted, with more or less broad interpretation, to the language of the CC based on the concept of various levels of intent and negligence but the assessment team would consider it more expedient if the same terms and concepts were applied throughout all sources of criminal substantive law, which particularly refers to such basic elements of criminal responsibility as these components of *mens rea*.
391. Kosovo authorities should therefore reconsider whether and how the knowledge element in the ML offence meets the respective standards set by the CC and provide for the mutual interchangeability of these terms either by a legislative solution (e.g. adding another explanatory provision to paragraph (4)) or by developing jurisprudence in this field. On the other hand, it would be more expedient if the legislators adapted the current wording of paragraph (2) of Article 32 of the AML/CFT Law to the respective terminology of the CC (including the explicit coverage of the negligent ML once the term "to have cause to know" does actually cover, as it is assumed by the assessment team, a negligent form of the offence).

***Liability of Legal Persons - Essential Criterion 2.3***

392. Kosovo authorities should reconsider whether it is actually necessary to use literally the same provisions in Article 5 of the LLP Law and Article 40 of the new CC when defining the grounds and limits of corporate criminal liability, with a particular attention to Article 119 of the CC that establishes an otherwise appropriate connection between the two laws. One of these articles should eventually be abandoned (it seems more reasonable to keep the one in the LLP Law and delete the other one from the CC).

393. In this context, the most urgent problem is the contradiction between paragraphs (1) and (3) on the one hand and paragraph (2) on the other, as it was discussed more in detail in the descriptive part. As it was demonstrated there, paragraph (2) appears to contradict the neighboring paragraphs (1) and (3) in specifying that a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that. The assessment team tried to find possible solutions by which the coexistence of the apparently contradictory provisions could be explained but it should rather be up to Kosovo authorities to decide, first, what is the goal they actually intended to achieve by this legislation and second, what changes should be carried out so that the language of the LLP Law actually represent these goals. Whichever solution is chosen, either paragraphs (1) and (3) or paragraph (2) has to be modified accordingly.

394. The cumulative wording in the definition of "responsible person" (paragraph (1.1) of Article 2 of the LLP Law and paragraph (5) of Article 120 of the CC) should urgently be revisited and remedied. The current text implies a requirement for the last two conditions to be met at the same time, and even if the assessment team believes that this formulation does not reflect the actual will of the legislators, the definition, in its present form, might clearly limit the scope of application of both laws. If these conditions are actually meant to be alternatives then this feature should be expressed by using the term "or" instead of "and".

395. Once the legislators created harmony within the context of Article 5 of the LLP Law (or Article 40 of the CC) they have to find harmony between the general legislation on corporate criminal liability and the respective specific rules in Article 34 of the AML/CFT Law. As it was demonstrated above, these provisions are not necessarily opposite to each other but they show two different approaches in connecting the legal entities to the respective natural persons being responsible for the acts committed by or on behalf of the legal entity and such discrepancies may eventually raise issues of interpretation in concrete cases, particularly if it comes to legal entities

held responsible both for the offence of ML and other criminal offences (not necessarily the predicates) in the same proceedings.

396. Kosovo authorities should also find a legislative solution to provide for the coverage of paragraph (2) of Article 10 of CETS 198 as regards the liability of legal persons in cases where the lack of supervision or control by the responsible person made possible the commission of the ML offence for the benefit of that legal person but by another natural person under its authority (that is, the ML offence was actually committed as a result of the responsible person's omission).

397. Despite all these technical deficiencies, the assessment team is of the opinion that the aforementioned rules on corporate criminal liability should have already led to the issuing of at least a single criminal report, for any sort of criminal offence, against a legal entity in Kosovo in the roughly 16 months preceding the Cycle 2 on-site visit. Kosovo authorities should therefore seek for possible obstacles, including those highlighted in this Report that may hinder law enforcement and prosecutors in successfully investigating and prosecuting legal persons for criminal offences and particularly for ML/FT activities.

***Possible parallel civil or administrative proceedings - Essential Criterion 2.4***

398. Due to the complete lack of relevant information, the assessment team was prevented from assessing whether and what other civil or administrative procedures are applicable to legal entities as well as from forming an opinion and making adequate recommendations in this field.

***Sanctions for Money Laundering - Essential Criterion 2.5***

399. While the criminal sanctions applicable to natural persons for the ML offence were found dissuasive and proportionate, the same cannot be said about the punishments available for legal persons. A fine ranging from €15,000 to €35,000 cannot be considered proportionate and dissuasive and thus cannot be effective either. In order to solve this problem, Kosovo authorities should either reconsider the rates for converting imprisonment punishments to fines applicable to legal persons or the introduction of additional factors by which the converted amounts can be further increased or multiplied under certain circumstances.

### 2.2.3. Rating for Recommendation 2

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.2** | **PC** | • serious uncertainty in legislation as regards the basics of corporate criminal liability (whether or not it depends on the culpability of the natural person);<br>• ineffectively mild sanctioning provisions of legal entities for criminal offences (low range of punishment); and<br>• harmonisation required between AML/CFT Law and CC or LLP Law in terms of concept and terminology as regards<br>– the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC); and<br>– the basics of corporate criminal responsibility and that of the related natural persons (Article 34 AML/CFT Law vs Article 40 CC / Article 5 LLP Law). |

## 2.3. Criminalisation of Terrorist Financing (SR.II)

### 2.3.1. Description and Analysis

400. SR II calls upon countries to criminalise the FT, terrorist acts and terrorist organisations and to ensure that such offences are designated as ML predicate offences.

401. The structure and concept of the legislation by which FT is rendered punishable in Kosovo is (or rather, has become) so unique that it requires some preliminary explanation.

402. As described below in more detail, FT has originally been penalised within the traditional corpus of criminal legislation, that is, the CCs (meaning the Prov.CC and CC respectively). In the new CC, the offence by which FT is criminalised, as discussed below in more detail, is the facilitation of the commission of terrorism (paragraph (1) of Article 138 of the CC) that makes part of the criminal offences against the constitutional order and security of Kosovo (Chapter XIV CC). Despite some of its technical deficiencies, this offence does fit in the dogmatic and structural context of the CC, both within the said Chapter of the Special Part and in general terms.

403. It was already in the middle of the Cycle 1 assessment procedure when the assessment team became aware that the current amendment to the AML/CFT Law would introduce a new, separate FT offence. The amending Law (Law No. 04/L-178), which was adopted on 11 February 2013 and published in Official Gazette on 08 March 2013 and entered into force 15 days thereafter, actually provided for a new FT offence that was inserted into the said law, without any particular conceptual or textual context, in a new Article 36B. As a result of this, there are now two separate pieces of Kosovo legislation by which the FT is rendered a criminal offence.

404. The duplicate criminalisation of FT is an exceptional feature of the Kosovo legislation that turned a moderately applicable legal framework far more complicated and less, if at all, functional. The obvious deficiencies will be summarised below, but before that, the assessment team will first provide a criterion-by-criterion description and, if applicable, comparison of both offences.

***Criminalisation of financing of terrorism - Essential Criterion SR.II.1(a) and (c)***

405. EC SR.II.1(a) and (c) require the criminalisation of FT consistent with Article 2 of the International Convention for the Suppression of the Financing of Terrorism (FT Convention). Criminalisation should be extended to any person who wilfully collects or provides funds with the unlawful intention that they should be used for terrorism; and the funds need not actually having been used to carry out or to attempt to carry out a terrorist act or be linked to a specific terrorist act.

*Financing of a terrorist act – Criminal Code*

406. FT has traditionally been criminalised in Kosovo law in the framework of the criminal offence of facilitation of the commission of terrorism. Within the Prov.CC that was in force until the end of year 2012 it was Article 112 that provided for this offence as follows:

> **"Article 112**
> **Facilitation of the commission of terrorism**
>
> (1) Whoever provides, solicits, collects or conceals funds or other material resources used, in whole or in part, for the purpose of committing terrorism shall be punished by imprisonment of five to fifteen years.
>
> (2) Whoever commits the offence provided for in paragraph 1 of the present article by negligence shall be punished by imprisonment of three to ten years."

407. The next two paragraphs (3) to (4) of the said Article 112 referred to other aspects by which terrorism can be facilitated, that is, recruitment as well as provision or receipt of instruction or training for the purpose of terrorism, which equally fell out of the scope of FT. There was then paragraph (5) which covered, among others, the dispatching or transfer of "other material resources" into or out of Kosovo for the purpose of committing terrorism:

*Article 112 paragraph (5)* – "Whoever, for the purpose of committing terrorism, dispatches or transfers armed groups, equipment, weapons or other material resources into or out of Kosovo shall be punished by imprisonment of ten to fifteen years."

which was, in this very respect, in an apparent overlap with the offence defined in paragraph (1) above. While all these offences covered conducts which only extended to the financing of a terrorist act ("for the purposes of committing terrorism") there was a separate provision under paragraph (2) of Article 113 to provide for the financing of a terrorist organisation (group) as follows:

**"Article 113**
**Organisation, support and participation in terrorist groups**

(2) Whoever provides support to a terrorist group shall be punished by imprisonment of three to ten years.

where paragraph (6) of Article 109 defined that the term "support to a terrorist group" included (among others) "providing or collecting funds or other material resources with the intent, knowledge or reasonable grounds for belief that they will be used, in whole or in part, by a terrorist group".

408. In the drafting process of the new CC this complex structure was amended with an apparent intent to gather and separate the FT-related conducts within the area of criminal offences of terrorist character. As a result, the offence of facilitation of the commission of terrorism, now provided in Article 138 of the new CC, encompasses both the financing of a terrorist act and that of a terrorist organisation:

**"Article 138**
**Facilitation of the commission of terrorism**

1. Whoever by any means directly or indirectly provides, solicits, collects or conceals funds or material resources with the intent, knowledge or reasonable grounds for belief that they will be used in whole or in part, for or by a terrorist group or for the commission of a terrorist act shall be punished by imprisonment of five (5) to fifteen (15) years.

2. Whoever assists the perpetrator or his or her accomplice, after the commission of an act of terrorism, by providing funds or other material resources to such person or persons shall be punished by imprisonment of three (3) to ten (10) years."

409. The new legislation no longer provides for the negligent FT offence (as it was in paragraph (2) Article 112 of the Prov.CC) which is quite reasonable in case of a criminal offence that is based on a purposive element. Recruitment and training are now criminalised by separate offences (Articles 139-140) and the offence of organisation and participation in a terrorist group (Article 143) no longer includes the financing component (as it makes part of paragraph (1) of Article 138 now). The aggravated offence that was defined in paragraph (5) of Article112 of the Prov.CC can now be found in the structure of a different criminal offence called preparation of terrorist offences or criminal offences against the order and security of Kosovo (Article 144) where paragraph (4) provides that:

*Article 144 paragraph (4)* – "Whoever, for the purpose of committing one or more acts of terrorist offences in this Chapter, dispatches or transfers armed groups, equipment, or other material resources into or out of Kosovo shall be punished by imprisonment of ten (10) to twenty (20) years."

in which the definition of "material resources" in paragraph (2) includes, but is not limited to, a range of resources including "financial services" which brings this offence, again, to some apparent overlap with the proper FT offence in paragraph (1) of Article 138 as quoted above.

410. In any case, the new criminal legislation provides for a structure and wording that is more in line with the respective international standards set by Article 2 of the FT Convention and FATF Special Recommendation II. Considering that the assessment team was not made aware of any actual implementation of the former CFT criminal legislation in any concrete criminal cases (there had been no investigations or prosecutions for any FT-related offences) it appears unnecessary to enter into any profound analysis of the old Prov.CC provisions that were applicable for the criminalisation of FT until the end of 2012 instead of which the assessment team will rather focus on the respective provisions of the new CC.

411. In the structure of the new CC the following offences provide for, to any extent, the actual financing of any aspects of terrorism:

- Article 138: Facilitation of the commission of terrorism (financing of a terrorist act or a terrorist organisation, see as quoted above)
- Article 144 paragraph (4): Preparation of terrorist offences or criminal offences against the constitutional order and security of Kosovo (possible coverage of financing of a terrorist act, see quoted above)
- Article 137 paragraph (3): Assistance in the commission of terrorism (this paragraph is, for unknown reasons, almost literally identical to the provision in paragraph (2) of Article 138 as quoted above)
- Article 139: Recruitment for terrorism (expressly refers also to those who recruit financiers of terrorism).

412. The financing of a terrorist act, as required by Criterion SR.II.1(a)(i) is expressly criminalised under paragraph (1) of Article 138 of the CC (*"for the commission of a terrorist act"*). In this respect, the term "terrorist act" is given a significantly comprehensive definition in paragraph (1) of Article 135 as follows:

> **"Terrorism, act of terrorism** or **terrorist offence** - the commission of one or more of the following criminal offences with an intent to seriously intimidate a population, to unduly compel a public entity, government or international organisation to do or to abstain from doing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of the Republic of Kosovo, another State or an international organisation:[88]
>
> 1.1. murder or aggravated murder (Articles 178-179);
>
> 1.2. inciting or assisting suicide (Article 183);
>
> 1.3. assault, including assault with light and grievous bodily injury (Articles 187-189);
>
> 1.4. sexual offences (Articles 230-232, 235-239 or 241);
>
> 1.5. hostage-taking, kidnapping or unlawful deprivation of l (Articles 175, 194 or 196);
>
> 1.6. pollution of drinking water or food products; offences related to the pollution or destruction of the environment (Article 270 and Chapter XXVII);
>
> 1.7. causing general danger, arson or reckless burning or exploding (Article 334 or Article 365);
>
> 1.8. destroying, damaging or removing public installations or endangering public traffic (Articles 129, 366, 378 or 380);
>
> 1.9. unauthorised supply, transport, production, exchange or sale of weapons, explosives or nuclear, biological or chemical weapons (Articles 176, 369 or 372-377);
>
> 1.10. unauthorised acquisition, ownership, control, possession or use of weapons, explosives, or nuclear, biological or chemical weapons, or research into or development of biological or chemical weapons (same references as above for 1.9);
>
> 1.11. endangering internationally protected persons (Article 173);
>
> 1.12. endangering United Nations and associated personnel (Article 174);
>
> 1.13. hijacking or unlawful seizure of aircraft (Article 164) or hijacking other means of public or goods transportation (no specific reference given);
>
> 1.14. endangering civil aviation safety (Article 165);
>
> 1.15. hijacking ships or endangering maritime navigation safety (Article 166);
>
> 1.16. endangering the safety of fixed platforms located on the continental shelf (Article 167);

88. The format (but not the contents) of the list of offences is edited for the purposes of this report. References are given to the respective articles of the new CC.

1.17. unauthorised appropriation, use, transfer or disposal of nuclear materials (Article 176);

1.18. threats to use or to commit theft or robbery of nuclear materials (Article 177); or

1.19. threatening to commit any of the acts listed in sub-paragraphs 1.1 to 1.18 of this paragraph."

413. As it can be seen above, paragraph (1) of Article 135 provides for a common definition for "terrorism", "act of terrorism" and "terrorist offence" which terms thus appear interchangeable in Kosovo criminal legislation. On the other hand, the FT offence in paragraph (1) of Article 138 refers to the financing of a "terrorist act" which is a further, different legal term even in the Albanian original (the terms defined by paragraph (1) of Article 135 are "*terrorizëm*", "*veprim terrorist*" and "*vepër e terrorizmit*" respectively, while the one in paragraph (1) of Article 138 is the slightly different "*vepra terroriste*") which variety of terms appears, on the face of it, somewhat confusing for those not familiar with Albanian legal terminology.

414. Following with Article136 that defines the criminal offence of the commission of the offence of terrorism, one can find that it applies further different terms for the same concept namely "offence of terrorism" and "act of terrorism" as follows:

**"Article 136**
**Commission of the offence of terrorism**

1. Whoever commits an act of terrorism shall be punished by imprisonment of not less than five (5) years.

2. When the offence provided for in paragraph 1 of this Article results in grievous bodily injury of one or more persons, the perpetrator shall be punished by imprisonment of not less than ten (10) years.

3. When the offence provided for in paragraph 1 of this Article results in death of one or more persons, the perpetrator shall be punished by imprisonment of not less than fifteen (15) years or life-long imprisonment."

415. Both these English terms are, however, equivalents of the same Albanian original "*vepra terroriste*" which is, as it was discussed above, translated as "terrorist act" in the FT offence in paragraph (1) of Article 138 of the CC and thus it can be demonstrated that both criminal offences refer to the very same concept in this respect. Furthermore, paragraph (1) and paragraph (4) of Article 144 specify that Articles 135 to 142 all define "(acts of) terrorist offences" (which clearly goes beyond the definition in paragraph (1) of Article 135). Also considering that Article 135 does not provide for a criminal offence but for explanations to terms used in the subsequent articles of the CC, the assessment team has the opinion that the slight discrepancy in terminology does not appear to be intentional and therefore the assessment team is ready to accept, for the time being, that the terms "terrorist act" in paragraph (1) of Article 138 and "act/offence of terrorism" in Article136 are equally covered by the explanatory definition in paragraph (1) of Article 135 as quoted above. Consequently, the broad definition in paragraph (1) of Article 135 is applicable both to the FT offence in paragraph (1) of Article 138 and the offence of terrorism in Article 136 (it is a further question to be discussed below whether the terrorism-related offences in Articles 136 to 144 would also fall within this category).

416. In this context, an "offence of terrorism" in Article 136 would be committed by perpetrating any of the offences defined and listed in paragraph (1) of Article 135 as quoted above, more precisely, any of the criminal offences listed in subparagraphs (1.1) to (1.18) if the respective offence is committed for the purpose specified in the preliminary part of paragraph (1) ("*with an intent to seriously intimidate a population, to unduly compel a public entity..."* etc.)

417. Kosovo legislators thus did not choose to provide for, on the one hand, a "generic" offence of terrorist act in line with the definition provided by paragraph (1)(b) of Article 2 of the FT Convention and, on the other, the criminalisation of the various terrorist offences prescribed in the nine treaties annexed to the same Convention pursuant to paragraph (1)(a) of Article 2. While they criminalised almost each of the nine "treaty offences" (see the table below) they decided to cover the remaining "generic" offence of terrorist act by giving references to the respective traditional criminal offences by which its components can be carried out. As a result, the coverage of paragraph (1) of Article 2 of the FT Convention is provided like this:

- *Paragraph (1)(a) of Article 2*: ("an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex") see subparagraph (1.5) as well as subparagraphs (1.11 to 1.18) of Article 135 of the CC (references in the table below)
- *Paragraph (1)(b) of Article 2*: ("any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict...") see the other subparagraphs which give references to criminal acts by which death or serious bodily injury can be caused such as murder (paragraph (1.1)) assault (paragraph (1.2)) and others.

418. As it was mentioned above, all the offences listed in subparagraphs (1.1 to 1.18) can only constitute a terrorist act if committed for the purpose provided in the preliminary paragraph of paragraph (1) of Article 135 which is acceptable for the offences that cover the "generic" offence (paragraph (1)(b) of Article 2 of the FT Convention) but definitely not for those by which the nine "treaty offences" are covered (paragraph (1)(a) of Article 2 *idem*). The reason is that paragraph (1)(a) of Article 2 requires countries to criminalise the financing of treaty offences without any extra purposive element and hence it is inconsistent with the Conventions to require proof that a particular treaty offence was done for the particular purpose (such as the one in paragraph (1) of Article 135).

419. For example, the hijacking offence in the Convention for the Suppression of Unlawful Seizure of Aircraft (which is listed in the annex to the FT Convention) does not require proof that the hijacking was done for a particular purpose. The FT Convention only requires that financing of this hijacking offence be criminalised. In case of Kosovo, the new CC criminalised the hijacking offence fully in line with the respective convention (see Article 164) but it can only be considered a "terrorist act" and hence its financing can only be considered a FT offence pursuant to paragraph (1) of Article 138 if the hijacking is committed for the purpose provided in the preliminary part of paragraph (1) of Article 135, which approach is restrictive and does not meet the standard of the FT Convention.

420. In case of hostage taking, which is one of the treaty offences, the purposive element makes part of the offence itself according to the International Convention against the Taking of Hostages. In this case, the new CC criminalised the offence (Article 175) with an incomplete adoption of the respective purposive element (compelling of a natural or juridical person or a group of persons is not included) which is only the first problem. The second problem is the listing of this offence in paragraph (1.5) of Article 135 which means that it can only be considered a "terrorist act" if committed for the purpose specified in paragraph (1) of Article 135 – and this is clearly redundant in case of an offence that otherwise contains a purposive element.

***Table 6: Conventions listed in the Annex of the FT Convention***

| Convention | Relevant Articles in CC |
|---|---|
| Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 | Article 135.1.13 ← Article 164 CC<br>Hijacking aircraft or unlawful seizure of aircraft |
| Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on 23 September 1971 | Article 135.1.14 ← Article 165 CC<br>Endangering civil aviation safety |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 | Article 135.1.11 ← Article 173 CC<br>Endangering internationally protected persons<br>Article 135.1.12 ← Article 174 CC<br>Endangering United Nations and associated personnel |
| International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 | Article 135.1.5 ← Article 175 CC<br>Hostage taking<br>(with a restricted coverage as regards the entities that can be compelled) |
| Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980 | Article 135.1.17 ← Article 176 CC<br>Unauthorised appropriation, use, transfer or disposal of nuclear materials<br>Article 135.1.18 ← Article 177 CC<br>Threats to use or to commit theft or robbery of nuclear materials |

| Convention | Relevant Articles in CC |
|---|---|
| Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988 | Article 135.1.14 ← Article 165 CC<br>Endangering civil aviation safety |
| Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) done at Rome on 10 March 1988 | Article 135.1.15 ← Article 166 CC<br>Hijacking ships or endangering maritime navigation safety[89] |
| Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (SUA Protocol) done at Rome on 10 March 1988 | Article 135.1.16 ← Article 167 CC<br>Endangering the safety of fixed platforms located on the continental shelf[90] |
| International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 | No specific coverage (partially covered by Article 135.1.7 ← Article 334 Arson or Article 365 Causing general danger) |

421. Because of the general requirement of the extra purposive element and the sometimes deficient implementation, the coverage of the "treaty offences" is only partially in line with the standards prescribed by the FT Convention and the same can be said about the "generic" offence of terrorist act too. Certainly, the concept of paragraph (1)(b) of Article 2 of the FT Convention is to a very large extent covered by the various offences (murder, assault etc.) listed under paragraph (1) of Article 135 but the Convention encompasses "any other act" intended to cause death etc. and thus not only the ones that can be subsumed under the criminal offences listed under paragraph (1) of Article 135. While this construction is likely to be applicable in most of the cases, the actual coverage cannot be as large as that of the offence in the FT Convention.

422. As for the link between the collected or provided funds and the respective terrorist act, the knowledge element in the FT offence in paragraph (1) of Article 138 is limited to the mere carrying out (committing) of the terrorist act but not its organisation and preparation. Ideally, the funding of a terrorist act should already be penalised at the stage of preparation or organisation which is currently not the case in paragraph (1) of Article 138. Nonetheless, this apparent deficiency is addressed by Article 145 which provides that for an act to constitute an offence as set forth in Articles 135 to 144 (thus including the FT offence too) it is not necessary that a terrorist offence actually be committed.

423. Apart from this issue, the assessment team have some doubts whether the definition of "terrorist act" in paragraph (1) of Article 135 does actually extend to the other terrorism-related offences in Articles 136 to 144. This is out of question in case of Article 136 (which consists of the commission of any of the offences listed under paragraph (1) of Article 135) and the FT offence in paragraph (1) of Article 138 (or else the "financing of the financing" would be penalised) but not in case of the other related offences such as:

- Assistance in the commission of terrorism (Article 137 covering the failure to report the preparation of a terrorist offence or its perpetrators);
- Recruitment for terrorism (Article 139);
- Training for terrorism (Article 140);
- Incitement to commit a terrorist offence (Article 141);
- Concealment or failure to report terrorists and terrorist groups (Article 142);
- Organisation and participation in a terrorist group (Article 143); and
- Preparation of terrorist offences or criminal offences against the constitutional order and security of Kosovo (Article 144).

89. Article 166 CC does not cover the amended definition of the criminal offences in the SUA Convention as carried out by the 2005 Protocol but the FT Convention only requires the coverage of the SUA Convention.

90. Article 167 CC does not cover the amended definition of the criminal offences in the SUA Protocol as carried out by the 2005 Protocol thereto but the FT Convention only requires the coverage of the 1988 SUA Protocol.

424. Since these offences are not listed and thus, theoretically, cannot be subsumed under the definition in paragraph (1) of Article 135 it is doubtful whether and how the funding of these offences could be considered a FT offence in the sense of paragraph (1) of Article 138. Some of them might indirectly be covered (e.g. funding the commission of the offence in Article 143 that consists of organisation of or participation in a terrorist group could obviously be considered as financing a terrorist group as referred to in paragraph (1) of Article 138). Others can be, to some extent, covered by the above-quoted paragraph (4) of Article 144 which provides that whoever, for the purpose of committing one or more acts of terrorist offences in the same Chapter of the CC dispatches or transfers armed groups, equipment or other material resources into or out of Kosovo (however it appears inapplicable to material sources that do not cross the border of Kosovo). Nonetheless, there might be offences (e.g. collecting and providing assets, only within the territory of Kosovo, for the purposes of recruitment for terrorism) which are apparently uncovered by the FT offence in paragraph (1) of Article 138.

*Financing of a terrorist act – AML/CFT Law*

425. As it was discussed above, a new *sui generis* FT offence was inserted into the AML/CFT Law by virtue of its latest amendment the core offence of which reads as follows:

> **"Article 36B**
> **Terrorist Financing Criminal Offence**
>
> 1. Whoever, when committed intentionally, participates as an accomplice, provides or collects funds or organises or direct others to provide or collect funds, or attempts to do so, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used in full or in part:
>
> 1.1. to carry out a terrorist act;
>
> 1.2. by a terrorist; or
>
> 1.3. by a terrorist organisation
>
> will be deemed to have committed the act of terrorist financing."

426. Similar to the other FT offence in paragraph (1) of Article 138 of the CC, the *actus reus* of the new offence is practically in line with the requirements of the FT Convention. In this respect, however, the new FT offence does not appear to be more compliant with this standard than the pre-existent one in the CC. That is, the new offence contains practically the same range of material elements that the CC offence already does, while most of the differences between the two provisions appear to be related to terms and expressions in which the CC offence goes beyond (but the new offence remains within) the standards of the Convention. The only notable exception is the use of the phrase "participates as an accomplice" at the beginning of the new offence, which seems to be obvious and therefore redundant.

427. Financing of a terrorist act is provided by paragraph (1.1) of Article 36B above. This term is defined, by virtue of the same AML/CFT amending law that introduced the new FT offence in the AML/CFT Law, by a new paragraph (1.42) of Article 2 which provides that a "terrorist act" is to be understood "as defined in the Criminal Code of Kosovo". It means that anything that has been said above in relation to the CC provisions in this respect, with all their strengths and weaknesses, shall automatically be relevant for the new FT offence.

*Financing of a terrorist organisation and an individual terrorist – Criminal Code*

428. As for the coverage of financing activities beyond the scope of Article 2 of the FT Convention, that is, the general concept of financing of terrorist organisations and individual terrorists, the assessment team needs to remark that these aspects have only partially been addressed by the CC of Kosovo.

429. The most important deficiency in this field is that the CC offence does not at all cover the financing of an individual terrorist. Article 138 covers the FT only to the extent that the funds or material resources are provided, solicited, collected or concealed to support a terrorist group or the commission of a terrorist act. On the other hand, paragraph (2) of Article 138 of the CC (the same provision exists also in paragraph (3) of Article 137 of the CC) criminalises the provision of funds or other material resources to an individual terrorist but only after the commission of an act of terrorism. This *quasi* accessoryship after the fact construction is directly linked to a specific

terrorist act that has already been committed (or at least attempted) and in no circumstances can be considered as financing of an individual terrorist for any purposes, including legitimate activities, as required by the spirit of FATF SR.II.

430. Instead of "terrorist organisation" the FT offence makes reference to the financing of a "terrorist group" which term is defined by paragraph (4) of Article 135 as:

> **"Terrorist group** - a structured group of more than two persons, established over a period of time and acting in concert to commit terrorism. A structured group is a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

431. Considering the broad definition the new CC provides for "terrorism" in paragraph (1) of Article 135 this definition meets the contents of the definition of "terrorist organisation" as provided by the Glossary of Definitions attached to the FATF Methodology. The fact that the terrorist group needs to be "structured" implies, on the face of it, a higher level of integration and structure than what is required by the Glossary definition of terrorist organisation which only refers to *"any group of terrorists"* but the second sentence of the definition above extends the scope of the term "structured group" wide enough to remain in line with the FATF standard (the only requirement being that the group is not randomly formed for the immediate commission of an offence).

432. It is not expressly specified by legislation but it appears from the definition above that financing of a terrorist organisation (i.e. a terrorist group) does not require that the funds were actually used to carry out or attempt a terrorist act or were linked to a specific terrorist act (as required by FATF SR.II.1.c). This conclusion is allowed by the rather indefinite definition above as well as the formulation of the offence in paragraph (1) of Article 138 being not related, as far as the financing of a terrorist group is concerned, to any concrete terrorist act. On the other hand, this broad interpretation appears open to argumentation and therefore should be confirmed by case practice as soon as possible.

433. Another aspect where the CC appears to need clarification or completion is related to whether and to what extent the financing of a terrorist group for any purpose (including legitimate activities such as funding the everyday expenses of the group) is actually covered. Certainly, the CC does cover financing activities where the funds are to be used by such a group without any explicit specification or restriction as to what the funds are actually intended for. Notwithstanding that, the assessment team has the opinion that full compliance with both the wording and meaning of SR.II can only be achieved if this aspect is also covered by positive law or, at least, by jurisprudence.

*Financing of a terrorist organisation and an individual terrorist - AML/CFT Law*

434. Even before the new FT offence was inserted into the AML/CFT Law, the latter legislation had already gone beyond, to some extent, the scope of the CC offence. That is, while the FT offence was only provided and defined by the CC as discussed above, the AML/CFT Law also provided for a definition of the term "terrorist financing" in paragraph (1.36) of Article 2 – in which respect the legislators followed the same approach that resulted in the definition of "money laundering" in paragraph (1.23) of the same article. This definition made clear reference to "terrorist financing" as opposed to the name of the FT offence in paragraph (1) of Article 138 of the CC "facilitation of the commission of terrorism":

> **"Terrorist financing** - the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 112 and 113 of the Criminal Code of Kosovo and within the specific definitions provided by FATF in the Special Recommendation II."

435. While in the case of the ML definition in paragraph (1.23) of the AML/CFT Law the assessment team could only assume that its introduction in the preventive law might have served for the purposes of the preventive reporting regime, the assessment team is almost sure about the same in case of the FT definition above.

436. The least important problem with this definition is its reference, even in its current wording, to the article numbers of the already obsolete Prov.CC considering that Article 440 of the new CC

provides that all references to articles in other laws of Kosovo or the UNMIK Regulations (namely the Prov.CC) shall refer to the respective new article numbers of the new CC as a result of which the reference to Articles 112 and 113 of the Prov.CC shall refer to the new Article 138 (Facilitation of the commission of terrorism) and Article 144 (Preparation of terrorist offences or criminal offences against the constitutional order and security of Kosovo).

437. What is more problematic is the actual scope and meaning of this definition. First, it is clearly restricted to the financing of offences thus excluding the funding of terrorist organisations or individual terrorists for any purpose. In this respect, it is even more restrictive than the FT offence in paragraph (1) of Article 138 of the CC which, at least, does cover the financing of terrorist organisations (groups). The conducts by which financing is carried out are practically the same as those in the proper FT offence with only slight changes in the wording. It is a further issue, however, that which offences can actually be subject to financing according to this definition: these are offences *"within the meaning of Articles 112 and 113 of the Criminal Code of Kosovo* (that is Articles 138 and 144 of the new CC) *and within the specific definitions provided by FATF in the Special Recommendation II."* Within the meaning of the above mentioned CC articles one can find, first of all, the FT offence itself and, on the other hand, another preparatory offence to the commission of terrorism with a specific FT-like conduct in paragraph (4) of Article 144 as quoted above. Within the specific definitions of FATF SR.II one can find, again, definitions related to the offence of TF as it needs to be criminalised pursuant to, and even beyond, the scope of the FT Convention. Taking these pieces together, the definition quoted above clearly refers to the provision or collection of funds to be used to carry out TF offences, that is, the financing of TF, which is absurd.

438. Furthermore, the reference to FATF SR.II – a unique feature which is likely to be a specialty of the legislation of Kosovo – is problematic in itself. The less important problem is that SR.II as such is already outdated and reference should therefore be made to the new FATF Recommendation 5 that replaced it. It is a more serious issue, however, that SR.II (or the new R.5) just does not fit into this context. FATF (Special) Recommendations are international standards but not legal norms that could be directly applied and enforced. Countries have to find the optimal way to implement the standards set by these Recommendations for which a simple reference like this, however, just cannot be considered a solution.

439. Following on with the new FT offence in Article 36B of the AML/CFT Law, it clearly covers financing activities committed with the intention that the funds be used or in the knowledge that they are to be used by a terrorist (paragraph 1.2) or by a terrorist organisation (paragraph 1.3). The Law remains silent about any further details in this respect and, particularly, it neither contains any definition for the terms "terrorist" and "terrorist organisation" nor does it specify any other source of interpretation for this purpose (e.g. the otherwise deficient provisions of the CC or, as a last resort, the FATF standards) where and how these would be defined.

440. The fact that the legislators failed to provide any sort of definition for the terms "terrorist" and "terrorist organisation" in the AML/CFT Law or elsewhere seriously questions the applicability of the new criminalisation. Without an adequate definition, the practitioners cannot know exactly what characteristics would make a terrorist or a terrorist organisation in this context (e.g. whether an individual terrorist is defined by the terroristic acts he/she has already committed or by those he/she is about to carry out; what level of involvement is required to consider him/her an actual terrorist etc.) which poses an impediment to the effective application of the new FT offence.

441. As opposed to the CC offence, paragraph 2 of Article 36B explicitly stipulates that the offence is committed irrespective of any occurrence of a terrorist act or whether the funds have actually been used to commit such an act, thus providing compliance with FATF SR.II.1.c.

***Definition of funds - Essential Criterion SR.II.1.b***

442. EC SR.II.1(b) requires that the TF offences should be extended to any funds as that term is defined in the FT Convention and should thus include funds whether from a legitimate or illegitimate source.

*Criminal Code*

443. The FT offence in paragraph (1) of Article 138 extends to any funds as that term is defined in the FT Convention. The range of funds applicable to the FT Convention is defined by paragraph (2) of Article 135 of the CC identically to the respective definition in the FT offence as *"assets of*

*any kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letter of credit".*

444. By use of the expression "however acquired" the definition clearly includes funds whether from a legitimate or illegitimate source.

*AML/CFT Law*

445. The provision that defines "funds" for the purposes of the new FT offence in Article 36B is paragraph 1.30 of Article 2 ("Property or Funds") that is relevant also for the ML offence and hence it has already been discussed in detail under Recommendation 1 above. The comparison of the competing provisions proves that the definition in paragraph (1.30) is almost identical to that in paragraph (2) of Article 135 of the CC as quoted above.

446. The only relevant difference is, however, that the definition in paragraph (1.30) does not contain any express reference to funds "however acquired" and thus it remains unclear whether funds from legitimate and illegitimate sources are equally covered.

***Attempt and ancillary offences - Essential Criteria SR.II.1(d) and (e)***

447. EC SR.II.1 (d) and (e) require that the offence of FT should be extended to attempted acts of terrorism, and should include the engagement in any of the types of conduct set out in paragraph (5) of Article 2 of the FT Convention.

*Criminal Code*

448. The attempt to commit a FT offence is covered by the general provision in Article 28 of the new CC by which attempt to commit a criminal offence threatened with imprisonment of at least 3 years shall generally be punishable (which obviously refers to the FT offence that is punishable by a term of imprisonment of up to 15 years).

449. Paragraph (4) of Article 2 of the FT Convention requires the criminalisation of participation as an accomplice in a completed or attempted ML offence, organising or directing others to commit such offence as well as contributing to the commission thereof in the framework of association or conspiracy. As it was discussed in relation to the ML offence, these are all addressed by the new CC where the act of "co-perpetration" (Article 33) covers the notion of participation as an accomplice, the "criminal association" (Article 34) covers association while the notion of conspiracy is covered either by the latter article or by the act of "agreement to commit criminal offence" (Article 35). Organising or directing others to commit the offence may also be covered (apart from those mentioned above) by the act of incitement (Article 32).

*AML/CFT Law*

450. In the same respect, paragraph (4) of Article 36B of the AML/CFT Law provides as follows:

> "An attempt to commit the offence of financing of terrorism or aiding, abetting, facilitating or counseling the commission of any such offence shall be punished as if the offence had been completed."

451. As for the ancillary conducts listed in this paragraph, these are formulated in such a way that resemble neither the concept and wording of paragraph (5) of Article 2 of the FT Convention (and hence EC II.1.e) nor that of the CC of Kosovo as discussed above. (In fact, it is quite close to the terminology of the Palermo Convention which is, however, irrelevant in this respect.). That is, while it covers most, if not all ancillary offences, the actual scope of these offences and particularly the underlying legal framework remains unclear.

452. This situation is somewhat similar to the one described under Recommendation 1 where the concept and terminology applied in the CC on the one hand and the AML/CFT Law on the other was found to show significant differences in this field which might cause problems of interpretation. Here again, terms such as "participation", "association", "aiding-abetting" etc. are left without proper explanation in the AML/CFT Law and cannot easily be interpreted within the context of the

CC. Certainly, these terms are likely to provide, although in a different structure and logic, for the same coverage as the respective offences in the General Part of the CC (as it was demonstrated under Recommendation 1). Nevertheless it remains doubtful whether and to what extent could the CC be applicable, as an underlying basis of interpretation for the purposes of the new FT offence (which, unlike the ML offence in Article 308 of the CC, is not connected to the corpus of the Criminal Code).

***FT offences as predicates for ML - Essential Criterion SR.II.2***

453. EC SR.II.2 requires that TF offences should be predicate offences for ML.

454. As discussed in relation to the ML offence, any criminal offence under the law of Kosovo may constitute a predicate offence for ML including the offence of FT (either the one provided by the CC or the new FT offence introduced by the AML/CFT Law).

***Jurisdiction for Terrorist Financing Offence - Essential Criterion SR.II.3***

455. EC SR.II.3 requires that TF offences should apply regardless of whether the person alleged to have committed the offence is in the same country or in a different country from the one where the terrorist or terrorist organisation is located or where the terrorist act occurred or will occur.

456. The criminal legislation of Kosovo (meaning both the CC and the AML/CFT Law) does not specify whether the FT offence applies regardless of whether the person alleged to have committed the financing offence is in the same jurisdiction or a different jurisdiction from the one in which the terrorist act occurred or would occur or where the respective terrorist or terrorist organisation is located. That is, neither of the competing FT offences contain a provision similar to the one in paragraph (4.3) of Article 32 of the AML/CFT Law by which jurisdiction for the laundering of foreign proceeds is provided.

457. Certainly, the scope of paragraph (1) of Article 138 and the related offences within the new CC as well as the new FT offence in Article 36B of the AML/CFT Law are not restricted to domestic forms of terrorism and therefore, on the face of it, the financing of foreign terrorists or terrorist organisations as well as terrorist acts to be committed in another country can be subsumed under the FT offence. Nonetheless, this is just an implicit coverage which should rather be provided for by positive legislation.

458. It should be noted that concerning some terrorism-related offences, the criminal law of Kosovo applies to any person who commits a criminal offence provided for in Articles 136-145 of the CC outside the territory of Kosovo if such an offence constitutes a threat to the security of Kosovo or its population, in whole or in part (paragraph (2) of Article 115 of the CC), but this sort of legislation does not meet FATF SR.II.3. These rules may regulate whether and under what conditions a country has jurisdiction over criminal offences committed abroad, but the actual wording of FATF SR.II.3 leaves no doubt that the ultimate question is whether the FT can be punished in a country once the respective terrorist activities (are planned to) take place or the terrorist organisations or individuals are located in a different country, which results in a certain bifurcation as regards the place of commission of the crime (i.e. financing activities in country "A" while the respective terrorist activities / organisations / individuals are in country "B"). Such a situation needs to be addressed by a specific provision which is currently missing from the law of Kosovo.

***The mental element of the FT – Essential Criterion SR.II.4 (applying FATF R.2: EC 2.2)***

459. EC 2.2 of FATF Recommendation 2 requires that the intentional element of the offence of ML is to be inferred from objective factual circumstances.

460. As was discussed in relation to the ML offence, the respective FATF standard on the inference of the intentional element from circumstantial evidence is met by Article 22 of the new CC according to which *"knowledge, intention, negligence or purpose required as an element of a criminal offence may be inferred from factual circumstances".*

461. Unlike the ML offence, the new FT offence in Article 36B of the AML/CFT Law is not connected, in general terms, to the CC and thus the latter cannot automatically be considered as an underlying legal framework in this respect. As a result, the aforementioned Article 22 of the CC

does not seem to be *ex lege* applicable to the new FT offence even though the court would likely apply these generic rules in such a case.

***Liability of legal persons – Essential Criterion SR.II.4 (applying FATF R.2: EC 2.3 & 2.4)***

462. EC 2.3 of FATF Recommendation 2 requires the application of criminal liability to legal persons and where this is not possible then civil or administrative liability should apply, while EC 2.4 of the same Recommendation requires that in making legal persons subject to criminal liability for ML it should not preclude the possibility of parallel criminal, civil or administrative proceedings in countries in which more than one form of liability is available.

463. Criminal liability of legal persons applies, as it was discussed above in relation to the ML offence, with respect to all offences including the offence of FT. For this reason, the findings and recommendations made by the assessment team in relation to the ML offence are equally relevant as regards either of the competing FT offence.

***Sanctions for FT – Essential Criterion SR.II.4 (applying FATF R.2: EC 2.5)***

464. EC 2.5 of FATF Recommendation 2 requires natural and legal persons to be subject to effective, proportionate and dissuasive criminal, civil and administrative sanctions for ML.

*Criminal Code*

465. The punishments imposable for the offence of FT are severe enough to be effective, dissuasive and also proportionate to the threat the offence represents. The FT offence in paragraph (1) of Article 138 is threatened with an imprisonment ranging from 5 to 15 years and the related accessoryship offence in paragraph (2) of Article 138 with one ranging from 3 to 10 years. This is all in line with the range of punishment available for other terrorism-related offences, first of all the commission of a terrorist offence in Article 136 which is punishable with a minimum 5 years term of imprisonment, but the minimum level is 10 years in case the offence results in grievous bodily injury and 15 years or lifelong imprisonment if the offence causes death.

*AML/CFT Law*

466. Pursuant to paragraph (3) of Article 36B the FT offence stipulated in paragraph (1) of the same Article shall be punishable "by a fine up to 500,000 Euros or imprisonment from 7 to 20 years or either of these penalties".[91]

467. Despite any potential similarities between the competing FT offences mentioned above, the range of punishment is one of the issues where the duplicate criminalisation of FT will necessarily cause problems for practitioners when determining the implementation of the applicable law. On the one hand, the FT offence in Article 36B is threatened with a significantly more serious term of imprisonment than the one in paragraph (1) of Article 138 of the CC (7 to 20 years vs. 5 to 15 years). On the other, however, it can also be sanctioned by a non-custodial punishment (fine up to €500,000) which is a rather lenient alternative to imprisonment, particularly as the AML/CFT Law provides no minimum amount for such a fine. (While Article 46 of the CC provides that a fine may not be less than €100, the assessment team could find no legal provision to render this rule applicable beyond the scope of the Criminal Code.). Taking into account that the FT offence can thus be punished only by a moderate amount of fine, the sanctioning regime in paragraph (3) of Article 36B cannot be considered sufficiently dissuasive.

468. In addition, the final phrase "or either of these penalties" seems to make no actual changes in that the respective sanctions are alternatives anyway (that is, either of them can be applied). While this provision is meaningless in its present form, it may raise some doubt whether both imprisonment and pecuniary punishment can be imposed to a terrorist financier.

91. In the official English version of the amending Law, this part reads as "*by a fine of five hundred thousand (500,000) euros*" thus apparently indicating a fixed amount of fine. Examination of the Albanian original, however, proves that the amount of 500,000 Euros is the highest fine that can be imposed ("*me një gjobë deri në pesëqind mijë (500,000) euro*" where "*deri në*" means "up to").

***Statistics and effectiveness***

469. Both the statistics provided to the assessment team and the information gathered on-site confirmed that there has never been any investigation or prosecution for FT or any FT-related offences in Kosovo. Any assessment of the effectiveness and implementation of the relevant provisions cannot be undertaken in the absence of concrete cases, let alone judicial practice.

## 2.3.2. Recommendations and Comments

***Criminalisation of financing of terrorism - Essential Criterion II.1***

*The duplicate criminalisation*

470. The duplicate criminalisation of the FT is a unique and unprecedented feature of the Kosovo legislation. The new, separate FT offence in Article 36B of the AML/CFT Law seems to have been inserted into the *corpus juris* of Kosovo without the necessary circumspection, paying no attention to the harmony and mutual applicability of the respective legal framework.

471. The idea of introducing a new FT offence in the AML/CFT Law was problematic from the beginning considering that there had already existed a range of terrorism-related provisions (offences and definitions) in the CC that provided for a comprehensive coverage of the area, including the criminalisation of TF in Article 138 of the CC. TF is an offence that is traditionally rooted into the context of terrorism-related criminal offences and the respective definitions (e.g. "terrorist act") and the CC provisions, by which the FT criminalisation has originally been covered in Kosovo, are actually based on this contextual approach. The fact that the new FT offence would be out of this context threatened with a situation where the FT offence can be found in one piece of legislation whereas all terrorism-related offences and the definitions in another.

472. Despite the warnings the assessment team expressed in the course of the assessment procedure, the amending legislation was adopted and hence all concerns that the assessment team had harboured became reality. What is more worrisome, the amendment of the AML/CFT Law, while introducing the new FT offence, did not amend or repeal any of the competing and/or overlapping CC articles. As a result, the existing CFT framework in the Special Part of the CC remained entirely intact and now there are two competing criminal offences, one in the CC and the other in the AML/CFT Law, under which FT activities could equally be subsumed. It is an explicit case of legal uncertainty that poses a serious risk to the effective application of the respective provisions.

473. The new FT offence in Article 36B is an entirely "foreign body" within the AML/CFT Law both in terms of its location and applicability within the law: the new Article 36B and the other three new articles are put at the end of Chapter IV (Sanctions and offences) in a seemingly random order (e.g. Article 36A deals with remit for the CBK's compliance inspection and Article 36C with the consequences of intimidation regarding reporting suspicious activity or transactions…) using legal terms that would require proper explanation or definition (such as "individual terrorist") that is entirely missing.

474. Before and during the Cycle 2 on-site visit to Kosovo, the assessment team attempted to explore the reasons and circumstances that led to such an unfortunate legislative approach. The team found that whereas the criminal legislation (CC, CPC) would normally belong to the competence of the MoJ, it was the MoF that had been responsible for the legislative aspects of the AML/CFT Law and had therefore exclusive competence for the preparation and drafting of any amendments thereto, even if such an amendment, like the last one, would affect criminal legal issues. That is, the amending law that contained the new FT offence had originally been drafted by the MoF but it was circulated, before the adoption procedure, among all other responsible ministries including the MoJ.

475. The assessment team could not determine, despite any efforts, why the MoF had deemed it necessary to introduce a second FT offence in the AML/CFT Law. Certainly, in some aspects it is significantly more in line with the relevant FATF standards than the CC offence, but the deficiencies of the latter could have been remedied, beyond any doubt, within the framework of the CC. In other words, the new FT offence does not have such an added value that would justify its introduction in the AML/CFT Law instead of, or besides, the existing CC offence.

476. In any case, the assessment team learnt that the draft legislation had actually been circulated to the MoJ where it was examined by the Legal Department. As a result of this review, the MoJ found that the draft was in harmony with the pre-existent legal framework, including the criminal legislation and agreed to its adoption. Notwithstanding the reasons described above, however, the assessment team harbours serious doubts about the soundness and reliability of this examination.

477. The assessment team urges the Kosovo authorities (involving both Ministries) to start communication and coordination in this field, to analyse the situation, explore the overlapping or redundant areas in the respective pieces of legislation and to find an effective legislative solution by which the duplicate criminalisation of FT can be eliminated and a single, autonomous and comprehensive FT offence can be achieved. As a first step, the MoF, as one of the ministries that actually "sponsor" the drafting of criminal substantive legislation in Kosovo, should urgently be included in the recently established Working Group for Criminal Justice, which has a mandate to review the criminal justice of Kosovo and currently consists of, among others, the MoJ, the KJC, the KPC as well as the KC but not the MoF.

478. Apparently, the Kosovo authorities have also realised the importance of this issue. Paragraph (6.4) of Article 2 of 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 recognises the duplicate criminalisation of FT and the differences between the two FT offences. As a remedy, it stipulates that the criminalisation of FT should only be included in the CC and its content should be amended to comply with the FT Convention. For this task, however, the Action Plan appoints the MoJ as the responsible authority together with the FIU and the National Coordinator as supporting institutions while the MoF, which has otherwise been generally responsible for the drafting and amending of the AML/CFT Law, appears to be left out again. Because of this, whereas the assessment team unconditionally agrees with the goal set by the Action Plan, they also reiterate the need for the necessary inter-ministerial communication and coordination in this field.

*Financing of a terrorist act*

479. As to the terminology used in Articles 135 to 144 of the new CC the assessment team noted the risk of redundancy or confusion that might be caused by the use of slightly different terms in the explanatory provision of paragraph (1) of Article 135 and the offences in Articles 136 and 138. Since there is no sign of substantial discrepancy as regards the scope of the different terms (paragraph (1) of Article 135 provides the very same definition for three terms at the same time) the legislators should reconsider the simplification and uniformity of the terminology used in the respective articles.

480. Covering the scope of the generic terrorist offence as required by paragraph (1b) of Article 2 of the FT Convention is provided for by Article 135 by way of listing various criminal offences of the CC. This solution may to a very large extent cover the concept of the said paragraph of Article.2 but as the Convention encompasses "any other act" the list of the respective offences (murder, assault etc.) cannot be as large as that of the offence in the FT Convention. As a consequence, paragraph (1b) of Article 2 of the FT Convention should be addressed by a separate offence (it can be formulated either within the explanatory provision in Article 135 or, more adequately, within the structure of the offence in Article 136) and so the references to murder, assault etc. in paragraph (1) of Article 135 can be abandoned.

481. As for the criminalisation of the "treaty offences" these can only be considered a "terrorist act" and hence their financing can only be considered a FT offence pursuant to paragraph (1) of Article 138 if these are committed for the purposes as provided in the preliminary part of paragraph (1) of Article135. Considering that paragraph (1a) of Article 2 of the FT Convention requires countries to criminalise the financing of treaty offences without any extra purposive element, it is inconsistent with this standard to require proof that a particular treaty offence was done for the particular purpose. Because of the general requirement of the extra purposive element and the sometimes deficient implementation (see examples in the descriptive part) the coverage of the "treaty offences" is only partially in line with the FT Convention which should urgently be remedied in the respective criminal legislation.

482. It is doubtful whether and to what extent the definition of "terrorist act" in paragraph (1) of Article 135 extends to the terrorism-related offences themselves in Articles 136 to 144 (apart from Article 136 and paragraph (1) of Article 138) particularly whether the funding of these offences could be considered a FT offence in the sense of paragraph (1) of Article 138. This issue should be revisited by Kosovo authorities and an appropriate legislative solution needs to be found (e.g. the extension of paragraph (1) of Article 135 in this respect) so that financing of these offences can also be subsumed under the scope of the FT offence.

*Financing of an individual terrorist or a terrorist organisation*

483. The financing of an individual terrorist, as required by FATF SR.II is missing from the respective CC provisions and should urgently be provided for. The offence in paragraph (2) of Article 138 is not relevant in this respect.

484. Still in the context of the FT offence in the CC it is not expressly specified by law that financing of a terrorist group does not require that the funds were actually used to carry out or to attempt a terrorist act or were linked to a specific terrorist act. While this conclusion can indirectly be drawn from the existing provisions, there remains some room for argumentation and therefore this issue should either be confirmed by jurisprudence or by a more precise positive legislation. Equally, the current legislation needs clarification or completion as regards the financing of terrorist groups for any purpose (including legitimate activities such as funding the everyday expenses).

485. While the new FT offence in the AML/CFT Law expressly provides for the financing of an individual terrorist or a terrorist organisation, these provisions cannot be implemented as the legislators failed to determine, by adequate definitions, the actual coverage of the terms "terrorist" and "terrorist organisation". This deficiency should urgently be remedied otherwise these achievements of the new legislation remain meaningless and inapplicable.

*Others*

486. In order to be consistent with its conclusions made in relation to the definition of ML, the assessment team recommends deleting the "extra" definition of FT in paragraph (1.36) of Article 2. Such a solution would automatically resolve the otherwise deficient coverage of this definition (regarding the funding of terrorist organisations and individual terrorists) as well as the problems with its confusing (and probably entirely wrong) references to certain FT-related articles of the (former) CC and to FATF SR.II.

*Jurisdiction for Terrorist Financing Offence*

487. While the scope of paragraph (1) of Article 138 of the CC (and the related offences) are clearly not restricted to domestic forms of terrorism and therefore the offence does not exclude its applicability to the financing of foreign terrorists or terrorist organisations or terrorist acts committed in another country (and therefore, in lack of any opposite practice, the rating is not affected at this point) this implicit coverage should rather be provided for by positive legislation.

### 2.3.3. Rating for Special Recommendation II

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.II** | **PC** | • duplicate criminalisation of FT that causes redundancy and leads to serious legal uncertainty for practitioners;<br>• financing of an individual terrorist (for any purpose) is clearly not covered by the FT offence in the CC;<br>• inconsistent and/or redundant terminology used in FT-related provisions in the CC;<br>• deficient coverage of "act of terrorism" as required by paragraph (1) of Article 2 of the FT Convention:<br>– no complete and general coverage of the "generic" offence of terrorism as subject of FT ; and<br>– deficient coverage of the "treaty offences" as subject of FT by requiring an extra purposive element; |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • unclear whether the definition of "terrorist act" in paragraph (1) of Article 135 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence; and<br>• the range of sanctions by which the FT offence in the AML/CFT Law is threatened, including fine as a stand-alone punishment, cannot be considered dissuasive. |

## 2.4. Confiscation, freezing and seizing of proceeds of crime (R.3)

### 2.4.1. Description and Analysis

488. The scope of Recommendation 3 is to require countries to adopt measures, including legislative measures – the Recommendation provides some types of measures to be introduced - to enable their competent authorities to confiscate property laundered, proceeds from ML or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudice to the rights of *bona fide* third parties. Moreover countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction.

489. The Kosovo seizure and confiscation framework is regulated primarily by the CC and the CPC and is generally adequate in terms of legislative design and scope, however there are a number of inconsistencies. The new CC and CPC entered into force immediately after the first on-site visit. Prior to this a provisional CC and CPC had been used with a significantly narrower framework for seizure and confiscation.

***Scope of property subject to confiscation - Essential Criterion 3.1***

490. According to EC 3.1 laws should provide for the confiscation of property that has been laundered or which constitutes the proceeds from, the instrumentalities used in, and the instrumentalities intended for use in the commission of any ML, FT or other predicate offences and property of corresponding value.

491. Article 96 of the CC provides for the confiscation of '*material benefits acquired through the commission of criminal offences*'. This covers all crimes that generate criminal proceeds, including ML, TF and other predicate offences. Article 69 of the CC provides for the general confiscation of objects (instrumentalities) used in or derived from the commission of criminal offences, which together with the abovementioned provisions on "material benefit" satisfies the requirements of the FATF EC.3.1 (a – c).

492. In order to undertake the confiscation of *material benefit* the criminal proceedings must be concluded with a judgement in which the accused is pronounced guilty (Article 280 CPC) except in case of property originating from acts of corruption (Article 281 CPC). The Prosecutor is required to list property subject to confiscation in the indictment (Article 274 CPC). Failure to do so can trigger an application for the property to be released to its owner.[92]

493. In order to confiscate property *used* in a criminal offence (*instrumentalities*) the prosecutor must prove at the main trial that the asset was used in the criminal offence (Article 283 CPC). It is

92. On 14 January 2014, the Chief State Prosecutor issued the Directive No. 26/2014 on Actions of prosecutors concerning the sequestrated and confiscated assets or property for which a freezing order has been issued. This text clarifies among others the mandatory statement of the intention to request or not freezing, seizure of confiscation and the attachment of procedural decisions and lists of assets after due identification in the indictment file. A quarterly statistical report is required to be produced by coordinators (chief prosecutors) assigned for the implementation of this Directive. A simplified Guide to Confiscation as well as annexes regarding Mandatory Confiscation under the Criminal Code, Property subject to automatic forfeiture (CPC Article 282) and the Form on listing benefits gained from the crime are constitutive parts of the above-mentioned Directive.

not entirely clear whether a guilty verdict is needed in order to confiscate such *instrumentalities* apart from property subject to automatic forfeiture pursuant to Article 282 CPC (property items that are inherently dangerous or illegal). The CPC does not however include any standard of proof or procedure for the final confiscation of *instrumentalities intended for use* in the commission of an offence, which raises doubts about the possibility of their final confiscation.

494. Paragraph (1) of Article 97 of the CC provides for a payment of an 'equivalent' (i.e. corresponding) value to be made where the material benefit cannot be confiscated. This has never happened in practice.

***Confiscation of direct and indirect proceeds - Essential Criterion 3.1.1(a)***

495. According to EC 3.1.1(a) the requirements under EC 3.1 should equally apply to property that is derived directly or indirectly from proceeds of crime, including derived income, profits or other benefits.

496. In accordance with paragraph 34 of Article 120 of the CC material benefit is "any property derived directly or indirectly from a criminal offence. Property derived indirectly from a criminal offence includes property into which any property directly derived from the criminal offence was later converted, transformed, or intermingled, as well as income, capital or other economic gains derived or realised for such property at any time since the commission of the criminal offence". Article 276 of the CPC generally provides for a similar definition, which meets the requirements of the FATF standard with regard to the confiscation of indirect proceeds.

***Confiscation from a third party – Essential Criterion 3.1.1(b)***

497. EC 3.1.1(b) requires that, subject to the protection for the rights of bona fide third parties, the requirements under EC 3.1 should equally apply to all the property as in EC 3.1.1(a) regardless of whether it is held or owned by a criminal defendant or by a third party.

498. With regard to confiscation from a third party, the provisions of the CC and CPC differ quite significantly, creating a certain amount of ambiguity, and possibly leading to serious problems of implementation in the future. Paragraph (2) of Article 97 of the CC allows for confiscation from third parties where they have acquired the material benefits without 'compensation' or less than the real value knowing (or where they should have known) that the material benefit had been acquired through crime. Where the transfer of benefits was made to a family member there is a reversal of the burden of proof onto the family member to prove "they gave compensation for the entire value". These provisions are generally acceptable to meet the requirements of international standards. At the same time Article 278 of the CPC, establishes a much higher burden of proof stating that criminal proceeds *transferred* to third parties can only be subject to confiscation in three cases:

i. the proceeds of the criminal offence were transferred from the possession of the defendant;
ii. the transfer was for substantially less than the fair market value of the criminal proceeds; and
iii. there is evidence that the defendant still retains control or use of the criminal proceeds.

499. In addition, in the view of the assessment team the wording implies that all three abovementioned conditions must be met simultaneously for confiscation to take place.

500. When criminal proceeds are in the possession of a third party, they shall be subject to confiscation if:

i. the third party obtained possession of the proceeds of a criminal offence as a direct result of the criminal offence;
ii. there is evidence that the defendant still retains control or use of the criminal proceeds or maintains control of the third party.

501. Therefore the conflict of the CPC provisions with the CC creates a hindrance to the implementation of the norms contained in the CC, by setting a higher standard of proof, which could ultimately impact the effectiveness of law enforcement as and when they undertake confiscation measures.

***Provisional measures - Essential Criterion 3.2***

502. EC 3.2 requires legal and other measures to be in place for provisional measures, including the freezing and /or seizing of property, to prevent any dealing, transfer or disposal of property subject to confiscation.
503. In the Prov.CPC Article 247[93] provides for a general power of 'temporary confiscation' to the Public Prosecutor. Moreover, Articles 490-499[94] gave the Court power to carry out the final confiscation of the material benefits and equivalent sums of the material benefits (inferentially not available) upon conviction.

504. The revised CPC[95] Article 264 sets out a system for temporary freezing of assets that are the proceeds of crime or evidence in the investigation as a preventative measure to prevent removal or dissipation. This includes an Order issued by the State Prosecutor and valid for 72 hours during which time the Prosecutor must immediately make an application to the pre-trial Judge for an 'Attachment Order' to freeze the assets. The Attachment Order lasts initially for 30 days during which time and giving three weeks' notice a hearing is scheduled to consider any challenge from those affected by the Attachment Order.

505. Article 112 also allows for temporary sequestration of objects and the definition includes the material benefits from the commission of a criminal offence. It is unclear from the drafting if this relates solely to objects found in the course of a search as this section follows on from the articles concerning searches with and without a Court Order. The language of the text is inconsistent as it refers to temporary sequestration and temporary confiscation in the same breath. The same terms should be employed for purposes of clarity and consistency.

506. The FIU has a power under paragraph (6) of Article 22 of the AML/CFT Law to delay a reported transaction for up to 48 hours. This is another temporary freezing power but only applies to certain transactions notified to the FIU by a reporting entity.

507. Under paragraph (10) of Article 29 of the AML/CFT Law, KC has the power to seize monetary instruments across the borders suspected to be the proceeds of crime. This must be immediately notified to the Prosecutor for investigation. KC must also inform the FIU.

***Confiscation ex-parte and without prior notice - Essential Criterion 3.3***

508. In terms of EC 3.3 there should be legal or other measures, unless this is inconsistent with fundamental principles of domestic law that allow for the initial application to freeze or seize property subject to confiscation to be made *ex-parte* or without prior notice.

509. It is clear from the text of Article 264 of the CPC that the initial freezing order by the SPO is inferentially ex-parte and without notice. An opportunity to contest the Attachment Order is provided by the later hearing. The assessment team was provided with case examples (court orders translated to English) confirming that such measures have actually been applied in practice.

***Powers to trace property - Essential Criterion 3.4***

510. EC 3.4 requires that relevant competent authorities, such as law enforcement agencies or the FIU, should be given adequate powers to identify and trace property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.

511. The law enforcement agencies such as KP[96] and KC have sufficient powers to search for and seize, property that is, or is suspected to be, the proceeds of crime. The Prov.CPC Article 240 and the new CPC Article 105 give general powers of search and seizure through a Court Order. It seems however that in practice law enforcement authorities have been doing very little in this area (see assessment of effectiveness below).

93. Now Article 264 'Temporary freezing of assets' in the new CPC (No. 04/L-123).

94. Now Chapter VIII Articles 274 onwards.

95. Criminal Procedure Code No. 04-L-123 that is effective as from 1 January 2013.

96. The Asset Recovery Office under the KP participates as observer in CARIN network (Camden Asset Recovery Information Network) that enables to exchange asset information and good practice with EU member and other states.

512. There is no power in law that allows the authorities to determine whether property may become the proceeds of crime.

513. The FIU has powers under the AML/CFT Law to request information from obliged entities and commercial databases and share that information with law enforcement agencies, tax authority, KIA and Prosecutors for the purposes of investigations within their competence.

514. There are limitations on the ability of all agencies to determine the ownership of real estate. Such registers that exist are out of date. Examples were given to the assessment team where properties were still registered to grandparents who have died, but the families still live in the property and have not registered any change in the title. Indeed the ownership may be vested in several family members but not registered as such.

515. There is no power to compel a convicted criminal to repatriate assets liable to confiscation that he may have removed from the jurisdiction.

***Rights of bona fide third parties – Essential Criterion 3.5***

516. In accordance with EC 3.5 the rights of *bona fide* third parties should be protected through legal and other measures consistent with the standards provided in the Palermo Convention.

517. Article 270 of the new CPC gives third parties the opportunity to voice their objections to any provisional measures taken with regard to their property that has been used as instrumentalities in an offence. In this regard the third party must prove that

- he/she did not or could not have known about the use of the property in a criminal offence;
- the property cannot be used again in the commission of an offence;
- the provisional measures unreasonably harm the interests of the third party.

518. In cases where the third person's property is linked to the material benefit obtained from an offence, this third person must prove that:

- he/she has had a property interest in the property for over 6 months prior to the temporary confiscation of the property;
- he/she paid a market rate for the property interest in the building, immovable property, movable property or asset;
- he/she did not know of acts in furtherance of the criminal offence;
- the suspect or defendant would be unable to use, transfer, or otherwise access the building, immovable property, movable property or asset; and
- the temporary measure being proposed would unreasonably harm the interests of the person objecting.

519. While the steps prescribed above to be taken by *bona fide* third parties seem to be clear and transparent, the onus of proof is perhaps unjustifiably shifted to the *bona fide*, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property.

520. The new CPC through Article 279 gives rights to *bona fide* third parties to make their ownership claims within the confiscation process.

***Powers to void actions and contracts – Essential Criterion 3.6***

521. EC 3.6 requires authorities to take measures to prevent or void actions of any kind where the persons involved knew or should have known that consequent to those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

522. Beyond the power of the FIU to delay or postpone certain transactions reported to it by obliged entities, there is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

523. The power to freeze the material benefits of criminality to preserve them for possible confiscation could be applied but this does not address the direct recommendation of FATF EC 3.6.

***Other confiscations - Additional Element 3.7***

524. AE 3.7 seeks to establish whether the laws provide for the confiscation of property of organisations that are found to be primarily criminal in nature; property subject to confiscation but without a conviction of a person (*civil forfeiture*); and property that is subject to confiscation and which requires an offender to demonstrate the lawful origin of the property.

525. Law No. 04/L-140 on Extended Powers for Confiscation of Assets acquired by Criminal Offence was promulgated on 26 February 2013. This Law extends the powers of confiscation to cases where the defendant has either died or is outside the jurisdiction and cannot be tried for the offence in question. It also allows for confiscation of assets where there is a conviction but the assets are not the proceeds from the predicate offence (see below for more details).

526. There is no provision in law to provide for the confiscation of property of organisations that are primarily criminal in nature.

527. Kosovo does not have any laws that allow for the confiscation of the proceeds of crime *in rem,* except for several corruption offences, as stipulated by Article 281 of the new CPC. In these cases the legal elements of the corruption offence must be established, as well as that a reward, gift or benefit has been accepted. Otherwise any confiscation must be tied to a criminal indictment.

528. The Law on Extended Powers for Confiscation addresses the cases where, after a final judgment, the state prosecutor can demonstrate that the defendant has acquired other assets that have not been material benefits of the criminal offence for which the defendant has been convicted; that those assets were obtained after 31 December 1999; that the defendant's legitimate incomes was insufficient to enable the purchase of those other assets; that the defendant was engaged in a pattern of activity similar to that with which he was convicted; and that this pattern of activity would enable the purchase of those assets.

529. When a criminal proceeding may not be continued due to the death of the defendant, but assets are subject to an Attachment Order, Temporary Confiscation, or an indictment has been filed which lists assets subject to confiscation, the Court upon the proposal of the SPO or the injured party may continue the confiscation proceedings if the value of the asset subject to confiscation exceeds €1,000; and it is in the interest of justice to continue the proceedings.

530. If an indictment has been filed which lists assets subject to confiscation and the defendant according to this indictment is a fugitive or becomes a fugitive, the Court upon the proposal from the SPO may continue the criminal procedure if the SPO has grounded suspicion that the defendant is a fugitive; the value of the asset subject to confiscation is more than €5,000; and it is in the interest of justice to continue the proceedings.

531. If the SPO renders a ruling to suspend an investigation under Article 157 of the CPC, but if during the criminal proceedings assets were attached by an Attachment Order or were made subject to Temporary Confiscation, the SPO shall ask the pre-trial judge to continue those measures. The pre-trial judge shall authorise the Attachment Order or Temporary Confiscation against the defendant for 6 months if the prosecutor has grounded cause that the defendant committed the criminal offence and that the asset was acquired by that criminal offence; if the value of the asset subject to confiscation exceeds €10,000; and if it is in the interest of justice to continue the proceedings. The SPO may renew his request to the court once again for 6 months. If the investigation has not been resumed by the expiration of the court's authorisation, the defendant's attorney may request the pre-trial judge to terminate the Attachment Order or Temporary Confiscation.

532. Notwithstanding, these provisions of the Law still do not fulfil the civil confiscation/non-conviction based confiscation criteria of FATF EC 3.7. Under Kosovo law a criminal case has to be preferred against a defendant and the prosecution (except for the criteria discussed above) has to demonstrate the assets/material benefits derived from that criminality. There is no concept in law that there is no right of title to the proceeds of crime *in rem.*

***International co-operation in asset freezing/seizing not linked to criminal sanctions (CETS 198 Article 23.5)***

533. In accordance with paragraph (5) of Article 23 of CETS Parties to the Convention are required to co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property ordered by a judicial authority of the requesting Party.

534. Article 36 of the AML/CFT Law affords powers to extend co-operation to other jurisdictions in the matters of freezing/seizing and confiscation the proceeds of crime, ML and TF for the purposes of prosecution and confiscation. Apart from a single example (a real estate temporarily sequestrated in Montenegro) no external Orders of this nature have been made in Kosovo. There is no legislation that enables deprivation of property that is not linked to criminal sanctions to be made.

***Compensation linked to confiscated property (CETS 198 Article 25.2)***

535. In terms of paragraph (2) of Article 25 of CETS 198 Parties to the Convention shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated property to the requesting Party.

536. Kosovo has never executed any external requests to confiscate property in the manner envisaged by CETS 198 Articles 23 and 24.[97] It follows that there has been no property or equivalent value returned to a requesting party to CETS 198. There is no specific international asset sharing law or other provisions although it is not precluded by the legislation. Indeed the AML/CFT Law affords the widest possible co-operation on confiscation matters. One interpretation of that could be to enable international asset sharing.

537. Kosovo law does envisage that victims of crime can be compensated. The Prov.CPC through Articles 107 to 118 provide for property claims.

538. Article 490 of the Confiscation procedures (Prov.CPC) provides for injured parties to make a claim having preference against the proceeds of crime being considered for confiscation.

539. The new CPC Article 62 establishes the rights of an injured party to compensation. CPC Article 458 allows for property claims such as damages or recovery of an object arising from the commission of a criminal offence.

540. In the new CPC Article 275 gives the rights of injured parties to make a claim during the confiscation process of the material benefits of the crime. In the eventuality of Kosovo executing an external Confiscation Order it would be open for injured parties to make a claim for restitution or compensation during this process.

541. There are no agreements in place for sharing confiscated property with other jurisdictions (CETS 198 paragraph (3) of Article 25). The MoJ has stated that where no formal agreements exist with other parties the principles of reciprocity will apply. There have been no cases of sharing confiscated property - if this is requested it will be considered on a case by case basis.

***Statistics***

542. In 2010 Kosovo created an Agency for the Management of Sequestrated and Confiscated Assets (AMSCA).[98] The responsibilities of the agency are to store and manage assets referred to it by the Prosecutor, and dispose of or sell assets once final confiscation is ordered by a Court. The statistics of confiscated property referred to the agency are produced below.

543. These are the only statistics on confiscations provided to the assessment team (apart from NCEEC statistics for the first quarter of 2014 – see below) and can be only indicative, as not all property that has been sequestrated or confiscated has been managed by the Agency. That is, there is still a stock of confiscated assets that remain in premises of law enforcement agencies for which the AMSCA was reported to be trying to find modalities to regroup and ensure their reception, management, as well as consider potential sale. In addition, EULEX has also had sequestration cases which were not submitted to AMSCA.

97. See also below at the paragraph 2658 of this Report.

98. AMSCA Law No. 03/L-141.

***Table 7: Summary of sequestrated or confiscated assets (goods-capital) with approximate value estimated according to the market price, which are under the administration of AMSCA***

| | 2013 | 2012-1 | 2012-2 |
|---|---|---|---|
| **Classification of assets** | ***€uro*** | ***€uro*** | ***€uro*** |
| | | | |
| Real Estate (buildings-lands) | 1,374,000 | 757,114 | |
| Gold | - | 1,010,694 | |
| Silver | - | 16,138 | |
| Machines | 36,000 | 78,390 | |
| Transporting vehicles | 52,000 | 299,740 | |
| Other | 35,000 | 10,850 | |
| **Total** | **1,497,000** | **2,172,926** | **0** |

Source: *AMSCA 2013 annual financial report*

***Table 7a: Seized and confiscated cash for 2012 and 2013***

| | Seized Cash | Confiscated Cash |
|---|---|---|
| **Year** | ***€uro*** | ***€uro*** |
| 2012 | 282,919 | 29,926 |
| 2013 | 340,816 | 1,227 |
| **Total** | **623,735** | **31,153** |

***Table 7b: Sequestrated and confiscated assets for the first half of 2014***

| Legal measures regarding the proceeds of crimes (2014) | Sequestration | Confiscation |
|---|---|---|
| | ***€uro*** | ***€uro*** |
| January | 71,411.00 | 866.45 |
| February | 65,890.85 | 0 |
| March | 20,000.00 | 822.00 |
| April | 60,229.00 | 1,701.00 |
| May | 36,021.00 | 141.00 |
| June | 43,400.00 | 0 |

Source: *AMSCA 2014*

***Table 7c: Sequestrated and confiscated assets that AMSCA returned based on decisions during the reporting period:***

| | 2013 | 2012-1 | Total 2012-2013 |
|---|---|---|---|
| **Return of Assets** | ***€uro*** | ***€uro*** | ***€uro*** |
| Real Estate (buildings-lands) | - | - | 0 |
| Gold | - | - | 0 |
| Silver | - | - | 0 |
| Machines | 49,900 | 125,000 | 174,900 |
| Transporting vehicles | 38,000 | 16,500 | 54,500 |
| Other | 70 | | 70 |
| **Total** | **87,970** | **141,500** | **229,470** |

544. The amount of returned cash based on court orders was €54,518 for 2013. According to the AMSCA, the net amount of proceeds of crime confiscated in 2013 was € 1,227 which is extraordinarily low compared to the total amount of temporarily seized assets (€ 1,497,000 as above). Results of the first six months of 2014 show that achieving at least similar results in 2014 will be challenging.

545. For the entire time period subject to assessment, no other statistics have been provided with a breakdown for the number and type of offences, and whether any of the confiscated proceeds had been linked to ML, which makes it difficult to judge the effectiveness of the confiscation regime.

546. Subsequent to the Cycle 1 on-site visit the assessment team was informed that the FIU had issued Administrative Instruction No. 001/2013 addressing its obligations to compile and maintain comprehensive and meaningful statistics in accordance with the obligations placed upon it by the AML/CFT Law. The Instruction states that the compilation of statistical data, *inter alia* on confiscated or seized assets in relation to prevention of ML and TF will be done by the FIU and will be based on:

- data that is received at the FIU as initial information;
- data and intelligence reports compiled by the FIU; and,
- data which is received as feedback at the FIU.

547. In addition, the assessment team was later informed that the NCCEC within the KPC was authorised to coordinate statistics and to collect information. In this context, KPC would manage the unified database on statistics covering prosecution services. Each institution will have a coordinator responsible for statistics.

548. According to the latest information the assessment team was given, the NCCEC has already started the collection and processing of statistical information mentioned above. The scope of these statistics is, however, limited by the preferences and priorities of the NCCEC and therefore the focus is set on economic crimes with a greater potential for confiscation.

549. The assessment team was given data from this NCCEC database for the first quarter of 2014 (on the basis of approximately 50 different criminal cases). In this period, more than €1,000,000 worth of cash, real estate, vehicles and other goods were sequestrated in these cases.[99]

550. The KP claim that the ECID maintains statistics on sequestration and confiscation of assets acquired through criminal activity, as well as evidences regarding court decisions on freezing and confiscation and that there is a mutual cooperation, whereas the Agency maintains statistics at the national level. Nonetheless, the assessment team has not been provided with this type of statistical information during the assessment process.

551. Taking all these into account, the assessment team welcomes the provided information and expects that the actions taken will allow to obtain statistics with a greater level of detail and breakdowns on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences. Notwithstanding the assessment team notes that the FIU Administrative Instruction does not compel authorities to maintain statistics which should therefore be addressed to the greatest extent possible – refer to the analysis of Recommendation 32 within the context of Recommendation 23 in Section 3 of this Report for recommendations in this regard.

***Effectiveness***

552. The assessment team has serious concerns about the effectiveness of the system of seizure and confiscation in Kosovo. The legal and procedural tools available under the previous legislation, albeit patchy, had not been used and obviously ignored at various levels of the system, including the police and prosecution.

99. The NCCEC reported a significant increase in frozen and sequestrated assets for the second and third quarters of 2014 as a result of which the total of such assets neared € 29,000,000 (particularly real estate) by the end of September 2014.

553. Most notably the assessment team was informed of a case where real estate purchased through criminal proceeds had not been confiscated because it was registered to the spouse of the accused. Instead several much less valuable items, namely automobiles, were confiscated clearly demonstrating the selective approach of the responsible prosecutor. In such cases the judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime.

554. The assessment team had the general impression that law enforcement authorities are unwilling to undertake activities to trace criminal proceeds, which is resulting in a low number of seizures and confiscations. The other obstacle to developing asset recovery capacities of Kosovo authorities is the apparent lack of feedback between the various actors in the system – FIU, police and prosecutors, who should be working in an integrated manner in order to identify and successfully pursue criminal proceeds. This is obviously not happening in practice.

555. The Office of the NCCEC established as a part of the recent National Strategy against Economic Crime is intended to be an overarching authority with the aim to prioritise and monitor measures in this area both at the level of individual agencies, as well as in an interagency framework. In this respect, after a series of meetings involving various Kosovo authorities a MoU between the KPC, KJC, MoJ, MoF, MIA, CBK, KIA and KAA was signed on 22 November 2013 with the purpose to set the basic principles for the establishment and operation of the NCCEC; to set out the basic principles for his/her mandate and responsibility and to undertake, on their respective behalf, effective cooperation with the NCCEC. This entity will promote, coordinate, monitor, evaluate and report activities of all public and private institutions who are concerned with the prevention, detection, investigation, prosecution and adjudication of crime that generate material benefits by protecting the Kosovo financial system from the risk of ML, FT and tax evasion.

556. Following the signature of this MoU, a NCCEC was appointed in January 2014 and was about to getting functional at the time of the Cycle 2 on-site visit. The establishment and operations of the National Co-ordinator are governed by the KPC Regulation of 27 December 2013 on the establishment and functioning of the National Coordinator. According to the Regulation the aim of the establishment of the National Co-ordinator is that of increasing the efficiency in the prosecution of crimes, and the sequestration and confiscation of material benefits deriving from crimes.

557. In this respect, the assessment team highly appreciates that the Office of the Chief State Prosecutor issued Directive A. No. 4/2014 of 14 January 2014 regarding the actions of prosecutors related to the temporarily sequestrated and confiscated assets or property for which a freezing order was issued. This Directive finally declares that all temporarily confiscated assets shall be under the control and supervision of the State Prosecutor and requires, among others, that prosecutors consult with AMSCA as to whether and how to apply for an attachment order, a temporary freezing or a temporary confiscation order and that they ensure that all assets subject of confiscation be listed in the indictment and their confiscation be proposed to the court. Annexed to this Directive, the prosecutors can find a practical manual to the provisional measures and confiscation regime, identifying the different stages of the procedure and the respective pieces of legislation.

558. Notwithstanding all these, an effective system of benchmarking and monitoring in the area of financial investigations and asset tracing/seizure and confiscation that would be essential to achieve effective implementation of FATF Recommendation 3 is still missing from the confiscation regime. In this field, the State Prosecutor's Office should consider issuing a similar guideline focused at encouraging and assisting the investigating and prosecution authorities to conduct more efficient financial investigations for the proceeds of crime.

### 2.4.2. Recommendations and Comments

559. The CPC should be amended to include provisions that indicate the standard of proof required to allow for the confiscation of instrumentalities intended for the use in a criminal offence.

560. Kosovo should harmonise the norms of the CC and CPC with regard to third party confiscation. In this case priority should be given to the framework set out in the CC, which is generally in line with international standards, and would not pose effectiveness problems in terms of implementation, contrary to the norms of the CPC.

561. Kosovo should revise the provisions of the CPC regulating the protection of the rights of *bona fide* third parties. The standard of proof required from the *bona fide* to prove their legitimate rights and intentions with regard to property should be lowered.

562. Kosovo should institute mechanisms to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

563. The judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime.

564. Kosovo should implement the relevant components of the AML/CFT strategy as soon as possible, particularly to enhance the role of financial investigations, asset recovery mechanisms and interagency coordination and cooperation in these fields.

565. The National Office for Economic Crimes Enforcement should become fully staffed and operational so that it can continue to ensure monitoring and enhancement of the effectiveness of interagency cooperation and coordination in the area of financial crime as well as periodically publish its findings.[100]

566. The AMSCA, KP, KPC and KJC should be required to keep coordinated statistics on an annual basis with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences.[101]

567. There is inconsistent language across the legislation with regard to seizure and confiscation provisions. The AML/CFT Law refers to offences that generate proceeds of crime, the CC refers to 'material benefits'. As well, Article 112 of the CPC refers to temporary sequestration and temporary confiscation in the same breath. The language of the text is inconsistent. The same terms should be employed. There should be consistency of terminology throughout the legislation to dispel ambiguities, including the discrepancies between the CC and CPC.

568. The substitution of non-criminally acquired assets in lieu of confiscating the actual proceeds/material benefit is implied in paragraph (1) of Article 97 of the CC. This should be redrafted to remove any doubt.

569. Temporary Freezing Orders are initiated by the Prosecutor. There are provisions for appeal by those affected by the Order but it is not explicitly stated in the CPC that application for these Orders are *ex-parte*. The language of the relevant provision (Article 274 of the CPC) should be explicit to remove doubt.

570. The assessment team welcomes the adoption of the new Law on Extended Powers for Confiscation. However, it considers that this Law does not allow the judiciary to take a proactive approach in taking the necessary measures where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime. Therefore, the assessment team urges the Kosovo authorities to take the necessary measures in order to address this issue.

571. Consideration should be given to implementing a system of *in rem* confiscation of the proceeds of crime, as the extended law on confiscation does not provide this.

100. Two quarterly reports of the National Coordinator for first half of 2014 are available at http://www.psh-ks.net/

101. After the on-site visit, the assessment team was informed on the intention of Kosovo authorities to include in the Annual Report of 2015 on harmonisation of statistics under the inter-institutional follow-up mechanism relevant statistics concerning freezing, seizure and confiscation of criminal proceeds including ML, FT and underlying predicate offences.

### 2.4.3. Rating for Recommendation 3

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.3** | **NC** | • no procedure or standard of proof indicated in CPC to allow for the confiscation of instrumentalities intended for the use in a criminal offence;<br>• while the provisions of third party confiscation included in the CC meet international standards, the supporting Articles of the CPC conflict with these provisions;<br>• the standard of proof for a *bona fide* third party is unjustifiably high, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property;<br>• there is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation;<br>• the effectiveness of the existing measures must be considered low due to an insufficiency of prosecutions resulting in low levels of confiscation of the proceeds of crime;<br>• meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime; and<br>• LEAs and prosecutorial authorities do not proactively undertake asset tracing and recovery when pursuing any acquisitive crime. |

## 2.5. Freezing of Funds Used for Terrorist Financing (SR.III)

### 2.5.1. Description and Analysis

572. SR III requires the freezing of funds and other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the relevant United Nations Resolutions. Moreover countries should implement measures enabling relevant competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the FT, terrorist acts or terrorist organisations.

***Freezing assets under S/Res/1267 - Essential Criterion SR.III.1 and***
***Freezing assets under S/Res/1373 - Essential Criterion SR.III.2***

573. According to EC SR.III.1 countries should be able to freeze, without undue delay and without prior notice, funds or other assets of persons designated by the UN Al-Qaida and Taliban Sanctions Committee in accordance with S/Res/1267(1999).

574. EC SR.III.2 requires countries to have effective laws and procedures to freeze, without undue delay and without prior notice, terrorist funds or other assets of persons designated in the context of the UN S/Res/1373(2001).

575. The assessment team found a serious lack of dedicated legal structure for the practical conversion into domestic law of designations under UNSCRs 1267 and 1373 (including consideration of designations by third countries) and the lack of a national designating authority for UNSCR 1373. As a consequence, there is practically no specific legislation to provide for the freezing of assets of designated persons and entities under the relevant UNSCRs in Kosovo.

576. With one but obsolete exception mentioned below, neither the primary nor the secondary legislation made available to the assessment team contain any positive legal provision regarding

any list of designated persons and entities issued either by the UN Security Council or by another international entity or jurisdiction. The notion of such lists is practically non-existent in the law of Kosovo which thus does not provide for their recognition, official publication and updating (let alone the elaboration of national lists) and neither stipulates any direct legal consequences for those being listed by the UNSCR or other jurisdictions.

577. In fact, the only instance the notion of "terrorist lists" has ever been mentioned in any piece of Kosovo legislation were two Administrative Directives issued by the Financial Intelligence Centre (the predecessor of the present FIU) in 2007 and 2008 as follows:

- Administrative Directive No. 003 (16 February 2007) published a list of 19 various persons and entities allegedly suspected of involvement in TF activities. The designation was apparently made upon "information from foreign governments" but no clear reference was made whether or not these persons and entities had ever been listed by the UNSCR or elsewhere. The Directive required that each bank and financial institution take appropriate measures to ascertain whether they have any business relationship or are engaged in any transaction with the listed persons and entities and if yes, the banks and financial institutions were obliged to file an STR (SAR means suspicious activity report) with the Centre within 24 hours pursuant to their reporting obligation as prescribed by the UNMIK Regulation 2004/2 then in force.
- Administrative Directive No. 006 (11 March 2008) prescribed that banks and financial institutions develop an internal system whereby new and existing customers who are assessed as high risk, on the basis of established Know-Your-Customer procedures, are checked against the following lists of suspected persons and entities:
  - Consolidated List of the Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organisation as Established and Maintained by the UN 1267 Committee (with an URL provided to the regularly updated version of the list on the UN website);
  - Specially Designated Nationals and Blocked Persons list, issued by the US Treasury, Office of Foreign Assets Control (also with an URL to the regularly updated list).

  The legal consequences were different depending on which list was involved. If an existing or prospective customer's name appeared on the 1267 list the bank or financial institution was prohibited from taking any action that would result in the release or transfer of any funds or property of the customer from the control of the bank and, at the same time, a SAR had to be submitted to the FIC pursuant to the above-mentioned UNMIK Regulation. If however the customer was designated on any other recognised list (there was only one) the bank or financial institution was obliged to submit a SAR as above and to apply enhanced monitoring to reflect the higher risk posed by the customer but it was not prohibited from continuing the business relationship.

578. At the time of their issuance, these Administrative Directives were considered a secondary legislation issued upon authorisation by the UNMIK Regulation 2004/2 (since repealed with the coming into force of the AML/CFT Law) which was a source of primary legislation at that time. Both Administrative Directives refer to Section 2 Article 2 paragraph (l) of the said UNMIK Regulation which empowered the FIC to issue administrative directives, instructions and guidance on issues related to ensuring or promoting compliance with the Regulation including, but not limited to (i) the use of standardised reporting forms; (ii) the nature of suspicious acts or transactions for the purposes of the Regulation including the development of lists of indicators of such acts and transactions; and (iii) the exemption of persons or entities or categories of persons or entities from reporting obligations under the present Regulation and the methods of reporting such exemptions.

579. Nonetheless, the UNMIK Regulation 2004/2 was silent on the issue whether and under what circumstances the FIC or other authorities have the authority to freeze assets that belong to designated persons and entities listed either by the UN Security Council or elsewhere. In particular, paragraph (l) of Article 2.1 of Section 2 does not appear to be specific enough to provide a firm legal basis for such a freezing-and-reporting mechanism that was established by the above mentioned FIC Administrative Decisions. Because of this, the assessment team has the opinion that the FIC went beyond its authorisation when extending the scope of the reporting regime implemented by the UNMIK Regulation to assets that belonged to designated persons and entities.

580. Apart from the lack of appropriate authorisation, there are further problems with these Administrative Directives. As for the one numbered No. 003 (2007) it is entirely unclear whether it had anything to do with the consolidated list of persons and entities belonging to or associated with

Taliban and Al-Qaida as it is issued and maintained by the competent committee of the UN Security Council instituted by UNSCR 1267. It appears there is no direct or automatic relationship between the two lists and therefore it is more likely that the relatively short list of persons and entities attached to the said Administrative Directive was actually produced by the FIC, which drafted it on the basis of "information from foreign governments". In doing so, the FIC had apparently acted as a national designating authority in the sense of UNSCR 1373 for which it clearly had not been authorised by the existing legislation of that time (in the UNMIK Regulation 2004/2 or elsewhere).

581. As opposed to the one discussed above, Administrative Decision No. 006 (11 March 2008) at least made an adequate reference to the updated UN Security Council list issued and maintained pursuant to UNSCR 1267 and went even beyond this by extending its scope to other lists of designated persons and entities (out of which, however, only the US OFAC list was mentioned but not the list of persons, groups and entities implied in terrorist activities as approved through the Common Position 2001/931/CFSP of the European Union Council). This Administrative Decision was however silent on why the "high risk" customers were exclusively made subject to examination against these lists, why there was a less strict regime established for those included in "other" terrorist lists and what procedures would have been followed when assets belonging to such persons and entities had been identified.

582. For the purposes of the assessment, the main question was whether and to what extent these Administrative Decisions could be considered as valid and applicable legislation in Kosovo particularly as both had been provided to the assessment team as part of the existing legislation in this field. On the other hand, the UNMIK Regulation 2004/2, that is, the primary legislation upon which they had been issued and to which they actually referred as a basis of authorisation has not been in force since 2010 and even if the AML/CFT Law gives literally the same powers to the FIU to issue administrative decisions (paragraph (1.12) of Article 14) it is nowhere stipulated in the law that FIC Administrative Decisions could or should be applicable *mutatis mutandi* in the new legal framework. Indeed it was confirmed by the authorities subsequent to the Cycle 1 on-site visit that no sanctions could be applied on the basis of these FIC Administrative Decisions as these can only serve as a guidance – which, however, appears questionable in itself as neither of the above mentioned Administrative Decisions can be found on the webpage of the Kosovo FIU among applicable instructions and guidelines. As a consequence, the assessment team decided not to consider FIC Administrative Decisions No. 003 and No. 006 as pieces of valid and enforceable legislation for the time being.

583. Apart from the Administrative Decisions discussed above, there is just one piece of legislation in Kosovo that could, in principle, be applicable to freeze funds used for TF. It is the Law on Implementation of International Sanctions (Law No. 03/L-183 of 15 April 2010 hereafter "LIIS") that *"shall determine the procedure for implementing the non-military international sanctions in the Republic of Kosovo imposed by the United Nations or other international organisations"* (Article 1) where "international sanctions" mean *"restrictions and obligations imposed by the resolution, convention, covenant, declaration or any act of the United Nations Organisation or other international organisations"* and may be of economic, financial, political, communication and public nature (paragraph (1.2) of Article 2). "Financial sanctions" are, pursuant to paragraph (1.4) of Article 2 *"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".*

584. On the face of it, the LIIS thus serves for the implementation of international restrictive measures such as the UNSCRs that are relevant in the context of SR.III and particularly UNSCR 1267/1988. However, the LIIS is too general in its scope and does not establish a practical administrative procedure for freezing accounts of persons or entities on the respective lists but can only serve as the legal basis for introducing such a procedure. All that is stipulated by paragraph (4) of Article 3 is the personal and territorial scope of the law (its provisions also apply to natural and legal persons of Kosovo in the territories of foreign states) while Article 9 provides that civil liability shall not be applied to natural and legal persons of Kosovo for the non-fulfilment of obligations relating to the implementation of international sanctions.

585. Instead of any further procedural rules, paragraph (1) of Article 3 of the LIIS authorises the Government to adopt additional decisions for implementation of an international sanction. It appears from the text of the law that such decisions are to be adopted on a case-by-case basis which means that procedural rules (which sanction is implemented, time limits for its implementation, conditions, possible exemptions, the entities to which the sanction applies and, if applicable, the expiration date of the sanction) would also be determined on an *ad hoc* basis. No

decisions issued under paragraph (1) of Article 3 of the LIIS are thus envisaged to provide for a general set of rules establishing an effective and publicly known procedure for the implementation of international restrictive measures, including an appropriate freezing procedure.

586. The assessment team has not been informed about any decision having been issued pursuant to the LIIS which apparently means that this law has not yet been applied in any concrete case. In fact, the Kosovo authorities did not at all seem to be aware of the existence of the LIIS. When asked about the legislation that may be applicable to target terrorist assets, some interlocutors that the assessment team met admitted that there had been no proper legislation in place while others made reference to the freezing regime established by the AML/CFT Law, to the provisional measures provided by the CPC or even to the combination of these regimes (where the transaction involving terrorist assets could be temporarily frozen by virtue of paragraph (6) of Article 22 of the AML/CFT Law and the assets could eventually be secured by provisional measures as provided by the CPC). Whereas neither of these laws had ever been used for freezing assets used for TF, nobody that the assessment team met on-site had ever mentioned the LIIS in the same context (furthermore, the representatives of some authorities plainly admitted that they had never heard about it).

587. As for the relevance of the AML/CFT Law and the CPC, the assessment team is of the opinion that the AML/CFT freezing regime of funds not involved in any transaction (e.g. deposited assets) is more than questionable and the same goes for the application of coercive temporary measures available in the CPC. In this context, one must keep in mind that criminal procedural rules could not have been applied without initiating a formal criminal procedure, which requires a criminal offence subject to the jurisdiction of Kosovo whereas the mere appearance of a name on any terrorist list does not necessarily constitute a domestic criminal offence. Moreover once a criminal procedure is initiated, the freezing action would then depend on the outcome of the proceedings.

588. Considering that currently there is no directly applicable, if any, legislation in Kosovo to convert designations under UNSCRs 1267 and 1373 into domestic law (more precisely, UNSCRs 1267, 1988 and 1373 as the Taliban and the Al-Qaida lists were separated in 2011 and the former is now covered by UNSCR 1988) to appoint and authorise a national designating authority for UNSCR 1373 and to effectively, if at all, provide for the freezing of assets of designated persons and entities, the assessment team came to the conclusion that it can be proven without any further analysis of the respective Essential Criteria that Kosovo does not meet, to any notable extent, the requirements of FATF Special Recommendation III.

### 2.5.2. Recommendations and Comments

589. There is no specific legal framework that would enable the Kosovo authorities to take the necessary preventive and punitive measures to freeze and if appropriate, seize terrorist related funds or other assets without delay, in accordance with the relevant United Nations resolutions. Neither the AML/CFT Law nor the CPC can be applied in this respect and the same goes for the No. 003 and No. 006 FIC Administrative Decisions which are not even enforceable legislation, even if some authorities consider them as guidance (bearing in mind that the latter considered the terrorist lists more specifically, to the fact that a customer is designated on any of these lists as some kind of additional indicators that made a transaction suspicious and thus give rise to reporting and, if applicable, freezing such a transaction by use of the regime set out in the AML/CFT legislation then in force).

590. The LIIS is far too incomplete in its present form, providing nothing more but an essential legal basis and a legislative authorisation for the issuance of *ad hoc* governmental decisions in concrete cases without any detailed rules on roles, responsibilities and procedures. Apparently, this law has never been applied in practice and the assessment team has serious concerns that some, if not all, competent authorities are not even aware of its existence, even if the LIIS has been in force since May 2010.

591. In the absence of effective laws (i.e. those going beyond the mere authorisation for issuing implementing decisions) and procedures to freeze funds or other assets owned by or related to persons designated by the relevant UNSCRs, the assessment team strongly recommends that the Kosovo authorities adopt a comprehensive set of rules (either judicial or administrative) that would enable them to adequately implement the targeted financial sanctions contained in the respective UNSCRs relating to the prevention and suppression of the financing of terrorist acts and the freezing of terrorist assets, addressing all requirements under FATF SR.III. (It should be noted in

this context that the approach followed by the above-mentioned FIC Administrative Decisions was inadequate and insufficient and hence should not be followed in *lex ferenda*.)

592. Generally speaking, for reasons discussed above, the obligation to freeze must go beyond the notion of "transaction" and the direct application of criminal procedural rules. More specifically, there should be a mechanism for conversion into domestic Law of designations under UNSCR 1267 and 1988 as well as in the context of UNSCR 1373. There is a need for a clear national authority for designations under 1373 and for consideration of foreign requests for designations. All designations under UNSCRs 1267/1988 and 1373 should be communicated promptly to all parts of the financial sector which, on the other hand, need clear guidance on the wide meaning of funds or other assets in the context of SR.III.

593. There need to be publicly known procedures for de-listing and unfreezing and for those inadvertently affected by freezing mechanisms. Once the mechanism is in place, compliance with FATF SR.III should be actively checked and sanctions should be available for non-compliance.

### 2.5.3. Rating for Special Recommendation III

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.III** | **NC** | • no effective and directly applicable laws and procedures in place for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and to ensure that freezing actions extend to funds or assets controlled by designated persons;<br>• no designation authority in place for UNSCR 1373;<br>• no effective systems for communicating actions under the freezing mechanisms to the financial sector and no practical guidance in this field;<br>• no procedures for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism;<br>• no procedure for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452;<br>• no specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs; and<br>• no measures for monitoring the compliance with implementation of obligations under SR.III and to impose sanctions. |

## 2.6. The Financial Intelligence Unit and its functions (R.26)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law".

### 2.6.1. Description and Analysis

594. Recommendation 26 deals with the establishment, functions, autonomy and independence of the FIU.

***Establishment of an FIU - Essential Criterion 26.1***

595. EC 26.1 requires countries to establish an FIU that serves as a national centre for receiving (and if permitted requesting), analysing and disseminating disclosures of STRs and other relevant information concerning ML and TF activities.

596. The FIU was established at the end of 2010 by Article 1 of the AML/CFT Law. The FIU inherited the building and structures of its predecessor the Financial Intelligence Centre (FIC), a body established by UNMIK and later run by EULEX to perform the functions of an FIU. The transition period from the EULEX-led FIC to the locally-run FIU took several years in between 2010-2012 and was formally completed in June 2012.

597. The FIU sits under the MoF and by Article 4 of the AML/CFT Law is the central independent institution responsible for requesting, receiving, analysing and disseminating disclosures of information – Suspicious Transaction Reports[102] (STRs). It is governed by Management Board with a Director who is responsible for the operations and management of the Unit.

598. The legislation requires reporting subjects to disclose information to the FIU by means of an STR, when they suspect that a transaction or an act constitute a "suspicious act or transaction" as defined in the AML/CFT Law within 24 hours of such suspicion occurring. They are also obliged to disclose to the FIU all single transactions in currency of €10,000 or more. Multiple transactions are treated as a single transaction if the bank or institution has knowledge that the transactions are by or on behalf of another and exceed €10,000 in a single day.

599. The FIU has implemented the UN developed 'goAML' system to manage the STRs and CTRs. The system provides for the secure reception, storage, analysis and dissemination of intelligence reports. There are MoUs covering the request and exchange of data between the FIU and KC, CBK and the KP. The MoU with KC as well as with KP envisage a liaison officer working in the FIU in order to facilitate the exchange of information. These liaisons officers also function as analysts in the FIU, apparently focusing on those cases which are of relevance and interest to their agency.

***Institutional Guidance - Essential Criterion 26.2***

600. EC 26.2 requires the FIU or another competent authority to provide financial institutions and other reporting subjects with guidance regarding the manner of reporting, use of reporting forms and the procedures that should be followed when reporting.

601. The FIU has issued guidance to reporting entities by means of 'Administrative Directives' by order of the Director of the FIC (now the FIU). There are 14 such Directives up to December 2011. However, as indicated above, consequent to the repeal of UNMIK Regulation 2004/2 which forms the basis for most of these Directives, the assessment team is inclined not to consider them as pieces of valid and enforceable legislation for the time being unless issued under the AML/CFT Law. The FIU has also issued various technical guidance on the way of reporting through the goAML system on the basis of the AML/CFT Law – refer to the analysis of Recommendation 25 below. The paragraphs that follow should therefore be read within this context.

602. These Directives cover the manner of reporting, particulars of risk areas that reporting subjects should pay special attention to, imposition of UNSCR 1267 on designated individuals and entities, and guidance on when to report aggregated cash deposits that exceed €10,000.

603. The reporting entities are requested to file STRs and other reports electronically through the goAML system.

604. The goAML reporting form allows entities to report their analysis through descriptive narrative text and to attach any supporting reference documents should the entity wish to provide more comprehensive information in support of its suspicions. Nevertheless the FIU is very often obliged to come back to reporting entities with requests for additional information in almost 100 % of cases, also adding to the resource burden on its analysts as well as financial institutions, which are forced to allocate additional resources to answering FIU requests instead of increasing the *quality* of reporting. This poor quality of reporting is further aggravated by the inadequate, almost total lack of feedback to reporting entities on the outcomes of specific cases. Since the Assessment

102. Includes suspicious acts (definitions paragraph (1.35) Article 2 of the AML/CFT Law).

Report for Cycle 1, the FIU issued various Administrative Directives and Administrative Instructions among which is Administrative Directive No. 001/2013 on Training for Preventing and Combating Money Laundering and Terrorist Financing. This document provides in particular that the Director of the FIU may request reporting entities to undergo training sessions that are related *inter alia* to their reporting obligations and methods of ML and FT. The FIU informed the assessment team that the reporting quality from the reporting entities, especially banks, has since been improved.

605. In 2013 the FIU provided information on ML typologies both through its Annual Report for 2012 and through a dedicated document which is published on its web-site.

***Access to information - Essential Criterion 26.3***

606. EC 26.3 requires FIUs to have direct or indirect timely access to the financial, administrative and law enforcement information that it requires to appropriately undertake its functions, including the analysis of STRs.

607. The scope and mode of FIU access to various databases is not fully satisfactory, which negatively impacts the analytical function of the Unit.

608. The FIU has direct access (on the basis of MoUs) to the databases of:

- the KBRA within the Ministry of Trade and Industry; and
- the DRLNGO within the MPA.

609. These databases are also available to the general public; however the FIU has access to an extended version, which is provided equally to law enforcement, tax and other special authorities. The FIU browses these databases through an internet connection available on a computer that is detached from the FIU analytical mainframe. Although this detachment may be for security purposes, this makes it impossible to perform any integrated visual analysis with the use of these databases, significantly slowing and diminishing the quality of the analytical process.

610. The FIU has an indirect access to KP and TAK databases. These authorities upload new information into the FIU database on a regular basis in accordance with the respective signed MoUs.

611. The FIU has established electronic links via goAML with KC, KP, TAK, CBK, KCA and municipal Cadastral Offices, FIU Albania, FIU Slovenia etc., through which it can request information searches or exchange the results of analysis and disseminations. Although the FIU would like direct access to LEAs' databases this is not currently possible, and it feels the current system of indirect access, usually via the liaison officers is adequate for its needs.

612. The FIU has signed co-operation agreements (MoU's) with several other domestic institutions, i.e. the TAK, the Anti-Corruption Agency and the Cadastral Agency. However, the MoUs provided to the assessment team have been signed by FIC and it is uncertain whether they are still valid due to the repeal of UNMIK Regulation 2004/2.

613. In any event it is clear that the current arrangements with regard to the scope and mode of database access are not sufficient for the FIU to properly undertake its functions. The number of databases that FIU has effective access to should therefore continue to be expanded. Those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML with the appropriate security firewalls.

***FIU power to obtain additional information - Essential Criterion 26.4***

614. EC 26.4 requires that FIUs have the power, either directly or through another competent authority, to obtain from all reporting entities additional information it may require to properly undertake its functions.

615. Paragraph (2) of Article 22 of the AML/CFT Law obliges banks and financial institutions to provide additional information related to a suspicious report that the bank or financial institutions would have filed with the FIU. It does not appear however that banks and financial institutions are obliged to provide information when such information is not related to a previously filed STR by the bank or financial institution. Additionally the abovementioned article, as it appears, does not grant the legal right to the FIU to address banks and financial institutions with a request for additional

information. Indeed no such powers are found in any other parts of the AML/CFT Law, e.g. Article 14 on the duties and competencies of the FIU, which gives it the power to demand information from a *public or governmental bodies or any international or intergovernmental body or organisation (in Kosovo) concerning a person, entity, property or transaction.* It is apparent that this does not include reporting entities.

616. The provisions of paragraph (2) of Article 22 are only applicable to banks and financial institutions. There are no other provisions in the AML/CFT Law imposing similar obligations on other reporting subjects to continue to provide information to the FIU following the submission of an STR.

617. In accordance with paragraph (1.14) of Article 14 of the AML/CFT Law the FIU "*requires data, documents and information related to specific requests of data or analyses from legal obligators, which should be offered precisely for inspection by FIU and to allow their copying and reproduction, only for the use of a Unit. Legal obligators who refuse such requests should within three (3) days be informed about the request of FIU, send it in written their reasons for refusal. After this, the FIU shall decide and notify the legal obligor whether he/she is or is not in compliance with obligations foreseen in this provision*". This wording, while quite ambiguous, is interpreted by the authorities to relate to the supervisory function of the FIU as regulated under Article 30 of the AML/CFT Law – see the analysis for Recommendation 23 and Recommendation 29 - and does not regulate the procedure to request additional information from reporting entities for analytical purposes.

618. Whatever the interpretation, it is quite apparent that the procedure to request additional information from reporting entities as described in the Law contains significant ambiguity and is open to legal challenge by the reporting entities. The FIU have explained that no problems have occurred in practice, however it is recommended to modify the text of the AML/CFT Law so as to provide the FIU with the power to request additional information from all reporting subjects unequivocal and not subject to any interpretation.

***FIU authorised to disseminate when ML/TF suspected - Essential Criterion 26.5***

619. EC 26.5 requires that FIUs have the power to disseminate financial information to domestic authorities for investigation where there are grounds for suspicion of ML or TF.

620. Paragraph (2) of Article 15 of the AML/CFT Law authorises the FIU to disseminate to LEAs any information received under paragraph (1) of Article 15, that is to say data from reports held by the FIU that identify individuals, transactional data, account particulars, data concerning a person or identity which has provided information to the FIU.

621. The AML/CFT amending Law No. 04/L-178 of 11 February 2013 adds to Article 15 of the AML/CFT Law the explicit power that "the FIU is able to exchange, domestically as well as internationally, all information accessible or obtainable directly or indirectly by the FIU". The FIU can do so "at its own initiative or upon request".

622. The FIU uses the goAML system to disseminate information to KC, KTA, CBK and the KP. The assessment team was also informed that the FIU disseminates materials directly to the SPRK, which has exclusive jurisdiction over ML cases. It was not clear to the assessment team which criteria the FIU was using when choosing whether to disseminate materials to KP or to SPRK. Intelligence Reports produced by FIU can be disseminated as it was mentioned above to the KP and the SPRK, but the basis of the criteria used by FIU as to where should such a report be sent raised doubts to the assessment team. The FIU explained that if in the Intelligence Report 5x5x5 is evalued as "*high suspicion of money laundering*" or "*a very high suspicion of money laundering*", the report is disseminated to SPRK, whereas if it is determined that there is a "*low suspicion of money laundering*"and "*impossible to determine*", the report is sent to the KP. Notwithstanding the assessment team still consider that the methodology for dissemination of these reports is not clear as nobody was able to explain to the assessment team the basis of these criteria on "high suspicion", "very high suspicion" and "low suspicion" of ML.

623. The FIU apparently receives no systematic feedback on the progress of its disseminations, even though the dissemination form does contain a request to the receiving authorities to inform the FIU about the outcome of the investigation. The little feedback that is received is usually sporadic and unsystematic. During the second on-site visit however the FIU informed that recently

it has started to receive feedback from the KP and indeed it had received feedback on a number of past requests.

624. Notwithstanding, it is expected that the newly created Office of the NCCEC will increase the cooperation and feedback between all the involved parties.

### *FIU Operational independence - Essential Criterion 26.6*

625. EC 26.6 requires FIUs to have sufficient operational independence and autonomy to ensure that it is free from undue influence and interference.

626. Article 4 of the AML/CFT Law establishes the FIU under the MoF as a central independent national institution responsible for requesting, receiving analysing and disseminating disclosures of information.

627. Article 5 of the AML/CFT Law establishes a Management Board to oversee and ensure the independence of the FIU, which is comprised of the ministers/directors of the MoF, Ministry of the Interior, Chief Prosecutor, KP, TAK, KC, and the CBK. The Board, by statute, has no executive or enforcement powers vis-à-vis the FIU but shall oversee and ensure the independence of the FIU. The Board meets twice a year and has no right to interfere in any way in FIU on-going cases. The FIU therefore clearly has operational independence and autonomy. This seems to be the case in practice.

628. The Board is authorised to review, approve and reject the reports of the FIU drawn up in accordance with Article 10 of the AML/CFT Law dealing with the administration and management of the Unit; oversee and periodically assess the performance of the Director of the FIU; appoint and dismiss the Director of the FIU; determine the budget of the FIU upon proposal of its Director; control and oversee the wealth stated by the Director of the FIU and the conflict of interest cases, in accordance with relevant legal rules and procedures.

629. In accordance with Article 10 of the AML/CFT Law, fifteen (15) days prior to each Board meeting once a year, the Director of the FIU must provide each and every member of the Board with an up-to-date written report summarising: the administrative, executive, and regulatory activities and decisions of the FIU; and all aspects of the financial management, revenues and expenditures of the FIU. The FIU informed that it has submitted the reports for the years 2011 – 2013 to the Board accordingly.

### *FIU information securely protected - Essential Criterion 26.7*

630. In accordance with EC 26.7 FIUs should securely protect information held and only disseminate it in according with the provisions of the law.

631. Article 14 of AML/CFT Law requires FIU staff to keep information obtained from their duties confidential and disseminate it only in accordance with the AML/CFT Law.

632. Moreover, paragraph (6) of Article 33 makes it a criminal offence for any official of the FIU to disclose information and remove or destroy records without lawful authority.

633. To this effect the assessment team notes that the FIU premises are physically secure with adequate controls for access to information.

### *FIU periodic public reports – Essential Criterion 26.8*

634. EC 26.8 requires FIUs to periodically publish reports with statistics, typologies and trends including information on the activities of the Unit.

635. Article 10 of the AML/CFT Law obliges the Director of the FIU to furnish the Board with a written annual report. This report should account for the administrative, executive and regulatory activities and decisions of the Board. Paragraph (1.9) of Article 14 of the AML/CFT Law allows the FIU to "make reports public as will be helpful in carrying out its tasks". The first FIU report was submitted to the Board for 2011 followed by those for 2012 and 2013.

636. The 2011 Annual Report has been made public through the FIU website but it does not contain ML typologies which could be useful to the reporting sector.

637. On the other hand, while the FIU 2012 Annual Report has been made public and is available on the FIU website, it contains some ML typologies which could be useful to the reporting subjects. The FIU informed that likewise, the 2013 Annual Report will include typologies. The FIU has also recently published on its website a report on ML and FT typologies in Kosovo.

***FIU application to joining Egmont - Essential Criterion 26.9***

638. EC 26.9 requires countries that have created an FIU to consider applying for membership in the Egmont Group. Hence EC 26.9 leaves membership at the discretion of the country concerned and does not make membership mandatory.

639. The FIU has secured the sponsorship of the FIUs of Slovenia, Finland and Senegal to attain membership of the Egmont Group of FIU's. It made a request at the end of 2011 to be allowed to attend Egmont Working Group meetings as an observer but this has been declined by Egmont. The FIU again applied for membership in 2013. With the amendments to the AML/CFT Law having entered in force its chances of becoming an Egmont Group member increased, although up to the drafting of this Report no formal decision was taken during the 2014 Egmont Plenary Meeting in Lima following an on-site assessment of the FIU earlier prior to the Plenary when the amendments to the AML/CFT Law were already in force.

***FIU adopting Egmont principles of information exchange - Essential Criterion 26.10***

640. Notwithstanding membership, EC 26.10 recommends that countries should have regard to the Egmont Group Statement of Purpose and its Principles for Information Exchange between FIUs for Money Laundering Cases as best practice guidance.

641. The FIU states that it has not adopted the Egmont Principles for Information Exchange as it is not an Egmont member. Whilst this is true those principles are best practice in this arena and should be adopted forthwith.

***Reporting by supervisory competent authorities – Third EU AML Directive Article 25(1)***

642. Article 25(1) of the Third EU AML Directive requires Member States to ensure that where, during their supervisory work or in any other way, supervisory authorities as mentioned in the Directive discover facts that could be related to ML of FT they should promptly report to the FIU accordingly.

643. There is no specific obligation on the CBK or other supervisors to report any ML/TF suspicions they may uncover in the course of their inspections. However paragraph (1.5) of Article 14 of the AML/CFT Law obliges the FIU and other bodies and institutions in Kosovo to "*mutually co-operate* and *assist one another in performing their duties and shall co-ordinate activities within their competence."* If, during an inspection a supervisor forms a suspicion on ML/TF this article, although leaving a degree of legal uncertainty, would seem to oblige him to report it as it would assist the FIU. The CBK informed that there has been at least one instance where following an inspection relevant information about such a case was forwarded to the FIU. Apparently the CBK did not receive any feedback about the outcome of the case, nor was the FIU able to recall receiving any such information from the CBK.

644. Notwithstanding the above, the MoU entered into between the FIU and the CBK on the basis of the delegation of a supervisory remit to the CBK for the entire financial sector, while also dealing with the exchange of information is silent on the issue of reporting by the CBK under these circumstances. It is also arguable to what extent the CBK would be covered by the protection provided by the AML/CFT Law for reporting subjects although Article 35 of the AML/CFT Law seems to provide accordingly – although a degree of legal uncertainty remains as there are no reporting obligations imposed upon the CBK under the AML/CFT Law. Notwithstanding, the CBK informed that according to its MoU with the FIU, CBK examination reports and findings are forwarded to the FIU. The assessment team however does not consider such submission of reports equal to or a substitution for a legal obligation for the CBK to file a STR in terms of the obligations under the AML/CFT Law for any ML/FT suspicions that may arise in the course of the examination

**Recommendation 32**

***Statistics maintained by the FIU – Essential Criterion 32.2***

645. EC 32.2 requires competent authorities to maintain comprehensive statistics on matters relevant to the effectiveness and efficiency of AML/CFT systems. For the purposes of the FIU and as a minimum this includes maintenance of statistics on STRs; ML and FT investigations, prosecutions and convictions including freezing and confiscation; MLA and international cooperation and other actions that are relevant for measuring the effectiveness of the AML/CFT regime.

646. The FIU maintains minimal statistics on STRs/CTRs received and disseminated. The Unit does not keep statistics on wire transfers as such information and data are not reported to FIU - refer to the analysis of Recommendation 32 within the context of Recommendation 23 in Section 3 of this Report for recommendations in this regard. Moreover, during the Cycle 1 on-site visit, there were no statistics available in the FIU on the outcome of disseminations to law enforcement. The assessment team was informed during the Cycle 2 on-site visit that, following the observations of the assessment team in the Cycle 1 Report, as of 2013, the FIU received feedback information from the KP and this included the period 2009-2013. For that time period, the KP has sent to the FIU feedback information with regard to the results in about 96 cases. Whereas the provision of feedback information started also recently by the TAK and the KC.

***Table 8: Overall STR reporting/disseminations[103]***

| STRs | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|
| Number of STRs received | 145 | 131 | 202 | 174 |
| **Disseminations** | | | | |
| Kosovo Police | 15 | 19 | 15 | 36 |
| Kosovo Police/Tax Admin. | | 3 | 7 | 5 |
| Kosovo Police/Kosovo Customs | | 0 | 3 | 3 |
| Kosovo Tax Administration | 6 | 3 | 10 | 16 |
| SPRK | - | 0 | 1 | - |
| Foreign FIU | 1 | 4 | 0 | 3 |
| Central Bank of Kosovo | 1 | 1 | 0 | |
| EULEX | 4 | 8 | 7 | 2 |
| Kosovo Customs | | 2 | 2 | 1 |
| **Total disseminations** | **27** | **40** | **45** | **66** |

***Table 9: Number of disseminated Intelligence Reports***

| Referred to | 2011 | 2012 | 2013 |
|---|---|---|---|
| Kosovo Police | 22 | 25 | 44 |
| Kosovo Tax Administration | 6 | 17 | 21 |
| Kosovo Customs | 2 | 5 | 4 |
| Cases disseminated to Prosecutor's office | 0 | 1 | - |
| Central Bank of Kosovo | 1 | 0 | 0 |
| EULEX | 8 | 7 | 2 |
| Foreign FIU | 4 | 0 | 3 |
| **Total of disseminated Intelligence Reports** | **43** | **55** | **74** |

103. Whereas EULEX maintained statistics till 2012, afterwards they are kept by FIU as close as possible to FATF standards. In the above table, a distinction between Disseminated Reports and Intelligence Reports was made until 2014 due to the fact that one closed case deriving from STR could be disseminated as Intelligence Report to both institutions – two rows are added to indicate that a case has been disseminated to the KP (ML) but also to KTA or Customs (for Tax Evasion or Smuggling).

***Table 10: Statistics on Terrorism financing*[104]**

| Cases | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|
| Number of cases related to *Terrorism financing* | 13 | 5 | 3 | 1 |
| **Total** | **13** | **5** | **3** | **1** |

***Table 11: Reports that have been sent to Kosovo Police, Eulex Police and SPRK***

| Case disseminated (generated by STR) | 2010 | 2011 | 2012 | 2013 | Request for information (from LE) disseminated | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|---|---|---|---|
| Kosovo Police | 15 | 22 | 25 | 44 | Kosovo Police | 21 | 22 | 30 | 55 |
| SPRK | 0 | 1 | 1 | 0 | SPRK | 4 | 2 | 6 | 1 |
| EULEX Police | 4 | 2 | 7 | 2 | EULEX Police | 16 | 18 | 11 | 12 |
| **Total** | **19** | **25** | **33** | **46** | **Total** | **41** | **42** | **47** | **68** |

647. The main complaint from the FIU is that the Unit does not receive enough feedback on the STR/analyses they disseminate. However, an increase in the number and quality of feedback received appeared lately.

**Recommendation 30**

***Adequate Resources – Essential Criterion 30.1***

648. EC 30.1 requires that competent authorities involved in the prevention of ML and FT, including the FIU, should be adequately structured, funded, staffed and provided with sufficient technical and other resources to fully and effectively perform their functions.

649. During the Cycle 1 on-site visit, the FIU considered that its budget, staff numbers and technical resources were generally sufficient for the FIU to be effective and discharge its mandate. In order to stay ahead of developing trends in ML and TF, a "Performance and Resource Plan" of the FIU for 2014 – 2016 has been drafted. The Performance and Resource Plan 2014 – 2016 sets out how the FIU will build on its assets and achievements to meet the challenges that it will face over the next three years and how it will sustain its position as one of the leading intelligence units in Kosovo and in the region. It also shows how the FIU will measure its success and control its internal processes. Due to the evolution of the implication of EULEX and of the increasing commitment of the FIU as a supervisory body, the FIU stated in this document that *The current budget is not at a satisfactory level. This creates difficulties for the FIU-K to execute its mandate*. The FIU stated that the Government agreed to undertake the necessary budgetary efforts in order to address this issue.[105]

***Table 12: FIU financial and human resources***

| Year | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| **Budget in Total** | € 328,603 | € 368,255 | €327,293 | € 332,920 | € 334,250 |
| **Staff** | 16 | 16 | 16 | 18 | 18 |

650. There are an additional two EULEX analysts and one EULEX advisor working in the FIU.

104. These are cases disseminated for the Terrorism Financing which derive from STRs. While it should be noted that there is a huge number of the Disseminated Intelligence Reports with regard to the FT, they derived as requests for feedback information by the Anti-Terrorism Department.

105. *Source*: FIU Performance and Resource Plan 2014-2016, page 5.

651. FIU staff has attended frequent training courses on aspects of ML, TF trends, strategic and tactical analysis, financial investigations, audit and financial controls, computer management, goAML. This has been provided both locally and internationally. Despite the training the assessment team was informed that no strategic analysis has yet been conducted. It is expected that some strategic analysis will be undertaken as part of the implementation of the Performance and Resources Plan 2014 – 2016.

652. Staff are expected to maintain high standards of integrity. As mentioned above the Director, who shall be appointed by the Management Board upon the proposal of the MoF on the basis of demonstrated knowledge, professionalism and experience, has to declare his wealth.

653. Staff are recruited through the law governing the recruiting of civil servants which requires them upon signing their contract of employment to comply with the law on conflict of interest and display high standards of professionalism, integrity, honesty and proper skills (see also analysis and recommendations in section 2.4 of the AC assessment report).

654. Apparently the competition to fill vacancies in the FIU is extremely high – approximately 40 candidates per vacancy according to the FIU. This allows the FIU to recruit well-educated and highly-skilled staff. Staff turnover, which seemed to be an issue some years ago is no longer a problem.

655. Staff having access to confidential information go through an additional vetting procedure to verify their past.

***Effectiveness***

656. Unfortunately the assessment team has not been provided with sufficient information to comprehensively judge about the effectiveness of the FIU. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the insufficiency of interagency feedback notwithstanding that the FIU claims it is now receiving feedback. If this is the case, then this initiative should be supported by Kosovo authorities in the shortest time possible through a collective interagency effort led by the newly appointed NCCEC to ensure sustainability.

657. At the same time the FIU provided at least one example where its information was used in a successful ML investigation. The assessment team has also been provided with sanitised files intended for dissemination to law enforcement authorities. These materials demonstrate the clear ability of analysts in the FIU to perform proper analysis to the point as to be able to infer the probable predicate offence from available data. As noted above, the analytical process could surely be made more efficient and comprehensive if the FIU had integrated access to a wider range of databases.

658. The limited direct access of the FIU to databases of other agencies is a symptom of the limited institutional standing and recognition of the FIU by other authorities. The fact that the FIU is organisationally detached from a major ministry/agency (in this case the MoF) reflects positively on its operational independence, however the arrangement does not relieve the MoF from the general responsibility (including as the Chair of the Governing Board of the FIU) for the Unit in terms of ensuring and promoting its institutional standing with other authorities. Additionally the Governing Board, when considering and discussing various aspects of the FIU's work, should focus to a much larger extent on facilitating the integration of the FIU with other agencies, particularly in accessing information and databases. Particularly this should not be an unsurmountable issue since the Board consists of representatives of agencies which are key and direct partners of the FIU.

### 2.6.2. Recommendations and Comments

659. The MoF and the Governing Board of the FIU should take measures to facilitate and promote the institutional standing of the FIU with regard to other authorities.

660. The current arrangements with regard to the scope and mode of database access are not sufficient for the FIU to properly undertake its functions. The number of databases that FIU has access to should be expanded. Without prejudice to the security aspect, those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML to enhance the quality, scope and speed of analysis.

661. The current practice of requesting additional information from reporting entities in almost 100% of cases is clearly excessive. Additional measures to increase the quality of STRs and ultimately alleviate the burden of additional requests are requied and the FIU should work with the reporting subjects by continuing to provide general (typologies) and targeted feedback on the outcome of STR disseminations.

662. It is hoped that the FIU Administrative Directive No. 001/2013 on Training for Preventing and Combating Money Laundering and Terrorist Financing issued in October 2013 that provides in particular that the Director of the FIU may request reporting entities to undergo training sessions that are related inter alia to their reporting obligations and methods of ML and FT will help to address this issue.

663. The measures described above, should ultimately and in concert alleviate the technical resource burden on the FIU and reporting entities, allowing them to focus on the quality of information provided, as well as the quality of analysis undertaken. However, some of the measures require a more concerted effort on the part of a number of agencies. For example the lack of targeted feedback from the FIU to reporting entities stems from the very lack of law enforcement-to-FIU feedback and is thus a problem of the system in general, which needs to be mitigated following the claim by the FIU that feedback from law enforcement is not being provided.

664. Without sufficient feedback from law enforcement the FIU is also not able to properly benchmark its analysis, which significantly hinders any quality improvement of analytical materials produced by the FIU. A formal and regular system of feedback on progression of FIU referrals should be implemented jointly with KP, KC and Prosecutors. This issue should be considered as one of the priorities by the NCCEC.

665. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the insufficiency of interagency feedback and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort led by the newly appointed NCCEC.

666. The assessment team considers that the FIU Administrative Instruction No. 001/2013 on Compiling Statistics, Reports and Recommendations on Money Laundering and Terrorist Financing issued by the FIU in October 2013 goes in the right direction and expects that the collected data will enable to demonstrate the outcomes of FIU disseminations to law enforcement. This document provides in particular that the FIU compiles statistics and reports regarding, inter alia, cases that were analysed and sent to law enforcement institutions, the number of requests for information received by law enforcement institutions, the number of investigated and convicted persons in relation to prevention of ML and TF, and confiscated or seized assets in relation to prevention of ML and TF. There should also be a legal obligation on the maintenance of statistics by all stakeholders - refer to the analysis of Recommendation 32 within the context of Recommendation 23 in Section 3 of this Report for recommendations in this regard.

667. The publication of the Annual Report by the FIU should continue to be considered a priority in order to raise awareness about the activities of the FIU among the wider interagency community, as well as the reporting sector. This report should be used, inter alia as an effective tool by the FIU to provide feedback to the reporting sector, and thus should always include information on current ML typologies. In this regard the FIU may wish to consider obtaining feedback particularly from reporting subjects on the extent of the usefulness of the information provided in the Annual Report including the need for additional information that the reporting subjects would like to have in order to further assist them in being more effective in implementing the preventive ML and TF measures.

668. It is recommended to modify the text of the AML/CFT Law so as to make the FIU power to request additional information unequivocal and not subject to any interpretation. It is therefore recommended to insert a new paragraph (1.2A) to Article 14 of the AML/CFT Law dealing with the duties and competencies of the FIU to the effect that it can demand any information, data or documents from reporting subjects that are necessary for the Unit to fulfil any of its obligations under the Law. This recommendation would also cover situations where the FIU is requested information by its foreign counterparts which the Unit currently fulfils under paragraph (2) of Article 22 which is not legally correct as in such circumstances no STR would have been filed:

> *Article 14 (paragraph (1.2A))* for the purposes of fulfilling any of its obligations under this Law, the FIU may demand from any reporting subject all information, data, or documents that the Unit may require;

669. Notwithstanding that the FIU is not yet a member of the Egmont group, it should implement the Egmont Principles of Information Exchange as best practice in its dealings with foreign FIU's

### 2.6.3. Rating for Recommendation 26

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.26** | **PC** | • the scope and mode of FIU access to various databases is insufficient and negatively impacts the analytical function of the Unit;<br>• ambiguity in the powers of the FIU to request additional information from reporting entities open it up to legal challenges;<br>• the FIU should consider adopting the Egmont group principles for international information exchange;<br>• the lack of feedback from law enforcement on FIU disseminations negatively impacts the effectiveness of the FIU;<br>• the lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis;<br>• insufficient specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on both - the FIU and industry and decreasing effectiveness; and<br>• the need to excessively request additional information (stemming from low quality and non-informative STRs) puts a resource burden on the FIU, negatively impacting its' effectiveness. |

## 2.7. Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of ML & TF offences, and for confiscation and freezing (R.27 & R.28)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law";
- Customs and Excise Code of Kosovo (Law No. 03/L-109 of 10 November 2008);
- Law on Amending and Supplementing Customs and Excise Code No. 03/L-109 (Law No. 04/L-099 of 3 May 2012);
- Law on Police (Law No. 04/L-076 of 23 January 2012);
- Law on Police Inspectorate of Kosovo (Law No. 03/L-231 of 14 October 2010).

### 2.7.1. Description and Analysis

**Recommendation 27**

670. In accordance with Recommendation 27 countries should ensure that designated law enforcement authorities have responsibilities for ML and FT investigations possibly supported with special investigative techniques suitable for investigating ML.

***Investigations of ML and TF offences – Essential Criterion 27.1***

671. EC 27.1 requires the designation of law enforcement or prosecutorial authorities that have the responsibility for ensuring that ML and FT offences are properly investigated.

672. All the Kosovo LEAs have a responsibility for ensuring that ML offences are investigated. There is a specialised unit within the KP – the Financial and Money Laundering Investigation Unit within the Directorate against Economic Crimes and Corruption. KC have an investigative responsibility and the FIU also has a responsibility to refer cases for investigation when it detects or suspects that ML is taking place.

673. ML prosecutions are a competence reserved for the SPRK. There are currently 13 SPRK Prosecutors with plans to increase this to 15. SPRK also includes a number of international (EULEX) prosecutors whose appointment, legal status and performance of official functions is identical to the national prosecutors.

674. The KP regularly receive disseminations from the FIU and carry out a preliminary check within 24 hours of the information prior to submitting the file to the SPRK. Investigations are initiated when the SPRK is presented with sufficient information or evidence from the KP or other sources (including State Prosecutors) that an offence has been committed. ML investigations are prosecutor-led with law enforcement acting as "the right hand" of the prosecutor. Law enforcement must notify the prosecutor of any and all new information discovered in the course of a ML investigation. The assessment team was informed that there is always an on-duty prosecutor present in the KP in order to speed up the decision-making process on urgent cases.

***Postponement or waiver of arrest – Essential Criterion 27.2***

675. EC 27.2 recommends that consideration be given (by law or otherwise) to allowing an arrest to be postponed or waived and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering.

676. The timing of an arrest is a matter for the judgement of the Prosecutor or a pre-trial Judge. The only provision identifiable in the legislation where an arrest could be waived, or an indictment not preferred, is where a potential defendant agrees to become a cooperative witness. Article 235 of the CPC lays out the requirements and obligations of a cooperating witness. This is not fully inline with the requirements of the international standards, which require that postponement be available as a measure when, for example further evidence gathering is required.

***Additional Elements 27.3 to 27.6***

677. AE 27.3 to 27.6 deal with the powers of law enforcement or prosecution authorities to use a wide range of special investigative techniques and the use of effective mechanisms which include specialised investigative groups and cooperative investigations with appropriate competent authorities in other countries.

678. Having gathered the information required the SPRK then requests the opening of a formal investigation to a pre-trial judge in accordance with Article 84 of the CPC. The pre-trial Judge may authorise a range of covert investigation techniques as are required to collect sufficient evidence to sustain a prosecution whether for ML or any other offence.

679. Article 87 of the Criminal Procedures Code[106] describes the range of techniques available. These include amongst others the interception of communications, undercover operations, co-operating agent, the controlled delivery of postal items and the disclosure of financial data.[107] There are no statistics available on the instances where special investigative techniques have been employed in the investigation of MLor FT.

680. There is no evidence of any review of ML/TF trends and techniques by competent authorities on a regular interagency basis.[108] However it has been stated that, lately, meetings on

106. Law No. 04-L-123 in force as from 1st January 2013.

107. Article 256 of the old CPC has the same definitions.

108. FATF Recommendation AE 27.6.

ML trends were organised with prosecutors, judges, KP, FIU, KC, TAK and AMSCA (5 meetings held in 2013).

681. The competent authorities responsible for investigating ML and TF offences have the general criminal investigation powers of search and seizure that flow from CPC Article 105 (Court Order authorising search) and Article 110 (search without Court Order).

**Recommendation 28**

682. Recommendation 28 requires that when conducting investigations of ML and underlying predicate offences the relevant competent authorities should have the power to obtain documents and information for use in those investigations and in prosecutions and related actions.

***Power to compel documents, to search and to seize – Essential Criterion 28.1***

683. EC 28.1 requires that competent authorities responsible for conducting ML and FT investigations have the legal power to compel the production of transaction records, CDD records and all other financial records maintained by financial institutions and other businesses or persons. This power should extend to search of persons and premises and the seizure of such documents.

684. Article 119 of the new CPC gives the Prosecutor the right to request all documentary evidence including financial records. Article 121 of the new CPC lists the non-exclusive range of evidence that can be obtained by the prosecutor during the investigation stage and prior to the pre-trial testimony. According to Article 67 of the CPC, confidential data held by non-parties to the investigation can only be obtained through Court orders. This provision seems to cover the full range of the types of documents required under FATF Recommendation 28. At the same time, the same Article states that tangible evidence is *inter alia* "any… tangible evidence lawfully obtained under this Criminal Procedure Code whose existence and form provide evidence relevant to the investigation". Tangible evidence can be duly used in a criminal proceeding.

685. Additionally, Article 14 of the AML/CFT Law gives the FIU the right to request and take copies of certain data and information from obliged bodies. Paragraph (2) of Article 15 of the AML/CFT Law allows information held by the FIU to be disclosed to the KP and prosecutor for investigative purposes but this cannot be adduced as evidence without the authority of the Director of the FIU (paragraph (3) of Article 15).[109] Knowing that the information exists this does allow a more focussed approach to evidence gathering.

***Witnesses' statements – Essential Criterion 28.2***

686. EC 28.2 requires such competent authorities to have the powers to be able to take witnesses' statements for use in investigations and prosecutions of ML, FT and other underlying predicate offences, or in related actions.

687. Articles 122 and 123 of the CPC provide for the taking of witness statements in the course of the pre-trial stage. The interviewing of a witness can be undertaken by the prosecutor, or alternately can be delegated by him to a representative of law enforcement.

688. Articles 70-73[110] of the new CPC gives the LEAs the powers to collect information to investigate crime at the initial investigative phase. This includes the interviewing of witnesses and the taking/seizure of evidence.[111]

689. Covert and technical measures of surveillance and investigation can also be undertaken (Articles 86-96 of the CPC) by police at the authorisation of a pre-trial judge, or as is in the exclusive case of ML – of a prosecutor, in case the circumstances call for urgency. The evidence and materials gathered with the use of such measures, including financial records are admissible if collected in accordance with criminal procedure. Their admissibility can also be challenged by the defendant in the course of due process.

109. FATF Recommendation EC 28.1.

110. Article 201 of the 'old' CPC – General powers of the police to investigate.

111. FATF Recommendation EC 28.2.

**Recommendation 30**

***Resources and staffing – Essential Criterion 30.1***

690. EC 30.1 requires that competent authorities involved in the investigation and prosecution of ML and FT be adequately structured, funded, staffed and provided with sufficient technical and other resources to fully and effectively perform their functions.

691. The KP Economic Crimes Investigations Department had been understaffed according to the Cycle 1 asssessment. In 2013, it increased significantly, reaching a total of more than 23 police officers. As ML investigations increase in number and involve more of the police force, this Unit should be clearly tasked with an oversight and guiding role for all such investigations.

692. The assessment team was informed that 50% of police managers are in an 'acting' role, i.e. working at a higher grade than their substantive rank and that this causes rigidity in decision making. Apparently there have been approximately 5,000 complaints made against the KP of which only 500 have been investigated with consequent loss of public confidence in the integrity of the KP. The assessment team was informed from various sources that political 'interference' in the police is a problem and that there are "not enough" police.

693. KC and the FIU have provided extensive evidence of relevant training on aspects of ML, financial analysis and other professional competencies. These have been delivered by both external donors and in-country providers. Further training has been provided to KP, KP investigators, Prosecutors, Judges, Tax Inspectors, Customs Officers, FIU, banks and other agencies.

694. The KJI is responsible for training Judges and Prosecutors and candidates for Judge and Prosecutor. Within the Continuous Legal Education Programme, between 2009 and 2012 they delivered organised crime modules training covering: financial crime, corruption, informal economy and ML to 38 Judges and 22 Prosecutors. Corruption Modules covering: investigation techniques in cases of corruption, understanding of corruption – prevention, its consequences and combating, corruption related criminal offences and their elements to 37 Judges, 30 prosecutors and 24 others.[112] Within the Financial Crimes and Informal Economy modules: prosecution and investigation of ML; forms and elements of criminal offence of ML; legal instruments that sanction financial crimes; institutions authorised for combating of financial crime; criminal offences that constitute elements of financial crime; measures for prevention of financial crimes; investigation and confiscation of assets which proceed by commission of financial crime – evidence, ensuring and analysing of financial evidence, as well as working based on evidence; written documents and computer experts (65 persons participated, of them 26 judges, 17 prosecutors and 22 others[113]). Within the Initial Legal Education Programme (candidates for judges and prosecutors) the module on Financial Crime and Corruption was delivered at 20 training sessions. 141 candidates underwent training in this module, the larger part of them have already been appointed and discharge functions of Judges or Prosecutors.

695. It is unclear from the information provided whether the broader police force has been involved in general awareness-raising training on topics of ML and identification of criminal proceeds in the context of an economic crime investigation. In order to broaden the efforts in combating economic crime it is imperative to involve and raise awareness among general police about the need to proactively pursue criminal proceeds that are associated with any acquisitive crime.

**Recommendation 32**

***Statistics maintained by law enforcement and prosecutors office – Essential Criterion 32.2***

696. EC 32.2 requires competent authorities to maintain comprehensive statistics on matters relevant to the effectiveness and efficiency of AML/CFT systems. For the purposes of law

112. Professional associates in courts and prosecutors office, members of KP and representatives from the Anti-corruption units of Albania.

113. Professional associates in courts and prosecution offices, representatives from sector against organised crime (Albania), members of the KP.

enforcement and prosecutors this obligation would require statistics related to investigations, prosecutions, convictions and property frozen, seized or confiscated.

697. The following statistics for arrests and investigation of ML offences have been provided to the assessment team by the KP:

***Table 13: Arrests and Investigations of ML Offences***

| Money laundering cases | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|
| Cases under investigation | 22 | 3 | 8 | |
| Criminal charges filed | 3 | 3 | 3 | 4 |
| Against suspects | 7 | 6 | 14 | 6 |
| Arrested | 6 | 1 | 7 | 0 |

698. The SPO has otherwise reported the following statistics on ML:

- During 2009, prosecutors received in total 10 reports concerning 38 persons, whereas they worked on a total of 43 cases during this year. From the information received, 8 were reported by the KP and two from the FIC. 5 cases were solved but no indictments filed;
- During 2010, prosecutors received a total of 17 reports concerning 33 persons, whereas they worked on total of 71 cases. From the received information: 15 were reported by the KP, whereas 1 from the FIC and 1 from others. 21 cases were solved and 8 indictments filed for 8 persons.
- During 2011, prosecutors received in total 34 reports concerning 79 persons, whereas during this year there were 129 cases in total. From the information received: 30 were reported by the KP, 1 from FIC, one from the prosecutor directly and 2 from others. 33 cases were solved and 7 indictments filed.
- During 2012, prosecutors received a total of 10 reports involving 35 persons, whereas during this year they worked on 131 cases. From the received information, 4 were reported by the KP, 2 from FIC/FIU, 2 from the prosecutors, and 2 from others. 32 cases were solved and 7 indictments filed.
- During 2013, prosecutors received a total of 18 reports involving 36 persons.
- During 2014 up to the time of the on-site visit prosecutors worked on 56 cases. From the received information, 11 were reported by the KP, 1 from TAK, 1 by KC, 4 by EULEX and 1 from others. 25 cases were solved and 3 indictments filed

699. Information provided by KJC as well as that of the KPC suggests that there have been no criminal convictions for the offence of ML (it is not clear whether the so-called 'coalition' case (see section 2.1) has ended in a conviction).

700. It is apparent that the statistics and records kept by the KP and the Prosecutors do not match, both in terms of the criteria and the ultimate numbers. The assessment team was informed that the police and prosecutors have made significant progress towards synchronising their case referencing systems, however the same should be done for statistical referencing. KP statistics do not reflect ML prosecutions or their outcome. The assessment team was informed that the KP are sometimes informed about prosecutions, however it is clear that such data is not systematically provided, nor is it systematically recorded by KP themselves.

701. It has been stated that the NCCEC within the KPC will coordinate statistics and collect information. KPC will manage the unified database on statistics covering prosecution services. Each institution has a coordinator responsible for statistics. Leading institution responsible for collecting statistics from various institutions will be the coordination body within the KPC.

702. The statistics given by prosecutors indicate a gradual increase in the case load for ML offences handled by them, and the growing backlog of cases. Since ML crimes belong to the exclusive competence of the SPRK, which deals with a large number of other offences with only 10-15 prosecutors at its disposal, it is apparent that a change in approach should be eventually considered. Also, SPRK lack of capacity to deal with a growing number of ML cases could be demotivating to law enforcement, who would be reluctant to seek out criminal proceeds even when there is an obvious proceeds-generating predicate in play.

703. The increasing case-load of prosecutors coincided with a sharp drop in the number of ML cases reported to them by the KP in 2012 (according to KPC statistics). If one takes the KP statistics for ML cases investigated, the same sharp drop in investigations is recorded, but in 2011. Putting aside the issue of conflicting statistics, it can nevertheless be deducted that there has been a drop in the KP activity to investigate and refer ML cases to prosecution in the recent years. It is unclear what the cause is for this but it is a clear indicator of decreasing effectiveness. This is also confirmed by the fact that there is no rising rate of convictions (which could have pointed to an increase of quality while sacrificing quantity).

704. In 2013, the number of ML cases reported by the KP increased. However, during this year, according to the KPC statistics,[114] 45.61% of the AML criminal reports were dropped or closed before investigation and for 52.63% the investigations were ceased, leaving only 1.76% of cases ending with an indictment being filled. No statistics were provided to the assessment team on the reasons why no further action was taken for so many reports and why so few cases ended in an indictment being filled. During the interviews, it also appeared that the level of awareness of Prosecutors on ML matters could be significantly improved as, for example, some considered that tax evasion is not a predicate offence for ML. From a general perspective, the assessment team urges the Kosovo authorities to greatly strengthen their commitment to prosecute ML cases and to take appropriate measures in order to increase the number of cases ending in an indictment being filed.

***Police/FIU cooperation***

705. The assessment team was informed that, in the past, the police had had a difficult history in cooperating with the FIC, oftentimes due to the lack of clarity in the materials submitted by the FIC. The situation is apparently improving, however the assessment team has concerns with the insufficient feedback being provided to the FIU on the outcome of police investigations. Since 2013, KP communicates with FIU through the goAML system, which has facilitated and accelerated communication. According to the FIU, there is an improvement of cooperation with the KP with regard to the feedback received on the cases transmitted.

706. The KP were able to inform the assessment team of one successful investigation employing the use of FIU material with regard to a former judge convicted of 10 years imprisonment.

707. The KP have provided the following statistics with regard to the processing of materials received from the FIU:

***Table 14: Processing of material received from FIU***

| Reference/cases | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|
| Received from FIU | 18 | 31 | 22 | 45 |
| Under investigation | 4 | 3 | 4 | 13 |
| Preliminary investigations | | 3 | 6 | 3 |
| PPN under investigation | | 3 | 6 | 19 |
| Closed cases | | 7 | 3 | 3 |
| Special report | 8 | 2 | 10 | 1 |
| Criminal charges | 2 | 2 | | 1 |

708. As explained above, after the receipt of a file from the FIU the KP carry out a preliminary investigation to check the information contained in the FIU report. If the preliminary investigation confirms the FIU findings, then a request to open a proper criminal investigation is filed to the Prosecutor. From the abovementioned statistics it is apparent that on average 10-25 % of FIU cases go beyond the pre-investigation stage. The statistic seems to be more or less stable. This is a fact that is worrying in itself, as it demonstrates and confirms the absence of proper feedback from KP to the FIU. Such feedback could have allowed the FIU to fine-tune its analytical approach, which would ultimately result in less cases being turned down by KP. The assessment team was informed during the Cycle 2 on-site visit that, following the observations of the assessment team in

114. Annual report 2013 on Harmonisation of Statistics – Inter-Institutional Mechanism for Harmonisation of Statistics for Characteristic Criminal Offences, page 62.

the Cycle 1 Report, as of 2013, the FIU received feedback information from the KP and this included the period 2009-2013. For that time period, the KP has sent to the FIU feedback information with regard to the results in about 96 cases. Whereas the provision of feedback information started also recently by the TAK and the KC.

709. While the assessment team has identified several deficiencies in the analytical capacities of the FIU (see analysis in section 2.6 of this Report), the sample FIU materials provided to the evaluation team do demonstrate a result-oriented and rather informative analysis. Hence the gaps in the intelligence-investigation-prosecution chain do not solely fall to the FIU, but to a large extent the KP and SPRK, especially since there is such a large percentage of cases rejected at the preliminary investigation phase. Furthermore, such a mass rejection of cases means that from 75-90 % of FIU resources and staff-time used to generate case materials are rendered irrelevant. This is a rather demotivating statistic, which should be improved as soon as possible through improving FIU-KP collaboration, and this should be made an urgent priority of the NCCEC.

***Effectiveness***

710. The various shortcomings or weaknesses identified in the system as indicated above together with the inadequate statistics maintained and the insufficient awareness in the SPRK about the need to prosecute for ML and TF raise concerns on the effectiveness of the investigative and prosecutorial system for ML and TF related offences.

711. Moreover, the lack of indictment and of convictions for ML cases does not permit to consider that, when conducting investigations of ML and underlying predicate offences, power for competent authorities to obtain documents and information for use in those investigations and in prosecutions and related actions is fully effective.

### 2.7.2. Recommendations and Comments

712. The office of the NCCEC should urgently design measures to continue to increase FIU-KP collaboration and monitor their implementation in order to increase the efficiency in the use of FIU resources by the KP.

713. Statistics on the reasons why cases are dropped or investigations ceased should be maintained by KPC in order to understand how the investigation process could be improved in order to increase the very low number of indictments for ML. There should also be a legal obligation on the maintenance of statistics by all stakeholders - refer to the analysis of Recommendation 32 within the context of Recommendation 23 in Section 3 of this Report for recommendations in this regard.

714. The police liaison officer placed in the FIU following the signing of the MoU should become the main channel of feedback between the two agencies, particularly with regard to the supply of information on the progress of FIU cases. This should be explicitly specified in the text of the MoU. Additionally the FIU should hold regular consultations and coordination meetings with the KP ML Unit on issues pertaining to the content of supplied material.

715. It is recommended to introduce objective and transparent criteria for appointment/dismissal of the General Director and top management of the KP in order to ensure operational independence of the KP (see description in the AC Report, Section 2.3).

716. It is further recommended to adopt guidelines for the KP concerning the approval of exceptional outside engagement for police officers and establish a limit for the remuneration on such engagements (see description in the AC Report, Section 2.3).

717. The KPI role should be expanded to include an evaluation on whether KP is effective and 'fit for purpose'.

718. There should be a concerted effort to clear the backlog of ML cases in the prosecutorial system.

719. Kosovo competent authorities should continue their late effort in order to review ML/TF trends and techniques on a regular interagency basis with detailed input from the police and prosecution.

720. Kosovo authorities should introduce in the legislation a clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved.

### 2.7.3. Ratings for Recommendation 27 & Recommendation 28

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.27** | **PC** | • the lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy;<br>• increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness;<br>• KP has only recently started to provide feedback to FIU on cases, thus measurement of the overall effectiveness of the system cannot be undertaken;<br>• no systemic feedback provided by prosecutors to KP and other law enforcement bodies on the outcome of prosecutions;<br>• sharp drop in numbers of ML cases reported by the KP to SPRK in 2012 indicates decreasing effectiveness of the police in pursuing ML;<br>• there is insufficient awareness in the KP about the need to proactively pursue criminal proceeds when dealing with acquisitive crime;<br>• there is insufficient awareness in the SPRK about the need to prosecute for ML; and<br>• no clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved. |
| **R.28** | **LC** | *Effectiveness:*<br>• The lack of indictment and of convictions for ML cases does not permit to consider that, when conducting investigations of ML and underlying predicate offences, power for competent authorities to obtain documents and information for use in those investigations and in prosecutions and related actions is fully effective. |

## 2.8. Cross border declaration or disclosure (SR.IX)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law";
- Customs and Excise Code of Kosovo (Law No. 03/L-109 of 10 November 2008);
- Law on Amending and Supplementing Customs and Excise Code No. 03/L-109 (Law No. 04/L-099 of 3 May 2012).

### 2.8.1. Description and Analysis

721. SR IX, dealing with cash couriers, requires countries to have measures in place to detect the physical cross-border movement of currency and bearer negotiable instruments; the power for competent authorities to take action where there is suspicion that such movements are related to ML or the FT; and the power to impose effective, proportionate and dissuasive sanctions where there are breaches of regulations in this regard and where physical cross-border movements are related to ML or FT.

***Cross border transportation of currency or bearer instruments – Essential Criterion SR.IX.1***

722. EC SR.IX.1 requires countries to put in place either a system of declaration or a system of disclosure for incoming and outgoing cross boarder transportation of currency or other bearer negotiable instruments.

723. The KC Service has implemented a system of cross border currency and negotiable instruments control since 2004. This is now implemented through Article 29 – obligation to declare – of the AML/CFT Law. The system envisages that every person entering or leaving Kosovo and carrying monetary instruments of a value of Euro ten thousand (€10,000) or more must declare the amount of the monetary instruments and the source of such monetary instruments in writing, in a format prescribed by the KC, to a customs officer, and, if so requested by the officer, shall present the monetary instruments. The same obligation extends to the sending/receipt of monetary instruments via post or commercial courier.

724. In June 2011 in terms of Article 29 of the AML/CFT Law, KC issued Internal Instruction No. 96/2011 on "The Content and Form of Standard Forms/Certifications defined with Article 29 of the Law on Prevention of Money Laundering and Financing of Terrorism No. 03/L-196". Through four separate Annexes, the Instruction introduces:

- The form for declaration of monetary means;
- Certification for imposing fines and confiscation of monetary means;
- Additional annex of certificate regarding the imposition of fines and the confiscation of monetary means; and
- The process for initiation of violation procedure in competent Court for violation.

***False declarations/disclosures – Essential Criteria SR.IX.2 to SR.IX.4***

725. Overall EC SR.IX.2 to EC SR.IX.4 require that in case of false declarations or disclosures the authorities have the right to demand further information, and should be in a position to stop or restrain the movement of currency or bearer negotiable instruments if there is ML or TF suspicion. The relevant authorities should retain appropriate statistics on false declarations or disclosures.

726. A declaration is considered to be false if it contains incorrect or incomplete information. In case this occurs the KC have the power to seize and detain monetary instruments which have been falsely declared or undeclared (paragraph (12) of Article 29 of the AML/CFT Law). KC authorities also have the power to question and search natural persons and their baggage (paragraph (11) of Article 29 of the AML/CFT Law). The powers to restrain currency, as well as to question and search persons apply equally when there is a reasonable suspicion that monetary instruments are the proceeds of crime or were used or intended to be used to commit or facilitate ML or the predicate criminal offence from which the proceeds of crime were derived or are related to TF.

727. KC statistics keep statistics about trans-border transport of currency and negotiable instruments.

***Table 15: Trans-border transport of currency and negotiable instruments***

| Year | Businesses | Natural persons | Total number of cases of declarations per year |
|---|---|---|---|
| 2008 | 536 | 443 | 979 |
| 2009 | 608 | 360 | 968 |
| 2010 | 653 | 349 | 1,002 |
| 2011 | 731 | 705 | 1,436 |
| 2012 | 769 | 622 | 1,391 |
| 2013 | 553 | 583 | 1,136 |

728. KC authorities have indicated that on the occasion of a declaration or confiscation, the forms pursuant to the Administrative Instruction 96/2011 have to be filled-in, thus creating a hard copy which is then forwarded to the KC Intelligence Sector for further supplements. The

information is then saved in the electronic database of the KC Intelligence Sector and in the meantime it is forwarded through the goAML system to FIU for further processing and analysis. This information is kept in electronic form in the database of KC as well as in a physical folder (hard copy), however the assessment team has not seen any regulatory documents confirming this.

***Information on declarations available to FIU – Essential Criterion SR.IX.5***

729. EC SR IX.5 requires that the information obtained by Customs through the implemented system of declarations or disclosures should be made available to the FIU

730. KC forwards copies of all declarations to the FIU. This is done through the goAML system. KC also report all suspicious ML/TF incidents to the FIU in the form of an STR. So far KC have sent 4 such STRs to the FIU.

***Table 16: Kosovo Customs on cross border cash notifications to the FIU***

| Year | Number of Cases |
|---|---|
| 2010 | 1,002 cases |
| 2011 | 1,436 cases |
| 2012 | 1,391 cases |
| 2013 | 1,136 cases |

***Cooperation with relevant competent authorities – Essential Criterion SR.IX.6***

731. EC SR.IX.6 requires adequate co-ordination at domestic level between customs, immigration and other related authorities on issues related to cross-border movements of currency and bearer negotiable instruments.

732. KC co-operates closely with KP, FIU, Integrated Border Management agencies and EULEX. Joint operational exercises are held on all cross border irregularities and all forms of crime which includes cash couriers. There is a 6 monthly report on developing risk areas to be focussed on. The list of joint operations is provided below.

- 2013 - 50 joint operations between the KC and the KP were carried out that involve economic crimes, narcotics, organised crime, border lines and traffic police etc.
- 2012 - 132 joint operations were organised;
- 2011 - 115 joint operations were organised;
- 2010 - 98 joint operations were organised.

733. These joint operations included several special operations targeted at cash seizures, which produced results. In this regard the overall *modus operandi* of KC in terms of interagency cooperation can be considered effective.

734. KC report good feedback at the investigation phase from KP. KC has a designated official contact point between KC and KP for facilitating the exchange of information and for the acceleration of the process of exchange of information (intelligence) and also for coordinating common actions between the two agencies. Also, another liaison officer is designated as the contact point between KC and the Unit of Tax investigations in the framework of the TAK, who has a role to accelerate the process of exchange of information and coordination of common actions.

735. KC is part to the Memorandum of Cooperation establishing the National Coordinator's Office for Fight against Economic Crime (involving KPC; KJC; MoJ; MIA; CBK; KAA; and KIA) in order to increase cooperation between all the law enforcement agencies and exchange of information.

***Cooperation at the international level – Essential Criterion SR.IX.7***

736. EC SR.IX.7 requires countries to allow for the greatest possible measure of co-operation and assistance amongst competent authorities at the international level consistent with Recommendations 35 to 40 and Special Recommendation V.

737. KC have signed co-operation agreements with Albania, Finland, Turkey, Slovenia, "the former Yugoslav Republic of Macedonia", Montenegro, France, Hungary and Austria. With neighbouring countries, such as "the former Yugoslav Republic of Macedonia" and Albania Customs KC has instituted integrated data-sharing mechanisms. KC use the facilities within ILECU as a communication channel with those Customs Services in the regional ILECU group (for more information on ILECU see Section 6.3 of this Report).

738. If there were specific cases, KC would co-operate with the relevant authorities of other countries (where a co-operation agreement exists) in respect of any investigations into the smuggling of gold, precious metal and precious stones, including those where ML is suspected, within the constraints of the existing legislation. To date, KC has not recorded an instance of this kind of smuggling linked to actual or suspected ML.

739. KC have implemented service standards on the turnaround of international information requests as follows:

- 10 days when dealing with submissions within a normal time limit
- 5 days when dealing with priority submissions
- 1 day when dealing with top priority submission
- Within a day when dealing with urgent submissions

740. These turnaround times are considered by the assessment team to be generally adequate.

***Sanctions – Essential Criteria SR.IX.8 to SR.IX.11***

741. EC SR.IX.8 and EC IX.9 require that sanctions contemplated under Recommendation 17 are applicable to a person who makes a false declaration or disclosure and to any person who carries out a physical cross-border transportation of currency or bearer negotiable instruments related to ML or FT. EC SR.IX.10 and EC SR.IX.11 require that confiscation and freezing measures contemplated under Recommendation 3 and Special Recommendation III are also applicable to persons who carry out a physical cross-border transportation of currency or bearer negotiable instruments related to ML or FT.

742. KC have the power to investigate customs offences and are to be considered as having the competencies and responsibilities of police or judicial police for these investigations.[115]

743. The KC can apply sanctions to persons who make a false declaration or disclosure. These sanctions vary from referral for investigation/prosecution of a criminal offence, confiscation of the entire sum of currency to an administrative penalty amounting to 25% of the value. Upon seizure the authorised customs officer shall issue to the concerned person a written receipt stating the relevant facts and the amount of the monetary instruments seized and retained. The monetary instruments seized shall, where possible, be held in a special non-interest bearing account in the name of the CBK or otherwise beheld in safe custody with CBK until such time as the required fine is paid in full.

***Table 17: Kosovo Customs cash seizures where a penalty has been imposed***

| Year | Number of Cases |
|---|---|
| 2010 | 3 detected cases where the undeclared cash seized amounts €43,870 (25% of undeclared cash). |
| 2011 | 30 detected cases where the undeclared cash seized amounts €162,241 (25% of undeclared cash). |
| 2012 | 13 detected cases where the undeclared cash seized amounts €94,058 (25% of undeclared cash). |
| 2013 | 9 detected cases where the undeclared cash seized amounts €81,875 (25% of undeclared cash). |

744. Where money has been seized, after 10 days the Prosecutor can apply for its freezing, confiscation or release to the owner.

115. Customs and Excise Code No. 03-L-109, Articles 302 & 303.

745. KC have referred the following cases to the Prosecutor:

- In 2010, 49 criminal charges have been forwarded to the competent prosecutor for suspicion of tax evasion in the amount of €4,233,035;
- In 2011, 36 criminal charges have been sent to the competent prosecutor for suspicion of tax evasion in the amount of €7,071,222;
- In 2012, 37 criminal charges have been filed to the competent prosecutor for suspicion of tax evasion in the amount of €23,482,723; and
- In 2013, 159 criminal charges have been filed to the competent prosecutor for suspicion of tax evasion in the amount of € 5,787,914.

746. In many of these cases there was evidence of ML. There is no feedback on the outcome of these cases, if indeed there is an outcome yet due to delays in the judicial system. For this reason, KC have recently appointed a liaison officer working directly with the prosecutorial services, tracking the customs related cases and ensuring that they are processed at a faster speed. The assessment team has not been able to verify the practical output and effectiveness of this arrangement, however KC subsequently reported that with the appointment of a liaison officer there has been progress in exchanging feedback and also in speeding up the review of several cases that are considered of high importance.

***Notification to competent authorities of other countries – Essential Criterion SR.IX.12***

747. EC SR.IX.12 requires that if a country discovers an unusual cross-border movement of gold, precious metals or precious stones it should consider notifying the competent authorities of the country from which these items originated or to which they are destines. In this regard countries should co-operate to determine the reason for such movement and to take coordinated appropriate actions.

748. Both the AML/CFT Law and the Customs and Excise Code (Law No. 03/L-109 of 2008) are silent on this matter.

749. However, as indicated above Kosovo has signed various coordination agreements with a number of countries. Should such an event occur it is most likely that Kosovo could apply such agreements in order to cooperate with the countries involved in order to determine the reason for such movements.

***Data Protection in KC systems***

750. KC complies with the protection of personal data as required by the Law on the Protection of Personal Data, Law No. 03/L-172. Systems used for international transactions that hold personal data restrict access to specific authorised persons from the Directorate of Law Enforcement.

**Recommendation 30**

***Structure and resources –Essential Criterion 30.1***

751. EC 30.1 requires that the relevant competent authorities involved in combating ML and FT are adequately structured, funded, staffed and provided with the sufficient technical and other resources to fully and effectively perform their functions.

752. Total KC staff number 584. Staffing levels for specialist units are as follows: investigation - 15; intelligence – 18; anti-corruption - 4. KC believes the structure and funding is appropriate for its duties.

753. With the restructuring of the KC as of 1 January 2014, the key vacant postitions at the KC have been filled-in.

754. In February 2014, the KC and the TAK have signed an MoU for the integration of the Tax Investigation Unit of Kosovo, which currently functions under the auspices of the TAK and the Investigation Sector which functions within KC, in one functional department for the performance of joint duties and activities. This memorandum enabled for 18 officers of the Tax Investigation Unit to join KC and to increase the number of staff at the Investigation Department.

***High professional standards – Essential Criterion 30.2***

755. In accordance with EC 30.2 staff of relevant competent authorities should be required to maintain high professional standards including confidentiality of information, and should be fit and proper, including appropriately skilled, for their work

756. There is no efficiency scrutiny of the Department although Internal Audit reports on Departmental spending to the Kosovo Auditor General. KC are required to maintain highest standards of professionalism including standards related to confidentiality, integrity, honesty and proper skills. There have clearly been corruption issues within KC, however no indictments have occurred. Measures mostly taken were suspension and other disciplinary sanctions. In 2003 they instituted a Professional Standards unit and by 2009 had added an Internal Inspection Unit dealing with anti-corruption within the department. In June 2013 a new internal Code of Ethics has been adopted in KC, and in April 2014 there was an increase in the salaries of Customs Officers which is expected to positively impact their motivation and efficency.

***Training – Essential Criterion 30.3***

757. EC 30.3 requires that staff of relevant competent authorities be provided with adequate and relevant training for combating ML and FT.

758. The Training Section of KC has identified training needs of staff involved in combating organised crime. In 2012 the following specialised training has been provided: US OTA - Commercial Based Money Laundering/Secret Operations/Money Laundering Advanced Analysis/Advanced Techniques of Financial Analysis; EULEX - Presentation against Money Laundering/Confiscation of Assets; Embassy of France - Informant Recruitment and Management; EXBS - Control of Hidden Places in Transport Means.

### 2.8.2. Recommendations and Comments

759. Overall the assessment team found the powers and practical functioning of the KC authority to be in compliance with relevant international standards to a very high level. However some shortcomings identified in the above analysis still pose a certain degree of concern for the assessment team, especially given the extent and scope of operations of KC.

760. The role of the KC authority in Kosovo is especially important given the wider regional consequences of the drug and weapons trafficking and organised crime,[116] that originates/transits from/through Kosovo. In this regard consideration should be given to ensure a high level of motivation and integrity among staff.

761. A periodic external fit-for-purpose evaluation should be carried out with regard to KC in order to assess function, structure, effectiveness and value for money. The results should be made public.

### 2.8.3. Rating for Special Recommendation IX

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.IX** | **LC** | • no record-keeping rules in KC with regard to information on declarations/false declarations and suspicions of ML/TF; and<br>• prosecutor does not provide structured feedback on cases referred by KC. |

116. See EUROPOL EU Serious and Organised Crime Threat Assessment, 2013, pp. 9, 12 and 31.

## 3. PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS

### *Main Legal Framework*

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law";
- Law on Central Bank of Kosovo (Law No. 03/L-209 of 22 July 2010), hereafter "Law on CBK";
- Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions (Law No. 04/L-093 of 12 April 2012), hereafter "Law on Banks";
- Law on Pension Funds of Kosovo (Law No. 04/L-101 of 6 April 2012) hereafter "Law on Pension Funds";
- UNMIK Regulation No. 2001/25 on the Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries, hereafter "UNMIK Regulation 2001/25";[117]
- Law on Payment System (Law No. 04/L-155 of 4 April 2013);
- Central Banking Authority of Kosovo (CBAK) - Advisory Letter 2007-1 of May 2007 on the Prevention of Money Laundering and Terrorist Financing;[118]
- Central Banking Authority of Kosovo (CBAK) – Rule X on the Prevention of Money Laundering and Terrorist Financing;[119]
- Central Bank of Kosovo (CBK) - Regulation for International Payments of January 2014;
- Financial Intelligence Centre (FIC) and Financial Intelligence Unit (FIU) - Administrative Directives and Administrative Instructions.

### *CBK Rules and Regulations*

762. The CBK has issued Rule X on the Prevention of Money Laundering and Terrorism Financing and Advisory Letter 2007/1 as guidance to the financial sector for compliance with the obligations under the AML/CFT Law. The assessment team has identified various shortcomings in Rule X and the Advisory Letter. However the CBK has informed that following the amendments to the AML/CFT Law and the signing of the MoU with the FIU delegating supervisory powers under the AML/CFT Law to the CBK in accordance with Article 36A of the AML/CFT Law for the entire financial sector, the CBK will be withdrawing Rule X and the Advisory Letter which will be replaced by a new more comprehensive Regulation that reflects the amended AML/CFT Law and which will be applicable to all banks and financial institutions authorised under the Law on Banks.

763. The assessment team, in acknowledging and welcoming this initiative by the CBK, note the arrangements for temporary delegated powers to the CBK to issue regulations under certain conditions under the MoU between the CBK and the FIU whereby the CBK is delegated supervisory powers under Article 36A of the AML/CFT Law.

764. Notwithstanding, and because at the time of the on-site visit the Regulation was still in draft form under a consultation process, this Report will make reference to the identified shortcomings in Rule X and the Advisory Letter for the sake of continuity and accuracy of the current situation, but will cover these through references to the proposed provisions of the draft Regulation. However the proposed Regulation will not be taken into consideration for rating purposes of the relevant FATF Recommendations.

### *Scope of coverage of AML/CFT preventive measures*[120]

765. According to Article 16 of the AML/CFT Law banks and financial institutions providing a financial activity as defined in the AML/CFT Law are subject to the provisions and obligations under the AML/CFT Law.

117. A draft law covering the insurance sector is under process.

118. In the Report referred to as being issued by CBK.

119. In the Report referred to as being issued by CBK.

120. For further information on the financial sector please refer to Section 1.3 of this Report.

766. The AML/CFT Law defines a 'bank' according to the definition provided thereto through the Law on the CBK. The latter defines a bank as 'an entity as defined in the Banking Law'. The Law on Banks in turn defines a bank as 'a shareholder company engaged in the business of banking, including a subsidiary or a branch of a foreign bank'. The Law on Banks further defines the 'business of banking' as 'the business of accepting deposits from the public and employing such funds either in whole or in part for the purpose of granting credit or making investments at the bank's own risk'.

767. In accordance with Article 44 of the Law on Banks, banks may be authorised in their licences to engage in the following financial activities:

- receiving deposits (in the form of demand deposits, time deposits, or other forms of deposit), whether bearing interest or not, in any convertible currency;
- buying and selling for a bank's own account debt securities issued or guaranteed by governments or central banks of Kosovo or the European Union that are denominated and payable in the currency of the bank's deposits;
- providing payment and collection services;
- issuing and administering means of payment (including payment cards, travellers' cheques and bankers' drafts);
- buying and selling foreign exchange for cash for the account of a customer;
- providing for safekeeping of securities and other valuables; and
- extending credit, including: consumer and mortgage credit; factoring with or without recourse; and financing of commercial transactions and buying and selling assets from another bank or financial institutions;
- borrowing funds and buying and selling for a bank's own account or for the account of customers (excluding underwriting) of money market instruments (including notes, bills of exchange and certificates of deposit); debt securities; futures and options relating to debt securities or interest rates; or interest rate instruments;
- acting as intermediary between borrowers and lenders (money brokering);
- financial leasing;
- providing credit information services;
- providing services as a financial agent or consultant (not including services described in sections…);
- dealing in gold or one or more currencies other than the currency in which the bank's balance sheet is denominated, including contracts for the future purchase or sale of foreign currencies;
- providing trust services, including, the investment and administration of funds received in trust and administration of securities;
- providing services as an investment portfolio manager or investment adviser;
- underwriting and distribution of debt and equity securities and dealing in equity securities;
- islamic finance or Islamic banking, with the consent of the CBK and subject to such conditions and in compliance with such regulations as the CBK may prescribe;
- any other activity that the CBK shall determine by regulation is related to a financial activity and that does not conflict with the provisions of this Law.

768. The definition of a 'bank' is consistent with the European definition for such institutions in the relevant European Union Directives.

769. The AML/CFT Law defines a 'financial institution' as a person or entity that conducts one or more of the activities for or on behalf of a customer including activities shown below:

- lending, including but not limited to consumer credit; mortgage credit; factoring (business for buying cheques, obligations etc), with or without recourse; and finance of commercial transactions, including forfeiting;
- financial leasing, except financial leasing arrangements related to consumer products;
- transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system;
- money and currency changing;

- issuing and managing means of payment, including but not limited to credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, or electronic money;
- financial guarantees and commitments;
- trading on behalf of other persons or entities in one or more of the following:
  - money market instruments, cheques, bills, certificates of deposit, derivative products (coming from another activity etc);
  - foreign exchange;
  - exchange, interest rate and index instruments;
  - transferable securities; and
  - commodity futures trading;
- individual and/or collective portfolio management;
- participation in securities issues and the provision of financial services related to such issues;
- safekeeping and administration of cash or liquid securities on behalf of other;
- otherwise investing, administering or managing funds or money on behalf of other persons;
- acting as an insurance company, life insurance company or intermediary of life insurances as defined in Article 1 of UNMIK Regulation No. 2001/25 of 5 October 2001 on Licensing, Supervision and Regulation of Companies and Insurance Intermediaries; and 4
- acting as a fiduciary as defined in section 1 of UNMIK Regulation No. 2001/35 of 22 December 2001 on Pensions in Kosovo.

770. The Law on the CBK further defines a 'financial institution' as 'entities such as banks, foreign exchange offices, insurance companies, pension funds, and other entities conducting financial activities, as defined in any Law relevant for the purposes of this Law, for which the CBK is given supervisory authority by Law'.

771. The Law on Banks does not define a 'financial institution' except to the extent that for the purposes of the Law on Banks the term includes banks, MFIs and NBFIs. But the Law on Banks provides a definition of what constitutes a 'non-bank financial institution' as 'a legal entity that is not a bank and not a MFI that is licensed by the CBK under this Law to be engaged in one or more of the following activities: to extend credit, enter into loans and leases contracts, financial-leasing, underwrite, trade in or distribute securities; act as an investment company, or as an investment advisor; or provide other financial services such as foreign exchange and money changing; credit cards; factoring; or guarantees; or provide other financial advisory, training or transactional services as determined by CBK'.

772. It is worth noting that the definitions of a 'financial institution' provided by the AML/CFT Law and the Law on the CBK include the insurance sector.

773. Although there are very close similarities to the financial activities that can be undertaken by financial institutions or NBFIs as defined in the AML/CFT Law, in the Law on Banks and in the Law on the CBK, when taking into consideration the permitted financial activities under Article 94 of the Law on Banks, there remain some divergences between these definitions that could impact on the application of the international standards as reflected in domestic legislation for the licensing or registration of all types of financial institutions, including the application of the obligations under the AML/CFT Law.

774. Moreover, the Law on Banks also provides a definition of a 'Microfinance Institution' (MFI) being 'a legal entity organised as either an NGO under the NGO Law or as a JSC under the Law on Business Organisations which provides as its primary business loans and a limited number of financial services to micro and small legal entities, low-income households and low-income persons'.

775. Although there are no other definitions of a MFI in the Law on the CBK and in the AML/CFT Law it is clear from the permitted financial activities as defined in Article 93 of the Law on Banks that MFIs would be caught under the definitions of 'non-bank financial institution' given above and would therefore fall subject to the obligations of the AML/CFT Law.

## 3.1. Risk of money laundering or terrorist financing[121]

776. In September 2013, the MoF issued Administrative Instruction No. 04/2013 on National Money Laundering and Terrorist Financing Risk Assessment that tasked the FIU with its implementation in cooperation with other stakeholders and reporting entities.

777. By having issued Administrative Instruction MF No. 04/2013 on National Risk Assessment for ML and TF in accordance with Article 27 of the amended AML/CFT Law, the MoF established an overall platform for the undertaking of a national risk assessment including identification, analysis and evaluation of risks. The Administrative Instruction lays down the procedures to be followed and the criteria to be observed by the FIU to undertake and co-ordinate with other competent authorities a national risk assessment every five years. The first national risk assessment was completed by November 2013.

778. In November 2013 the Government of Kosovo published a document on the 'National ML and TF Risk Assessment of Kosovo 2013' - (NRA). The document is complemented by two Annexes: Annex 1 providing an analysis and evaluation matrix for individual identified risks and Annex 2 providing an Action Plan for the treatment measures to be applied for the identified risks. The document is part of the EU funded project for support to Kosovo institutions in combating financial and economic crime.[122] The NRA document was endorsed by the Government in December 2013.

779. The document identifies threats and vulnerabilities to which Kosovo is exposed while analysing and evaluating them to provide mitigating measures to be applied accordingly. The results indicate that ML, TF and other financial and economic crimes are considered to be mostly hidden crimes.

780. In January 2014 the NRA document was followed by the National Strategy of Kosovo and its Action Plan for the prevention of and fight against the informal economy, ML, TF and other economic and financial crimes for the period 2014-2018.

781. Notwithstanding the NRA, the CBK has not undertaken a risk assessment of ML and FT vulnerabilities within the financial sector. It does however require banks and financial institutions to undertake a risk assessment of their activities, products and services to identify their vulnerabilities to ML and the FT and develop their internal control systems accordingly.

782. Indeed while Kosovo has, within a relatively short period of time – approximately two months – carried out a NRA it has not undertaken a sectorial risk assessment. The assessment team has been informed that the sectorial risk assessment will be carried out gradually starting from a risk assessment of the construction sector.

783. The CBK has informed that it has developed a methodology for a risk based approach to supervision and it has eventually introduced the CAMEL (Capital, Assets, Management, Earnings and Liquidity) methodology. However, the CAMEL methodology[123] is internationally applied for prudential purposes as it is not designed to identify issues related to ML or the FT. Hence it appears that a risk based supervisory approach for the purposes of examining compliance with ML and FT preventive measures is not applied within the financial sector.[124]

784. Consequently, as is shown under Section 1.3 of this Report, Kosovo has not excluded any financial activity from the obligations under the AML/CFT Law.

121. For further information on the risk of ML and the FT, please refer to Section 1.6 of this Report.

122. The project is managed by the EU office in Kosovo and implemented by B&S Europe.

123. Which now includes an 'S' at the end for 'market Sensitivity', becoming 'CAMELS'.

124. The CBK eventually claims that it has developed a Supervisory Manual which includes a risk-based approach.

## 3.2. Customer Due Diligence (R.5 (*)[125])

### 3.2.1. Description and Analysis

785. FATF Recommendation 5 requires the application of CDD measures as defined in the Recommendation to be applied in specific circumstances as defined by law. It also requires that where CDD cannot be satisfactorily completed, then business should not be undertaken, accounts closed and a STR possibly be filed with the relevant authorities.

786. While maintaining some of the main elements of the international definition of CDD, paragraph (1) of Article 17 of the AML/CFT Law makes it mandatory on reporting subjects to apply these requirements. Paragraph (1) of Article 17 therefore requires all reporting subjects to apply a risk-based approach in their customer acceptance procedures with the application of enhanced measures for higher risk customers; the identification of the beneficial owner and verification of identification thereof together with an obligation for the understanding of the ownership and control structure of the customer; and obtaining information on the nature and intended purpose of the relationship together with ongoing monitoring.

787. Notwithstanding this definition, the AML/CFT Law does not refer to CDD any further. In accordance with the provisions of paragraph (2) of Article 17, there is no obligation for reporting subjects to apply the full CDD measures in the circumstances and timing as specified therein but only the application of the identification and verification measures to customers (not including beneficial owners) and thus creates legal ambiguity. Indeed, under Article 21 the AML/CFT Law creates a distinction between 'customer due diligence' and 'identification measures', even though the latter is a component of the former. Indeed, paragraph (3) of Article 21 of the AML/CFT Law states that *The requirements for identification and customer due diligence is deemed to be fulfilled, even without the physical presence of the customer, in the following cases:*

788. It should be noted that Article 23 of the AML/CFT Law covers obligations of banks and financial institutions in maintaining adequate internal programmes. The obligations established by paragraph (2) of Article 23 in detailing the coverage of the internal programmes does not cover the requirement to have procedures in place for banks and financial institutions to undertake CDD measures but only to undertake those for the first component, being the identification of the customer (without reference to the verification process) and excluding all other components of the CDD measures as implied and defined under the Law itself under paragraph (1) of Article 17, thus creating further legal ambiguity on the application of the full CDD measures.

789. Article 6 of Rule X of the CBK provides a slightly different version of CDD measures but, in essence, it covers that provided by the AML/CFT Law under paragraph (1) of Article 17. The Rule requires banks and financial institutions to conduct thorough CDD as defined in the Rule. The obligation under Rule X to apply full CDD measures generally complies with the provisions of paragraph (1) of Article 17. Article 8 of the draft CBK Regulation provides financial institutions with guidance on the application of CDD through a broader definition of the constituents of the term 'customer due diligence'. This brings the definition more in line with the requirements under international standards.

790. It is to be noted that Rule X of the CBK is based on UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation which has been repealed by the coming into force of the new Law on Banks through Article 117 which states that *The United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/21 of 15 November 1999, UNMIK Regulation No. 2008/28 of 28 May 2008, and any amendments thereto are hereby replaced upon enactment of this Law. Any rules promulgated under such regulations shall continue in effect, to the extent they are not in conflict with this law or until modified or repealed by the CBK.* Rule X goes beyond the Law on Banks as this Rule reflects the measures under the AML/CFT Law.

791. Indeed Rule X of the CBK still makes references to UNMIK Regulation 2004/2 which has been completely repealed with the coming into force of the AML/CFT Law through Article 39 which states that *This Law repeals and replaces UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offence.*

125. In accordance with the FATF Standards Methodology, an asterixed (*) Recommendation or EC signifies that that Recommendation or EC should be covered by primary law or regulation.

792. The above also applies to the Advisory Letter 2007/1 of May 2007 on 'The prevention of Money Laundering and Terrorist Financing' of the CBK which is also based and provides links and references to the above mentioned repealed UNMIK Regulations.

793. Consequently, the validity of the Advisory Letter and Rule X of the CBK as 'regulation' for the purposes of the FATF Methodology is questionable. However concerns raised on the validity of Rule X and the Advisory Letter should eventually be heavily mitigated since, as already indicated, the CBK is in the process of replacing both documents with a new Regulation.

794. Finally, any reference to the provisions of Rule X and Advisory Letter 2007/1 of the CBK are retained for the sake of consistency with the current practice but such references, and in particular where requirements under a particular standard are expected to be found in law or regulation, are without prejudice to, and should be read and interpreted within, the context of the concerns expressed on the entire validity of both documents. Moreover, and for clarification purposes, references will be made to the proposed Regulation replacing both documents notwithstanding that the Regulation was still in draft form and on a consultation process at the time of the Cycle 2 on-site visit.

795. The absence of legal clarity on the application of the full CDD measures in the appropriate provisions of the AML/CFT Law has consequential impacts on the full obligations for CDD measures under international standards.

796. The divergences between the AML/CFT Law and the Rule X of the CBK with reference to the application of the CDD measures (Rule X reflects international standards), does not appear only on paper but is also impacting the effectiveness of the application of the obligations in line with international practices. This has been confirmed by some of the industry in the course of the on-site visits, even though in practice the industry claims to be applying the full CDD measures because institutions are aware of the international requirements, particularly where they form part of a larger international banking group.

797. Notwithstanding it is advisable that this anomaly in the AML/CFT Law be addressed immediately by ensuring that reporting subjects under Article 16 of the Law are obliged to apply full CDD measures under paragraph (2) of Article 17 as defined in paragraph (1) of Article 17 and hence in accordance with the obligations under Rule X, and as more specified under the draft CBK Regulation.

798. Moreover there is an urgent need for the CBK to issue the proposed Regulation to remove any concerns on both the content and the legality of Rule X consequent to the repeal of the supporting UNMIK Regulations and the coming into force of the Law on Banks and the AML/CFT Law. This should further remove anomalies and give more legal clarity to the industry and the authorities themselves. This also applies to the Advisory Letter 2007/1 of the CBK.

799. In this regard, in the course of the on-site visit the financial sector expressed a positive receptive position for the new Regulation as it appears to better reflect practice and harmonisation with international standards.

***Anonymous accounts – Essential Criterion 5.1****

800. Paragraph (1) of Article 18 of the AML/CFT Law specifically prohibits banks, credit[126] and financial institutions from maintaining anonymous accounts. Indeed paragraph (2) of Article 18 requires that banks and financial institutions are required to verify the name and address of their clients before carrying out any transactions with them.

801. The CBK has confirmed that banks in Kosovo never maintained anonymous accounts as this has always been prohibited by law. UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, being the fore-runner of the AML/CFT Law did not make

126. The term "credit institution" is not defined in the AML/CFT Law or the Law on Banks. The term is used in the AML/CFT Law (Article 18, Article 21, Article 31A and Article 31B) separate from reference to a "bank" implying that the two types of institutions are separate. Indeed, for example while paragraph (1) of Article 18 refers to "banks, credit and financial institutions" paragraph (2) of the same Article refers to "banks and financial institutions". This creates legal inconsistency and ambiguity in the AML/CFT Law.

references prohibiting anonymous accounts but required the verification of the name and address and date of birth (for natural persons) before opening of an account.

802. Indeed, Section 15.2 of Rule X of the CBK requires that *For all customer relationships in existence at the date on which this Rule comes into effect, banks and financial institutions shall apply the customer due diligence measures as set out in Section 6 by April 30, 2007.* It is presumed that even if banks held anonymous accounts, these should have been converted to nominative ones accordingly. The CBK has confirmed that this has been the case.

803. It is therefore unclear why paragraph (1) of Article 18, which was introduced in the 2013 amendments to the AML/CFT Law, requires that *Banks and financial institutions shall apply the measures set out in this Act to customers and their accounts who are anonymous, and such accounts may not be used to process transactions until the owners and beneficiaries of existing anonymous accounts or anonymous passbooks are made the subject such measures as soon as possible*. While on one side this is a positive move for compliance with FATF E.C. 5.18 (see below), it sheds some doubt on the CBK claim that anonymous accounts have always been prohibited by law and as such these types of accounts do not exist in Kosovo.

804. However, the AML/CFT Law does not prohibit banks and financial institutions from maintaining accounts in fictitious names. While this may be in accordance with the European Union Third AML Directive,[127] the maintenance of such accounts is not allowed under the FATF standards. Accounts in *fictitious* names may be accounts that are named but the name appearing on the account is a fictitious one even though the bank or financial institution may have applied and maintained records for the full CDD measures – but these accounts are not easily identifiable from normal named accounts. The beneficiaries of accounts in fictitious names would normally only be known to selected officers of the institution.[128]

805. Although from information available it does not appear that accounts in fictitious names exist or can be opened in Kosovo given the strict identification measures established for opening accounts in general, yet the AML/CFT Law does not prohibit banks and financial institutions form *maintaining* them. The CBK has confirmed that no such accounts exist in banks in Kosovo.

806. The prohibition on the opening and maintaining of anonymous accounts is adequately covered through the AML/CFT Law. In practice it cannot be ascertained whether banks and financial institutions maintain or do not maintain anonymous accounts coming from previous periods, although as stated, the CBK has confirmed that as a result of its on-site examinations banks and financial institutions do not maintain such accounts.

807. However, the lack of prohibition on the maintenance of accounts in fictitious names and the lack of guidance on such accounts could lead to abuse of the system and thus become a vulnerability for banks and financial institutions.

808. It is therefore highly advisable that paragraph (1) of Article 18 of the AML/CFT Law be amended to prohibit the opening and maintenance of accounts in fictitious names through the addition of the word 'and accounts in fictitious names' at the end of the paragraph – please refer also to EU Third AML Directive Article 6 below.

***When Customer Due Diligence is required – Essential Criterion 5.2****

809. EC 5.2 of the FATF Standards requires that financial institutions undertake full CDD measures in five specific instances:

a) establishing business relations;

b) carrying out occasional transactions above the applicable designated threshold (USD/€ 15,000);

127. 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 purposes of money laundering and terrorist financing - *OJ L 309, 25.11.2005, pp 15-36*.

128. Accounts in fictitious names could be similar to numbered accounts but carry a fictitious name as opposed to a predetermined number. However numbered accounts are easily identified and allowed under both the EU and the FATF Standards provided that full customer due diligence measures are applied accordingly. Numbered accounts are mainly used in private banking and should be subject to enhanced monitoring both by the institution and the supervisory authorities.

c) carrying out occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note to SR VII;

d) there is a suspicion of ML or TF, regardless of any exemptions or thresholds; or

e) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

810. Paragraph (2) of Article 17 of the AML/CFT Law requires reporting subjects to identify their customers and verify their identity in three specific instances, with one instance composed of three elements:

2.1. establishing business relations;

2.2. carrying out occasional transactions, when the customer wishes to carry out:

2.2.1. a transaction in an amount equal to or above ten thousand (10,000) Euro, whether conducted as a single transaction or several transactions that appears to be linked. If the amount of the transaction is unknown at the time of the operation, the identification shall be done as soon as the amount becomes known or the threshold is reached, or

2.2.2. a domestic or international wire transfer of funds;

2.2.3. doubts exist about the veracity or adequacy of previously obtained customer identification data;

2.3. there is a suspicion of money laundering or financing of terrorism.

811. Although there are similarities between the requirements under the FATF Standards and the AML/CFT Law, yet there are serious divergences which impact on both compliance with the obligations and on effectiveness.

812. As already indicated above while the FATF Standard is to undertake full CDD in the specific instances, the AML/CFT Law creates legal uncertainty in requireing the undertaking of the identification of the customer and the verification of the identity.

813. A closer comparison of the two requirements shows the following divergences:

(i) whereas the FATF Standard refers to circumstances when carrying out occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note for SR VII, thus creating a threshold of €1,000, the AML/CFT Law (Article 17(2.2.2)) does not create a threshold and could therefore lend itself to interpretation – either that the identification measures are to be applied for every transaction that is a wire transfer without any threshold or that the threshold is set at €10,000 consequent to paragraph (2.2.1). Indeed the timing of verification as established under paragraph (2) of Article 18 appears to be that established for an occasional transaction, which could be a wire transfer transaction, under paragraph (2.5). It should be noted that according to the Kosovo authorities the legislator opted not to make use of the threshold option (€1,000) and therefore included paragraph (2.2.2) "a domestic or international wire transfer of funds" where the identification and verification procedures have to be applied for any amount representing a wire transfer.

(ii) although paragraph (2.2.3) of Article 17 of the AML/CFT Law covers situations where doubts arise on the veracity or adequacy of previously obtained customer identification data, similar to item (e) of the FATF Standard, yet whereas the FATF Standard applies in all circumstances, the obligation under the AML/CFT Law applies only when the customer is carrying out an occasional transaction.

814. It is worth noting in the circumstances that the AML/CFT Law does not define 'occasional transaction'. However, a logical definition would be that for a transaction that is carried out outside an established business relationship and therefore is not part of a continuous business activity between the reporting subject and the customer. Indeed when defining a 'business relationship' Advisory Letter 2007/1 of the CBK states: *A business relationship with a bank or financial institution means to engage the financial services of the bank or financial institution for more than an occasional transaction or transactions*.

815. Administrative Directive 006 of 11 March 2008 issued by the Financial Intelligence Centre[129] requires banks and financial institution to have mechanisms in place whereby new and existing customers who are assessed as high risk, on the basis of established know-your-customer procedures, are checked against the United Nations (Taliban and Al Qaeda 1267) lists and the Specially Designated Nationals and Blocked Persons list issued by the US Treasury, Office of Foreign Assets Control (OFAC) of suspected persons and entities. This Report expresses concern on the validity of the Administrative Directive in the light that the Directive was issued under UNMIK Regulation 2004/2 which has been repealed with the coming into force of the AML/CFT Law which does not provide for the continuity of such Directives.

816. The CBK informed that some banks use software with these lists and update them from the lists received by them from the MFA. It has been stated that the lists are sent to the banks for information and to the relevant associations.

817. On the other hand some parts of the industry were not clear on how such lists are received and how these are applied in the CDD process. Some parts claimed that they had received a list of such persons attached to the Administrative Directive 003 of 16 February 2007 of the FIC and have never received any further lists.

818. The ambiguities arising out of the interpretation that may be given to the requirements under paragraph (2) of Article 17 for identifying customers indicate inconsistencies with the international standards and could impact negatively on their application by the industry.

819. Although the obligation under paragraph (2) of Article 17 is to identify the customer and verify the identity as opposed to the undertaking of the full CDD measures as specified in the Law itself, it follows that while there is an obligation to identify the beneficial owner (paragraph (1.2) of Article 17(1) on the definition of CDD) there is no reference for the application of CDD measures under the circumstances as defined by paragraph (2) of Article 17 of the AML/CFT Law – see also further comment for EC 5.5* below.

820. Moreover, it is further recommended to review sub-paragraph (2.2.1) and sub-paragraph (2.2.3) of Article 17 of the AML Law to remove their subjectivity to interpretation and ensure that the measures there-under are applied in the appropriate circumstances.

821. Finally it is recommended that further management on the circulation of the United Nations and other lists of designated persons and entities and further guidance on their application by the industry would be appropriate to further strengthen effectiveness.

***Required CDD measures - Identification of customer and verification of identity – Essential Criterion 5.3****

822. EC 5.3 requires that financial institutions identify their customers and verify the customer's identity using reliable, independent source documents, data and information.

823. Paragraph (2) of Article 17 of the AML/CFT Law requires reporting subjects to identify their 'customers' and to verify that identification by means of reliable independent source, documents, data or information. By definition (the AML/CFT Law defines a 'client' and not a 'customer' although for the purposes of this analysis the two terms are understood to refer to the same person) this includes both a natural person and an entity, but there is no reference to 'legal arrangements', which term is not defined in the AML/CFT Law.

824. Article 17 of the AML/CFT Law further defines the type of independent source documents and information that banks and financial institutions should obtain to verify the identity of a natural person or an entity. The CBK Advisory Letter 2007/1 provides additional guidance on the documents and information that banks and financial institutions should seek to verify the customer's identity. The assessment team understands that the proposed CBK Regulation will include further guidance in this respect.

825. EC 5.3 appears to be adequately covered by the AML/CFT Law and, without prejudice to its validity, the additional guidance provided in the Advisory Letter 2007/1 of the CBK, with further

129. The Financial Information Centre (FIC) is the forerunner of the present FIU.

refinement on the verification process and verification documentation to be provided in the CBK proposed Regulation.

826. In this regard, it is further understood that in the proposed CBK Regulation, replacing Rule X and the Advisory Letter 2007/1 of the CBK, references are made to the two publications of the Basel Committee on Banking Supervision which should serve as the source documents for customer identification and verification of that identification: *Customer Due Diligence for Banks* of October 2001 (publication 85), and its attachment *General Guide to Account Opening and Customer Identification* of February 2003.

***Required CDD measures – verification for legal persons and legal arrangements – Essential Criterion 5.4***

827. The requirement under EC 5.4 is twofold. First financial institutions should identify whether any person purporting to act on behalf of a legal person or legal arrangement is so authorised (a requirement that should be found in the law), and identify and verify the identity of that person. Second, verify the legal status of the legal person or legal arrangement.

828. Paragraph (3) of Article 18[130] of the AML/CFT Law requires a person establishing a business relationship with a bank or a financial institution to declare in writing whether that person is acting on his own behalf or on behalf of another person or entity.

829. Moreover, paragraphs (4) and (5) of Article 17 further provide for the obligation to identify that person and the entity he is representing and to ensure that such person is appropriately authorised by the legal entity through a document indicating such authorisation.

830. EC 5.4 appears to be adequately covered by the AML/CFT Law and, without prejudice to its validity, the additional guidance provided in the Advisory Letter 2007/1 of the CBK, although, as already indicated under the analysis of EC 5.3 above, further refinement on the verification process and verification documentation may be necessary – this is expected to be provided in the proposed CBK Regulation.

***Identification of beneficial owner – Essential Criterion 5.5****[131]

831. EC 5.5 requires the identification of the beneficial owner and to take appropriate measures to verify that identify against independent data, information and documents from a reliable source.

832. According to the FATF Standards, the term 'beneficial owner' refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

833. The AML/CFT Law defines a beneficial owner as the natural person who ultimately owns or controls a customer or an account, the person on whose behalf a transaction is being conducted, or the person who ultimately exercises effective control over a legal person or arrangement. Further definition is provided in paragraph (2) of Article 17 which provides a threshold of ownership or control of 20% of a legal person for identification purposes.

834. It is worth noting that the definition in the AML/CFT Law is very close to that found in the FATF Glossary. Indeed, the definition in the AML/CFT Law consequently makes reference to the beneficial owner of a 'legal arrangement' when the Law does not define such term and does not make any further reference to legal arrangements, such as trusts, plained earlier, do not exist in the legal structure of Kosovo.

835. There is however no reference as to who constitutes the beneficial owner for 'legal arrangement' and what procedures are to be followed to identify such beneficial owners. The assessment team is informed that this will be addressed in the proposed CBK Regulation.

130. The reference 'engaging in a transaction under paragraph (3) of Article 17 of this Law' seems misleading as paragraph (3) only provides for the identification of a natural person.

131. The issue of the procedures that can be applied to identify the beneficial owner is further discussed under Section 4 of this Report.

836. The amended paragraph (1) of Article 17 of the AML/CFT Law now requires reporting subjects to identify the beneficial owner and/or a natural person or persons who directly or indirectly control 20% or more of a legal person. Where reporting entities consider that the risk of ML or TF is high, they shall take reasonable measures to verify his or her identity so that the institution or person covered by this law is satisfied that it/he/she knows who the beneficial owner is. It is understood that in its new Regulation replacing Rule X the CBK will be providing guidance accordingly.

837. While the FATF Standards require that financial institutions take reasonable measures to verify the identity of the beneficial owner in all circumstances, the amended paragraph (1) of Article 17 of the AML/CFT Law limits this obligation only to instances where the reporting subject determines that the risk of ML or the FT is high.

838. While the CBK guidance in this respect is a positive step, the Kosovo authorities should note that it covers only the financial sector and hence all other sectors of reporting subjects under Article 16 of the AML/CFT Law remain without guidance.

839. Moreover, Article 18 of the AML/CFT Law, which provides for the timing of the verification for all clients,[132] does not make reference to the timing of verification for the identification of the beneficial owner. Indeed, the only remote reference is found under paragraph (3.2) of Article 18 which states *having taken reasonable steps to verify that each identified person or entity is the owner or the beneficiary of any property that is the subject of the transaction, and believing in good faith that each identified person or entity is the owner and/or beneficiary of any property that is the subject of the transaction.* It is however highly debatable to what extent this can be interpreted as referring to the 'beneficial owner' as defined under the AML/CFT Law as opposed to the 'beneficiary' of a transaction that is undertaken.

840. It should be worth noting the definition of 'client' in the AML/CFT Law which is defined as: *any person that conducts, or attempts to conduct, a transaction with or use the services of a reporting subject as defined in Article 16, and shall include any owner or beneficiary or other person or entity on whose behalf the transaction is conducted or the services are received.* A quasi similar definition for a 'customer' is found in the Advisory Letter 2007/1 of the CBK, which however contains a very fine difference in that it refers to 'beneficial owner' as opposed to the reference to 'beneficiary' in the AML/CFT Law. Therefore, to what extent the reference to 'beneficiary' under the definition is referring to the 'beneficial owner' of a legal entity as opposed to the 'beneficiary' of a transaction – more probably being the latter – remains debatable and subject to interpretation.

841. Advisory Letter 2007/1, although similar to the AML/CFT Law, does not give any guidance or make an obligation on the identification of the beneficial owner and the verification of that identification, but includes the following reference to the beneficial owner concept:

- with reference to enhanced CDD, it refers to scrutiny of customer identification (including of the beneficial owner and controller);
- with reference to the enquiries of the compliance function it includes a reference to the occupation or business activity of the customer and the beneficial owner and reference as to whether the customer or the beneficial owner is a PEP;
- likewise, under the same circumstances, reference is made to the requirement for the compliance function for obtaining information in written or oral form from the customer or beneficial owner; and to visiting the places of business of the customer and beneficial owner; and
- when addressing issues related to correspondent banking relationships where the Letter requires information on the beneficial owner of non-resident banks.

842. On the other hand Rule X of the CBK seems to recognise that the AML/CFT Law does not provide any obligations on the identification and verification of the beneficial owner and therefore includes the following reference:

- under Section 6 it requires that banks and financial institutions shall conduct thorough CDD including (a) identification of customers, including beneficial owners;
- under Section 6.2 in determining the identification of the beneficial owner where it requires that *Banks or financial institutions shall take measures to determine if a*

132. Whereas the AML/CFT Law defines a 'client' the law and regulations refers to either 'customer' or 'client' interchangeably. For the purposes of this Report these two terms are interpreted to be similar in definition. Similar references are made in Rule X of the CBK.

*customer is acting on behalf of one or more beneficial owner(s) in accordance with section 3.2 of Regulation 2004/2* and to verify such identification against reliable sources – although this is subject to interpretation as to what extent it refers to the beneficial owner of a legal person as opposed to the beneficiary of a transaction despite the definition of beneficial owner in the same Section; and

- under Section 8 with reference to record keeping where it states that the necessary components of transaction records include (a) the name of the customer and the beneficial owner.

843. The assessment team has been assured that the CBK proposed Regulation provides more comprehensive details and guidance on the beneficial owner concept and the identification of the beneficial owner procedures. Indeed, the industry has expressed satisfactory remarks that their concerns on this issue will be adequately addressed by the new Regulation and the amendments to the AML/CFT Law which now includes a threshold.

844. Indeed the definition of 'beneficial owner' in the AML/CFT Law is very similar to that provided for in the FATF Glossary, thus also including the beneficial owner of a legal arrangement, which could include, for example, trusts.

845. In the case of legal arrangements such as trusts, one usually expects to find a further extension of the definition of beneficial owner defining who such owners would be under the trust. This is missing in the AML/CFT Law and the relevant rules of the CBK as further references to legal arrangements in the AML/CFT Law are absent beyond their inclusion in the definition. It is understood that this issue will be addressed by the CBK proposed Regulation. However this Report finds that the concept of "trusts" is not recognised under the legal system of Kosovo.

846. Notwithstanding, there is no reference in the AML/CFT Law or the present Rule X for the definition and identification of the beneficial owner under an insurance life policy. It is understood that since the proposed CBK Regulation is applicable to banks and financial institutions authorised under the Law on Banks, the proposed Regulation will still not address the beneficial owner issue for the purposes of life insurance policies.

847. It is therefore recommended that obligations on the identification and verification the beneficial owner under an insurance life policy, including a definition of who constitutes such beneficial owner, be provided for in the AML/CFT Law with further guidance by the CBK.

***Determination whether customer is acting on behalf of third party – Essential Criterion 5.5.1****

848. EC 5.5.1, through legislation or regulation, requires that for all customers financial institutions should determine whether a person is acting on behalf of another person and should take reasonable measures to identify the third party.

849. Paragraph (3) of Article 18[133] of the AML/CFT Law requires a person establishing a business relationship with a bank or a financial institution to declare in writing whether that person is acting on his own behalf or on behalf of another person or entity.

850. Moreover, paragraphs (4) and (5) of Article 17 further provide for the obligation on banks and financial institutions to identify that person and the authorising person or entity he is representing.

851. Without prejudice to the concerns expressed in this Report on its validity, this obligation is further reflected in Rule X of the CBK under Section 6 which requires the identification of the beneficial owner as defined in the Section where a person is acting on behalf of another. It is understood that this will be further reflected in the proposed CBK Regulation.

852. EC 5.5.1* appears to be adequately covered for banks and financial institutions but the AML/CFT Law seems silent on its application to other reporting subjects under Article 16.

133. The reference 'engaging in a transaction under paragraph (3) of Article 17 of this Law' seems misleading as paragraph (3) only provides for the identification of a natural person.

***Ownership and control structure – Essential Criterion 5.5.2***

853. EC 5.5.2 requires financial institutions to first understand the ownership and control structure of a legal person or arrangement and second (through legal provisions) to determine those persons who exercise ultimate effective control. The Methodology further provides guidance in this respect. For legal entities this would involve identifying the natural persons with a controlling interest and the persons who comprise the mind and management. For legal arrangements, such as trusts, this obligation would require the identification of the settlor, the trustee or person exercising control over the trust, and the beneficiaries.

854. Further to the identification of the beneficial owner in the case of legal persons and legal arrangements, the amended paragraph (1) of Article 17 of the AML/CFT Law requires that as regards legal persons, trusts and similar legal arrangements, reporting subjects take risk-based and adequate measures to understand the ownership and control structure of the customer.

855. Save for a slight reference under Section 3 in providing additional guidance on identification documents, Advisory Letter 2007/1 of the CBK is also silent on the requirements for banks and financial institutions in meeting the measures required under EC 5.5.2.

856. Section 6.2 of Rule X of the CBK provides guidance for banks and financial institutions in this respect, stating that: *For customers that are entities as defined in Regulation 2004/2, the bank or financial institution shall take reasonable measures to understand the ownership and control structure of the entity. This includes identifying the natural person(s) who ultimately owns or controls the entity.*

857. The minor provisions and references in the Advisory Letter 2007/1 and Rule X of the CBK are inadequate to cover the requirements under EC 5.5.2 of Recommendation 5 of the FATF Standards. The assessment team understand that the identification and establishment of the ownership and control structure, together with the establishment of the mind and management of a legal person shall be further addressed through the proposed CBK Regulation.

***Purpose and intended nature of the business relationship – Essential Criterion 5.6***

858. EC 5.6 requires that financial institutions should obtain information on the purpose and intended nature of the business relationship.

859. This requirement is specifically covered through paragraph (1) of Article 17 which includes the obligation of obtaining information on the purpose and intended nature of the business relationship.

860. In substance, the Advisory Letter 2007/1 of the CBK is silent on the requirement for banks and financial institutions to obtain information on the purpose and intended nature of the business relationship. It only makes a slight reference that could be linked to this obligation when addressing the recognition of suspicious transactions by requiring that financial institutions should gather information to learn about the customer and the customer's business to help them to recognise when a transaction is unusual.

861. On the other hand, Section 6.4 of Rule X of the CBK requires banks and financial institutions to collect information regarding the anticipated purpose and intended nature of the business relationship such that banks and financial institutions can create and maintain a customer profile for each customer of sufficient nature and detail.

862. The assessment team is informed that the proposed CBK Regulation provides additional guidance and links the obligation for obtaining information on the purpose and intended nature of the business relationship to the CDD measures, including the development of the customer business and risk profile and the ongoing monitoring of transactions.

863. In a risk based system that applies the CDD concept it is highly important that banks and financial institutions understand the purpose and intended nature of the business relationships they enter into. This is important for banks and financial institutions not only to build the customer profile but also to develop their customer acceptance policies and to determine those customers that, through their business and risk profile, would fall within their customer acceptance policies.

864. In obliging all reporting entities to obtain information on the nature and intended purpose of the business relationship, paragraph (1.3) of Article 17 of the AML/CFT Law requires that *The competent regulator may issue binding instructions in connection therewith*. It is therefore strongly recommended that the proposed provisions in the CBK Regulation in this regard be thorough and binding on all financial institutions with sanctions accordingly in relation to the application of the CDD measures.

***Ongoing due diligence on business relationship – Essential Criterion 5.7****

865. EC 5.7 requires legal provisions to be in place obliging financial institutions to conduct ongoing due diligence on their business relationships.

866. In its definition of what constitutes 'Customer Due Diligence' the AML/CFT Law under paragraph (1) of Article 17 includes the component dealing with the obligation for the ongoing monitoring of business relationships when requiring that *all reporting entities shall obtain information on the purpose and intended nature of the business relationship, and monitor the business relationship, including scrutiny of transactions made throughout the course of the relationship to ensure that the transactions being conducted are consistent with the reporting entity's or person's knowledge of the customer*.

867. However, there are no further references to this obligation in the AML/CFT Law with the exception of paragraph (5) of Article 21 dealing with enhanced due diligence which requires banks and financial institutions to ensure continuous and strengthened monitoring of the account and relationship with PEPs residing outside Kosovo.

868. Moreover, under Article 23 of the AML/CFT Law requiring banks and financial institutions to develop internal programmes with written procedures and controls for the prevention of ML and the FT, there is no reference that the procedures should include measures to undertake ongoing monitoring of business relationships – even though the list provided is not exhaustive.

869. Section 7 of Rule X of the CBK more specifically requires banks and financial institutions to conduct ongoing due diligence.

870. The Advisory Letter 2007/1 of the CBK is silent on the ongoing due diligence and monitoring of the business relationship.

871. Notwithstanding, and without prejudice to the concerns expressed in this Report on the validity of Rule X of the CBK, Rule X covers this requirement, but in doing so at times it went beyond the requirements under the AML/CFT Law – now rectified through the amendments to paragraph (1) of Article 17. The fact that Rule X at times went beyond the requirements of the AML/CFT Law was also a concern expressed by the industry. This creates conflicts within the industry as to whether to comply with the requirements of the AML/CFT Law or to go beyond and comply with the provisions of Rule X – which in fact is more harmonised with international standards than the AML/CFT Law itself. Normally, where not specifically empowered by the main law, rules and regulations should only serve to provide direction and best practices for the industry to effectively implement their obligations under the law.

872. There are however no specific requirement under the AML/CFT Law for ensuring the updating of CDD customer records and documents as part of the ongoing monitoring of the business relationship except where the customer presents a higher risk – paragraph (1) of Article 21 of the AML/CFT Law.

873. The assessment team understands that the proposed CBK Regulation, in providing guidance on the risk based approach, provides further guidance to banks and financial institutions in developing procedures for the establishment of the customer risk profile and the ongoing monitoring of the customer relationship.

***Ongoing scrutiny of transactions – Essential Criterion 5.7.1****

874. As part of the ongoing due diligence, EC 5.7.1 requires financial institutions to undertake scrutiny of all transactions undertaken in the course of the business relationship to ensure their consistency with the customer profile, their knowledge of the customer, and, where necessary, the source of funds.

875. As already described under the analysis for EC 5.7 above, Article 17 of the AML/CFT Law requires the scrutiny of transactions made throughout the course of the relationship to ensure that the transactions being conducted are consistent with the reporting entity's or person's knowledge of the customer.

876. Moreover, Article 20 of the AML/CFT Law on special monitoring of certain transactions, requires banks and financial institutions to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose and to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently apply the relevant international standards to combat ML and FT.

877. However, the requirements under Article 20 as mentioned above for special monitoring of certain transactions do not cover the obligations for ongoing CDD under Recommendation 5 of the FATF Standards, but rather the obligations under FATF Recommendation 11 and FATF Recommendation 21 – refer to the analysis and assessment of these two Recommendations below.

878. Furthermore, but only in the case of applying enhanced CDD for higher risk customers, Advisory Letter 2007/1 of the CBK requires banks and financial institutions, *inter alia*, to apply enhanced CDD through enhanced transaction scrutiny in addition to the scrutiny of the source of wealth and the source of funds of the customer.

879. Section 7 of Rule X of the CBK more specifically requires banks and financial institutions not only to conduct ongoing due diligence on the business relationship but also scrutinise transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, and the business and risk profile.

***Ongoing maintenance of CDD documents, data and information – Essential Criterion 5.7.2****

880. EC 5.7.2 requires the updating of the CDD documents, data and information through periodic reviews, particularly for higher risk customers. It should be noted that the Criterion makes emphasis on higher risk customers but does not limit the requirement to higher risk situations.

881. The obligation under paragraph (1) of Article 17 for reporting entities to monitor the business relationship, including scrutiny of transactions made throughout the course of the relationship, and the obligation under paragraph (5) of Article 21 dealing with enhanced due diligence for PEPs and which requires banks and financial institutions to ensure continuous and strengthened monitoring of the bank relationship, do not specify the obligation for periodically reviewing the CDD documents, data and information.

882. Moreover, paragraph (1) of Article 21 requires that when the reporting subjects determine, in accordance with paragraph (1) of Article 17, that the risk of ML or TF is elevated, they shall take reasonable measures to keep up to date the information collected pursuant to Article 17, and apply reasonable enhanced measures to monitor the business and risk profile, including the source of funds, and ensure that records and other information held are kept up to date.

883. Therefore, according to paragraph (1) of Article 21 it seems that the updating of the customer information is only to be applied where there is a higher risk of ML or the FT.

884. These provisions create legal ambiguity as while paragraph (1.3) of Article 17 seems to require the monitoring of business relationships without however requiring the ongoing maintenance of CDD documents, data and information, paragraph (1) of Article 21 applies this requirement only in situations of higher risk.

885. As part of the obligations to undertake CDD measures under Section 6 of Rule X of the CBK, sub-section 6.6 requires banks and financial institutions to gather and maintain customer information on an ongoing basis. In this regard, documents, data, or information collected under the CDD process (the Law only defines the CDD process but does not specifically apply it) are required to be kept up to date and relevant by undertaking periodic reviews of existing records, including transaction records.

886. On the other hand, Advisory Letter 2007/1 of the CBK is silent on this matter.

887. It is understood that the proposed CBK Regulation, in dealing with the risk based approach, shall provide further guidance to banks and financial institutions on the procedures that should be applied in this regard.

888. It should however be mentioned that according to the FATF Methodology, the provisions for EC 5.7.2* should be covered under the main legislation or regulations as defined.

889. It is therefore recommended that this requirement should be clarified under the AML/CFT Law in addition to the guidance to be provided under the proposed CBK Regulation and that the AML/CFT Law be amended to remove legal ambiguity on the requirement for the continuous application of maintenance and updating of customer documents and information.

***Risk: Enhanced due diligence for higher risk customers, business relationships and transactions – Essential Criterion 5.8***

890. In requiring financial institutions to undertake enhanced due diligence for higher risk customers, business relationships and transactions, EC 5.8 provides examples of such situations which however are not exhaustive.

891. Article 21 of the AML/CFT Law requires the reporting subjects to apply enhanced due diligence to customers in the presence of a higher risk of ML or TF. Article 21 further specifically requires this obligation in situations where there is a non-face-to-face relationship, correspondent banking relationships and relationships with PEPs. In this regard the Law specifies the enhanced measures to be applied in such circumstances.

892. Article 17 of the AML/CFT Law requires that all reporting subjects shall determine, on an ongoing basis, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services, and where reporting subjects determine that the risk of ML and/or TF is higher, they shall take the enhanced measures set out in paragraph (1) of Article 21, in additional to the measures set out in Article 17.

893. Article 21 further requires that the competent regulatory authority may issue binding instructions in connection therewith. The assessment team has been informed that such binding instructions shall be included in the proposed CBK Regulation replacing Rule X and the Advisory Letter.

894. The Advisory Letter 2007/1 of the CBK provides a non-exhaustive list of categories of customers and situations that could present a higher risk. In doing so, the Advisory Letter also provides indicative measures of enhanced due diligence that could be applied *In addition to scrutiny of the source of wealth and the source of funds of the customer.*

895. Section 6.3 of Rule X of the CBK, in dealing with the application of CDD, requires that banks and financial institutions apply enhanced CDD for customers, business relationships, and transactions that are likely to pose a higher risk of ML and TF. It requires that business relationships with a PEP shall always be deemed to involve higher risk. It does not however include what enhanced measures are to be applied except for a reference to the source of wealth and source of funds.

896. Although the AML/CFT Law, the Advisory Letter 2007/1 and Rule X of the CBK, without prejudice to the concerns expressed as to the extent of the validity of the latter two, require the application of enhanced CDD to customers that pose a higher risk, yet none of the three sources clearly provides for an obligation on banks and financial institutions to apply a risk sensitivity process to identify, categorise and rate higher risk customers – although the recent amendments to paragraph (1) of Article 17 make references to requiring banks and financial institutions to determine on an ongoing basis the risk of ML and TF presented by their customers.

897. Moreover, in the specific cases where the AML/CFT Law requires the mandatory application of enhanced due diligence measures – Article 21 - it does not specify that such enhanced measures are to be applied in addition to the application of the normal CDD measures although this is indirectly implied through paragraph (1) of Article 17.

898. The assessment team is informed that the CBK new Regulation shall require banks and financial institutions to:

- develop and establish effective procedures to identify the risk posed by each customer, including the categorisation of customers according to risk;
- develop and apply the institutions' risk appetite in the acceptance of risk related to ML and the FT;
- develop and institute effective customer acceptance policies in line with the institution's risk appetite; and
- develop and establish procedures for the application of enhanced CDD measures according to the degree of risk presented.

***Risk: Application of reduced or simplified measures for low risk situations – Essential Criterion 5.9***

899. EC 5.9 allows for the application of reduced or simplified measures where there are low risks of ML or the FT. The Criterion provides an indicative list of situations where the risk could be considered low having regard to the type of customer, product or transaction, or the location of the customer, i.e. the geographic risk factor.

900. The AML/CFT Law is silent on low risk situations and hence does not distinguish on the level of measures to be applied in such situations.

901. Likewise, both the Advisory Letter 2007/1 and Rule X of the CBK remain silent on the application of reduced or simplified measures for low risk situations.

902. It is further understood that likewise the proposed CBK Regulation will not address the issue of reduced or simplified measures for low risk situations as otherwise it will go beyong the provisions of the AML/CFT Law.

903. Indeed, in requiring banks and financial institutions to create and maintain a customer profile for each customer, Section 6.4 of Rule X of the CBK does not provide for the customer profile to be used to apply reduced or simplified CDD measures, but more specifically to determine whether enhanced due diligence measures are necessary. Notwithstanding, the maintenance of a customer profile does not necessarily follow a risk assessment process of the customer to identify the level of risk posed by that customer.

904. The application of reduced or simplified CDD measures in situations that pose a lower risk is not mandatory under the FATF Standards. However, the non-application of reduced or simplified due diligence measures has wider implications, for example in bank-to-bank transactions for their own account.

905. It is not clear whether the option of applying reduced or simplified due diligence measures has been omitted in the AML/CFT Law on purpose following a risk assessment exercise or whether this was done through an oversight.

906. The only reference to simplified CDD is however found under Article 31A of the AML/CFT Law as amended which deals with offences and the imposition of pecuniary penalties. In paragraph (1.14) of Article 31A the AML/CFT Law states that a pecuniary penalty may be imposed for failure to obtain the required customer data within the framework of the *simplified* CDD or failure to obtain such data in the prescribed manner with this Law.

907. The provisions for the imposition of a pecuniary penalty in circumstances that are not covered as an obligation – application of simplified due diligence - are ambiguous, inconsistent and create legal uncertainty in the AML/CFT Law as amended.

908. The assessment team therefore recommends that Article 31A of the AML/CFT Law be revised accordingly for legal clarity.

909. Notwithstanding, should the Kosovo Authorities eventually decide to include an option for the application of reduced or simplified CDD in the AML/CFT Law then it is advisable that:

- this option is taken following a risk assessment of those areas and situations that present a lower risk of ML and the FT;
- it is limited to situations prescribed by the Law (reference to the examples in the FATF Methodology for EC 5.9 would be appropriate for guidance);

- banks and financial institutions should develop internal procedures on the application of reduced or simplified due diligence measures;
- such procedures should form part of the risk based sensitivity process for customers;
- such procedures should form part of the overall application of CDD measures as opposed to the identification and verification procedures; and
- other related issues as detailed under Essential Criteria 5.10 to 5.12 be taken into account.

***Risk: Applying reduced or simplified measures to customers from other jurisdictions – Essential Criterion 5.10***

910. EC 5.10 requires that where reduced or simplified due diligence measures are allowed for customers from other jurisdictions, such jurisdictions should be those that are in compliance with and have effectively implemented the FATF Recommendations.

911. As detailed under the analysis of EC 5.9 above the ML and FT preventive system in Kosovo does not recognise the application of reduced or simplified CDD.

912. Should the Kosovo Authorities decide to include this option in the legislation, then, further to the measures recommended under the analysis of EC 5.9 above, they should ensure that banks and financial institutions have appropriate procedures in place to identify those countries that do not, or inappropriately apply, the FATF Recommendations.

913. Otherwise, comments and recommendations made under the analysis of EC 5.9 above likewise apply to EC 5.10.

***Risk: Applying reduced or simplified measures where there is suspicion or higher risk scenarios – Essential Criterion 5.11***

914. EC 5.11 requires that reduced or simplified due diligence measures are not to be applied where there is suspicion of ML or TF or where higher risk scenarios apply.

915. As detailed under the analysis of EC 5.9 above ML and FT preventive system in Kosovo does not recognise the application of reduced or simplified CDD.

916. Should the Kosovo Authorities decide to include this option in the legislation, then, further to the measures recommended under the analysis of EC 5.9 above, they should ensure that banks and financial institutions are prohibited by law from applying reduced or simplified due diligence measures in the circumstances as contemplated by EC 5.11.

917. Otherwise, comments and recommendations made under the analysis of EC 5.9 above likewise apply to EC 5.11.

***Risk: Guidance issued by the relevant authorities – Essential Criterion 5.12***

918. EC 5.12 requires that where financial institutions are permitted to determine the extent of CDD measures to be applied, they are further required to follow guidelines issued by the competent authorities. This requirement for financial institutions in turn poses an obligation on the relevant competent authorities to issue appropriate guidelines in such circumstances.

919. Article 17 of the AML/CFT Law requires that all reporting subjects shall determine, on an ongoing basis, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services, and where reporting subjects determine that the risk of ML and FT is higher, they shall take the enhanced measures set out in paragraph (1) of Article 21, in additional to the measures set out in Article 17.

920. It is Article 21 of the AML/CFT Law that then refers to a determination of the extent of CDD but only to the extent that enhanced due diligence measures are applied in higher risk situations. This is further supplemented by Section 6.3 of Rule X of the CBK which replicates the provisions of Article 21 – kindly refer further to the analysis of EC 5.8 above.

921. Advisory Letter 2007/1 of the CBK further provides limited indication on the type of additional enhanced due diligence measures that could be applied.

922. Therefore currently there is lack of guidance on the application of the CDD measures on a risk sensitivity basis which raises certain concerns for the industry. This may be due to the fact that a legal obligation for banks and financial institutions to apply a risk based approach has come in force recently with the amendments of the AML/CFT Law of February 2013.

923. It is understood that the proposed CBK Regulation will include effective guidance on the establishment and application of a risk based approach providing best practices on developing risk methodologies – references to the best practice guidance issued by the FATF in this regard is recommended.

***Timing of verification – Essential Criterion 5.13***

924. EC 5.13 stipulates that financial institutions should be required to verify the identity of the customer before or in the course of establishing the business relationship, or conducting an occasional transaction for occasional customers.

925. Article 18 of the AML/CFT Law establishes the timing of the verification of the identity of the customer. According to Article 18, the verification of the customer identity should be completed before:

- opening an account;
- taking stocks, bonds, or other securities into safe custody;
- granting safe-deposit facilities;
- otherwise establishing a business relationship; or
- engaging in any single transaction in currency of more than € ten thousand (10,000). Multiple currency transactions shall be treated as a single transaction if the bank or financial institution has knowledge that the transactions are conducted by or on behalf of one person or entity and total more than € ten thousand (10,000) in a single day.

926. Both Advisory Letter 2007/1 and Rule X of the CBK are silent on the timing of the verification of the identification process.

927. Article 18 of the AML/CFT Law adequately covers the provision of EC 5.13. The fourth bullet point *otherwise establishing a business relationship* should be interpreted in its wider intent to cover any other instance of providing a service to a customer that is not covered under the bulleted circumstances.

928. However, while the revised paragraph (1) of Article 17 of the AML/CFT Law has introduced the obligation for the identification of the beneficial owner, the assessment team notes that while the FATF Standards require that financial institutions take reasonable measures to verify the identity of the beneficial owner in all circumstances, the amended paragraph (1) of Article 17 of the AML/CFT Law limits this obligation only to instances where the reporting subject determines that the risk of ML or the FT is high.

929. It is therefore advisable that the timing of the verification of the identification of the beneficial owner should also be addressed to apply under all circumstances and not where the risk is higher – refer also to analysis re EU Third AML Directive Article 7b below.

***Timing of verification: Option to complete the verification process following the establishment of the business relationship – Essential Criterion 5.14.***

930. EC 5.14 provides for an option for financial institutions to complete the verification process following the establishment of the business relationship under condition that:

- this occurs as soon as is reasonably practicable;
- this is essential not to interrupt the normal conduct of business;
- the ML risks are effectively managed.

931. The FATF Methodology further provides examples where it may be essential not to interrupt the normal conduct of business.

932. The AML/CFT Law is silent on this matter in a direct way but, through the provisions of Article 18 on the timing of the verification as detailed above in the analysis of EC 5.13, such an option does not appear to be available.

933. The provisions of Article 18 of the AML/CFT Law do not provide for the requirements under EC 5.14.

934. However, should the authorities eventually decide to adopt the option of allowing business relationships to proceed under certain conditions prior to the verification process, it is advisable that this is done under clear legal provisions and appropriate guidance to the industry in order to avoid situations where transactions are undertaken which may later be identified as being suspicious.

***Timing of verification: Risk management procedures – Essential Criterion 5.14.1***

935. EC 5.14.1 requires that financial institutions adopt risk management procedures where a customer is permitted to use the business relationship prior to the verification process.

936. There is currently no requirement on banks and financial institutions to have in place risk management procedures for allowing customers to use the business relationship prior to the verification process since the AML/CFT Law prohibits such situations.

937. Should the authorities eventually decide to adopt this option, then it is recommended that relevant changes to the AML/CFT Law should ensure the obligation on banks and financial institutions to have appropriate and effective risk management procedures in place defining the conditions under which this may occur.

938. Such procedures, which should be approved by the relevant competent authority, should, *inter alia*, cover:

- an assessment of the risk posed by the customer and the management of such risk;
- the timing within which the verification process should be completed;
- procedures to be applied if the verification cannot be completed within the time specified;
- the type of activity that the customer may be allowed to undertake within the verification scheduled timing;
- the reversal of transactions should the business relationship be terminated (for example if an account has been opened and deposits accepted, the ways through which that money is returned without the institution having assisted in cleaning it); and
- the objective for not interrupting the normal conduct of business (reference to the examples provided in the FATF Methodology is recommended).

***Failure to complete the customer due diligence process – Essential Criterion 5.15***

939. EC 5.15 requires that where a financial institution cannot complete the required CDD measures, it should not be permitted to open the account, commence a business relationship or perform a transaction. In such circumstances the financial institution should further be required to considering filing an STR.

940. Paragraph (6) of Article 18 of the AML/CFT Law requires that if a bank or financial institution is unable to verify the identity of a client, the business relationship shall be terminated, any account closed and the property returned to its source. Moreover, such actions shall be without prejudice to the obligation of the bank or financial institution to report suspicious acts or transactions pursuant to paragraph (1) of Article 22 and to report additional material information pursuant to paragraph (2) of Article 22 of the AML/CFT Law.

941. Advisory Letter 2007/1 of the CBK is silent on this matter.

942. In reflecting, to an extent, the provisions of paragraph (6) of Article 18 of the AML/CFT Law, Section 6.5 of Rule X of the CBK, however states that: *In cases where a bank or financial institution is unable to verify the identity of a customer in accordance with section 3.7 of Regulation 2004/2, the bank or financial institution shall refuse the transaction and consider filing a suspicious transaction report as provided in section 3.9 of Regulation 2004/2.*

943. Although it appears that paragraph (6) of Article 18 may be covering the requirements for banks and financial institutions in accordance with EC 5.15, there are divergences that seriously impact on the implementation.

944. EC 5.15 refers to the non-completion of obligations under Essential Criteria 5.3 – 5.6 which require:

- identification of the customer and the verification of that identification against independent reliable source (EC 5.3*);
- for legal persons or legal arrangements the verification that a person acting on behalf of the legal person is so authorised; identification and verification of such representative; verification of the legal status of the legal person or legal arrangement (EC 5,4);
- identification of beneficial owner and verification of that identity; determination whether the applicant is acting on behalf of another person; identification and verification of the third party on whose behalf the applicant is acting; understanding the ownership and control structure of legal persons and arrangements including the natural persons who ultimately have control (EC 5.5); and
- obtaining information on the purpose and intended nature of the business relationship (EC 5.6).

945. By comparison, paragraph (6) of Article 18 requires that where the bank or financial institution *is unable to verify the identity of a client* it should take the measures contemplated by EC 5.15.

946. Moreover, Section 6.5 of Rule X of the CBK still makes references to UNMIK Regulation 2004/2 *which* has been completely repealed with the coming into force of the AML/CFT Law and is therefore irrelevant for the purposes of this assessment for EC 5.15.

947. The assessment team is informed that the proposed CBK Regulation shall address this issue accordingly but in doing so it may be going beyond the requirements under the AML/CFT Law.

948. It is therefore highly recommended that in reviewing the AML/CFT Law the provisions of paragraph (6) of Article 18 be reviewed accordingly and brought in line with the requirements under the FATF Standards by referring to the relevant items of the CDD process as opposed to the verification process only.

***Failure to complete the customer due diligence process where business relationship has commenced – Essential Criterion 5.16***

949. EC 5.16 requires that where the business relationship has already commenced, financial institutions should be required to terminate the business relationship and consider making an STR.

950. As already stated under the analysis of EC 5.14 above the AML/CFT Law is silent on the matter of allowing the use of the business relationship before the completion of the CDD process in a direct way but, through the provisions of Article 18 on the timing of the verification as detailed above in the analysis of EC 5.13, such an option does not appear to be available.

951. However, Section 6.7 (Termination of Customer Relationship) of Rule X of the CBK states that: *If the bank or financial institution is unable to comply with the customer due diligence required for a customer, it shall terminate the customer relationship and determine if it should file a suspicious transaction report as provided in section 3.9 of Regulation 2004/2.*

952. Since the AML/CFT Law does not allow the use of the business relationship prior to the completion of the verification process, it primarily appears that the requirements under EC 5.16 may not be applicable.

953. However, EC 5.16 should not be interpreted only in situations where a customer is allowed to use the business relationship prior to the verification process (EC 5.14), but also to situations where eventually there are doubts on the veracity and adequacy of the customer identification data (EC 5.2(e)) and for existing customers (EC 5.17).

954. Section 6.7 of Rule X of the CBK seems to imply situations for existing customers. However, the validity of this Section, also for reasons explained earlier in this Report, is debatable

since the Section refers to UNMIK Regulation 2004/2 which has been repealed through the coming into force of the AML/CFT Law and may therefore be creating a conflict.

955. It is therefore recommended that this issue be addressed in future amendments to the AML/CFT Law.

***Application of Customer Due Diligence process to existing customers – Essential Criterion 5.17***

956. EC 5.17 requires financial institutions to apply the full CDD requirements to existing customers on the basis of materiality and risk and to conduct due diligence on such existing relationships at appropriate times.

957. There does not appear to be any obligation under the AML/CFT Law for banks and financial institutions to apply the CDD requirements to existing customers or to conduct due diligence on such existing relationships except to the extent that paragraph (1.1) of Article 17 of the AML/CFT Law as recently amended now requires all reporting subjects to determine, *on an ongoing basis*, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services.

958. The Advisory Letter 2007/1 of the CBK is also silent on the application of the CDD requirements to existing customers.

959. However Section 15.2 of Rule X of the CBK requires that *For all customer relationships in existence at the date on which this Rule comes into effect, banks and financial institutions shall apply the customer due diligence measures as set out in Section 6 by April 30, 2007.* CBK has confirmed that this has been done.

960. The application of the CDD requirements to existing customers, even if on a materiality and risk basis, is important for the effectiveness of the system.

961. Although the AML/CFT Law does not directly require banks and financial institutions to undertake full CDD requirements in the case of existing customers, it does not exclude it. Hence, whenever the Law speaks of obligations of banks and financial institutions, for example the ongoing monitoring of relationships, the Law does not make distinctions between new and existing accounts.

962. The obligation under Section 15.2 of Rule X covers this requirement however only to the extent that the application of CDD requirements is only required under the Rule. Moreover it is dated and hence is no longer valid since 30 April 2007.

963. It is therefore recommended that the AML/CFT Law includes a specific provision that the CDD requirements are to be applied on an ongoing basis to existing customer, on the basis of materiality and risk – in which case this obligation should be linked to the risk based approach.

***Application of Customer Due Diligence requirements to existing anonymous accounts – Essential Criterion 5.18***

964. EC 5.18 requires financial institutions to undertake full CDD measures for existing anonymous accounts.

965. Paragraph (1) of Article 18 of the AML/CFT Law as introduce in February 2013 further to requiring that banks, credit and financial institutions are prohibited from keeping anonymous accounts or anonymous passbooks, banks and financial institutions are obliged to apply the measures set out in this Act to customers and their accounts who are anonymous, and that such accounts may not be used to process transactions until the owners and beneficiaries of existing anonymous accounts or anonymous passbooks are made the subject of such measures as soon as possible.

966. The CBK holds that there are not nor have there ever been any anonymous accounts as the Law has always prohibited them. The AML/CFT Law prohibiting anonymous accounts came into force in September 2010 and hence, unless specifically prohibited by the now repealed UNMIK Regulation 2004/2 – which is not the case - banks and financial institutions could have established such accounts.

967. It is assumed that if banks and financial institutions have complied with the requirements under Section 15.2 of Rule X of the CBK then any anonymous accounts held up to 30 April 2007 would have been converted into nominative ones. The period between April 2007 and September 2010 remains uncovered from any obligation to undertake CDD on any existing anonymous accounts, but the new provisions under Article 18 of the AML/CFT Law should cover any anonymous accounts having been opened or maintained at any time in the past.

***Position regarding passbooks in fictitious names – EU Third AML Directive Article 6***

968. Article 6 of the EU Third AML Directive prohibits financial institutions from keeping anonymous accounts or anonymous passbooks and requires such institutions to undertake full CDD measures on the owners of such accounts and passbooks. Article 6 of the EU Third AML Directive does not however prohibit accounts in fictitious names[134] but requires that all accounts be subject to CDD measures.

969. The AML/CFT Law prohibits anonymous accounts but does not prohibit accounts in fictitious names which are normally still subject to CDD measures.

970. The issue of passbooks in fictitious names is addressed under the analysis of EC 5.1 above regarding anonymous accounts in this Report.

***Threshold for occasional transactions – EU Third AML Directive Article 7b***

971. Whereas according to the FATF Standards financial institutions are required to undertake full CDD measures for occasional transaction *above* the designated threshold, Article 7b of the EU Third AML Directive imposes this obligation for transaction or linked transaction that are equivalent to or more than the designated threshold of €15,000.

972. Paragraph (2) of Article 17 of the AML/CFT Law requires the application of the identification procedures (the Law falls short of applying full CDD measures) for occasional transactions or linked transactions that are of an amount equal to or above €10,000. This Article further requires that *If the amount of the transaction is unknown at the time of the operation, the identification shall be done as soon as the amount becomes known or the threshold is reached.*

973. Article 18 of the AML/CFT Law further requires the verification of the identification data for customers before *engaging in any single transaction in currency of ten thousand (10,000) euros or more. Multiple currency transactions shall be treated as a single transaction if the bank or financial institution has knowledge that the transactions are conducted by or on behalf of one person or entity and total ten thousand (10,000) euros or more in a single day.*

974. Advisory Letter 2007/1 and Rule X of the CBK do not add material guidance on the provisions of Article 17 and Article 18 of the AML/CFT Law in this regard.

975. Moreover, Article 17 imposes the identification obligation for linked occasional transactions where the total amount is not known *as soon as the amount becomes known or the threshold is reached.* On the other hand Article 18 imposes the verification obligation for linked occasional transactions on behalf of one person or entity if these *total ten thousand (10,000) euros or more in a single day.* Thus whereas the identification obligation can be imposed even if the amount of the linked transactions is identified beyond a single day, the verification process can only be applied if the amount is exceeded within a single day.

976. It is therefore advisable that the provisions of both Article 17 and Article 18 are harmonised since the identification process is synonymous to the verification process within the context of the recommended review of the AML/CFT Law for the application of full CDD. Any period for measuring linked transactions could be established by regulation guiding the industry on the application of the CDD process – please refer also to analysis of EC 5.13.

134. Accounts in fictitious names could be similar to numbered accounts but carry a fictitious name as opposed to a predetermined number. However numbered accounts are easily identified and allowed under both the EU and the FATF Standards provided that full customer due diligence measures are applied accordingly. Numbered accounts are mainly used in private banking and should be subject to enhanced monitoring both by the institution and the supervisory authorities.

***Definition of beneficial owner – EU Third AML Directive Article 3(6)***

977. Although the definition of a beneficial owner in the FATF Glossary and in the EU Third AML Directive are similar, the definition provided in Article 3(6) of the EU Directive provides more detailed information for the beneficial owner in the case of legal persons mainly by setting a shareholding percentage threshold of 25% plus one share. The EU Third AML Directive further defines the beneficial owner within the context of legal arrangement such as foundations or trusts.

978. As already defined in the analysis for EC 5.5* the definition of beneficial owner under the AML/CFT Law is very similar to that of the FATF but does not include the additional criteria for the EU Third AML Directive – please refer to the analysis of EC 5.5 above for more detailed analysis.

979. Although the inclusion of a threshold seems to provide guidance yet it brings with it additional obligations. Having a threshold – according to Article 17 this is set at 20% – means that financial institutions would need to identify all persons with a 20% shareholding and over. Moreover if no such person exists, the financial institutions would have to identify the natural person who otherwise exercises control over the management of the legal entity. The assessment team has been informed that this matter is clearly addressed by the CBK proposed Regulation.

980. The definition of beneficial owner in the AML/CFT Law does not include an extension of the beneficial owner concept for legal arrangements such as trusts and foundations as defined in the EU Third AML Directive in the light that there is no legal provisions for trusts although these are arbitrarily referred to in various pieces of legislation, including in the AML/CFT Law.

981. Without prejudice to, and further to the recommendations made in the analysis of EC 5.5 in this Report, it is recommended that consideration be given to:

- extending the definition of beneficial owner to the beneficial owner of legal arrangements in accordance with the provisions of the EU Third AML Directive and in accordance as to how legal arrangements are recognised under the laws of Kosovo;
- provide adequate and appropriate written guidance to the industry on the application of the CDD measures for beneficial owners.

***Effectiveness***

982. This Report raises concerns on the effectiveness of the system in applying the concept of the CDD. First, because of the legal ambiguity in the AML/CFT Law which while defining the concept and imposing implementation does not provide for the full application of the CDD concept in the circumstances as required under the international standards. Second, because of divergences between the AML/CFT Law and the Rules issued by the CBK – although the provisions of Rule X of the CBK in this regard are more harmonised with international standards and will be replaced by the proposed draft CBK Regulation, and finally because the industry consequently provides for its own interpretation in applying this concept.

983. The effectiveness of the system is further negatively impacted through conflicts in the timing of the application of the customer identification process and the verification process. This is further impacted in weaknesses identified where there is failure to complete the identification process.

984. Moreover, the identified weakness in the appropriate application of the notion of the beneficial owner particularly for 'legal arrangements' and 'life insurance policies' further contribute to the concerns on effectiveness.

985. Finally, the effectiveness of the system is further negatively impacted through the lack of guidance, requirements and identified weakness in the application of a risk based approach, even though these are intended to be addressed through the proposed CBK Regulation.

### 3.2.2. Recommendations and Comments

986. As can be seen from the above analysis of the Essential Criteria for Recommendation 5, the AML/CFT Law, the Advisory Letter 2007/1 and Rule X of the CBK leave a number of gaps which, together with the concerns expressed by the industry in the implementation of their obligations in some specific areas, have negative repercussions on the effectiveness of the preventive system through the CDD process.

987. This Report expresses concerns regarding the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context that the UNMIK Regulation 2004/2 has been entirely repealed by the coming into force of the AML/CFT Law while UNMIK Regulation 1999/21 and UNMIK Regulation 2008/28 have both been repealed by the coming into force of the Law on Banks, leaving any rules or regulation issued there-under valid to the extent that there is no conflict with the law. The Advisory Letter and Rule X still make specific reference to all these Regulations irrespective of their position according to the law. This Report however notes and acknowledges that most of these issues will be addressed through the proposed CBK Regulation which will replace both documents.

988. This Report also expresses concern on the definitions of 'financial institution' in the respective laws which differ in some instances.

989. This Report further finds that the distribution and application of United Nations and other lists of designated persons and entities need to be addressed.

990. The identified gaps or weaknesses in the legislation and the system as applied mainly focus on:

- non-prohibition of maintaining accounts in fictitious names (EC 5.1 and EUD Article 6);
- legal ambiguity on the timing of the application of the full CDD measures by the AML/CFT Law as opposed to the application of the identification and verification procedures – with serious repercussions on various other provisions of the AML/CFT Law (EC 5.2);
- need of strengthening and providing legal clarity for obligations for the identification of beneficial owner for 'legal arrangements' and 'life insurance policies' (EC 5.5 and EUD Article 3(6));
- absence of guidance for the identification of the ownership and control structure of legal persons on a risk sensitivity basis (EC5.5.2);
- absence of guidance on establishing purpose and intended nature of business relationship in relation to the customer business and risk profile (EC 5.6);
- inadequate obligation for ongoing due diligence on business relationships and updating of customer documents and information in all circumstances and not under high risk situations only (EC 5.7 and 5.7.1/5.7.2);
- legal inconsistencies on the application of simplified customer due diligence (EC 5.9);
- lack of guidance on the risk based approach (EC 5.12);
- unclear timing of verification for beneficial owner (EC 5.13 and EUD Article 7(b));
- unclear obligations on failure to complete CDD (EC 5.15);
- unclear obligations on failure to apply CDD (EC 5.16); and
- absence of requirement for application of CDD to existing customer (EC 5.17).

991. In the light of the various identified gaps as detailed above, and which should be read within the context of the analysis of the respective EC, detailed recommendations for improving the legislation, and consequently the system, are made in the analysis of the respective EC above.

992. It is advisable that recommendations made are read through and within the context of the analysis of the respective specific EC. Notwithstanding, the main recommendations focus on:

- publication and effective implementation of the proposed CBK Regulation reviewing Rule X, and incorporating Advisory Letter 2007/1, within the context of the revised AML/CFT Law and the repeal of the UNMIK Regulations;
- harmonisation of the definition of 'financial institution' in the respective laws and regulations;

- clarification of the legal obligation for the application of the full CDD measures as defined in the AML/CFT Law as opposed to the application of the identification and verification processes which only form a component of the CDD concept;
- a review of the distribution and application of the United Nations and other lists of designated persons and entities;
- a general review of the AML/CFT Law in specific areas related to enhanced and reduced CDD within the context of the application and guidance on the risk based approach and the harmonisation of provisions as indicated in the respective Essential Criteria.

### 3.2.3. Rating for Recommendation 5

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.5** | **PC** | • legal ambiguity on the obligation to apply full CDD measures;<br>• no explicit prohibition for keeping accounts in fictitious names;<br>• threshold for wire transfers not clear;<br>• where doubts arise on the veracity or adequacy of previous obtained customer identification data applies only for occasional transactions;<br>• insufficient legal obligation to identify beneficial owner for legal arrangements and life insurance policies;<br>• lack of guidance on the obligation to understand the ownership and control structure of the customer;<br>• lack of guidance on the obligation to understand the purpose and intended nature of the business relationship in relation to customer profile and risk assessment;<br>• insufficient obligation to exercise ongoing monitoring of business relationship in all circumstances beyond high risk customers;<br>• lack of guidance on implementing a risk based approach;<br>• inconsistencies in the timing of the verification process against the timing of the identification process;<br>• failure to complete CDD process applies only to the verification process;<br>• failure to complete CDD where business relationship already exists is not adequately covered;<br>• obligation to apply CDD to existing customers is dated and only provided under Rule X in relation to repealed UNMIK Regulations;<br>• better distribution and application of lists of designated persons; and<br>• effectiveness issues with regard to the scope and extent of application of CDD, verification of the identification of the beneficial owner and application of the risk-based approach. |

## 3.3. Politically Exposed Persons (PEPs) (R.6)

### 3.3.1. Description and Analysis

993. Recommendation 6 requires that in relation to PEPs financial institutions should have in place additional due diligence measures that are to be applied further to the normal measures. The Recommendation stipulates the additional measures as analysed below through the assessment of the relevant EC.

994. The FATF Glossary to the Methodology defines PEPs as *individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.*

995. The EU Third AML Directive defines PEPs as natural *persons who are or have been entrusted with prominent public functions and immediate family members or persons known to be close associates of such persons.*

996. The EU Commission Implementation Directive[135] provides further guidance on the definition of PEPs by defining 'prominent public function' in similar terms to the FATF Standard while excluding middle ranking and more junior officials from the purposes of the definition. It also provides guidance to the definition of who constitutes 'immediate family members' and 'persons known to be close associates'.

997. Paragraph (1.41) of Article 2 of the AML/CFT Law defines a PEP as natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons.

998. The definition further states that the FIU in consultation with the MoF may issue a sub-legal act to define the prominent public functions and the immediate family members of such persons.

999. Advisory Letter 2007/1 and Rule X of the CBK do not add further guidance to the interpretation of the definition of PEP.

1000. Although the definition of PEP in the AML/CFT Law is very close to that of the FATF and the EU Directive, in accordance with the obligation under the definition, in January 2014, the FIU issued Administrative Instruction No. 04/2014 on PEPs thus addressing the definition of 'prominent public functions', 'close associates' and 'immediate family members'. Moreover, as the AML/CFT Law does not define categories of individuals who could be considered as falling within the PEP status the Instruction provides a comprehensive guidance list for both domestic and foreign PEPs accordingly.

1001. The assessment team understands that in its proposed Regulation replacing Rule X, the CBK shall address the issue of the interpretation of the definition of PEPs while providing guidance to banks and financial institutions on its implementations. It is important that an interpretation of the definition in the proposed CBK Regulation be harmonised with the Administrative Instruction issued by the FIU in consultation with the MoF to avoid inconsistencies which could impact the effective implementation of this obligation.

1002. The FIU Administrative Instruction and the eventual guidance through the proposed CBK Regulation on the definitions and implementation of the PEP concept to the industry, who had expressed concern on the proper definition and implementation procedures in general, is a step in the right direction for an effective implementation of this obligation.

135. Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis. *OJ L 214, 04.08.2006, pp 29-34.*

1003. Notwithstanding, the above mentioned amendments do not address the issue of whether the definition captures middle ranking and more junior officials in accordance with international standards.

1004. Unless there is a specific reason for the definition in the AML/CFT Law to cover also middle ranking and more junior officials, in which case it would be more appropriate to specifically include them, the authorities may wish to consider amending the definition accordingly.

1005. Moreover, whereas the definition of a PEP refers to both a domestic or a foreign person who fulfils the PEP status criteria, Article 21 of the AML/CFT Law imposes the enhanced due diligence and enhanced monitoring on foreign PEPs only while apparently for domestic PEPs reporting subjects shall apply enhanced due diligence measures not necessarily being those contemplated by the AML/CFT Law for foreign PEPs.[136]

***Appropriate risk management systems – Essential Criterion 6.1***

1006. EC 6.1 requires financial institutions to have risk management systems in place to determine whether a potential customer, a customer or the beneficial owner is a PEP.

1007. Paragraph (1) of Article 17 requires reporting subjects to determine, on an ongoing basis, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services. Article 21 then requires the application of enhanced due diligence if a reporting subject *determines* that a person is a foreign PEP. Otherwise there is no reference or obligation under the AML/CFT Law for reporting subjects to apply appropriate risk management systems to determine whether a potential customer, a customer or a beneficial owner is a PEP.

1008. Of relevance for EC 6.1 is the previous provision in Article 21 of the AML/CFT Law which required that with regard to transactions, relationships or services provided to PEPs residing outside of Kosovo, the reporting subject must have *appropriate risk based procedures* to determine whether the customer is a PEP. The words *appropriate risk based procedures* have been removed with the amendments of February 2013 to the AML/CFT Law.

1009. Although Advisory Letter 2007/1 and Rule X of the CBK make reference to PEPs representing a higher risk, they do not provide for or require banks and financial institutions to have risk management systems in place to determine the PEP status of customers.

1010. Lack of provisions and guidance on a risk based approach has wide repercussions on the effective implementation of the system. Indeed the industry itself has expressed concern on guidance in this respect.

1011. It appears that the only indication for banks and financial institutions to have risk management system to determine the risk of a customer is only inferred through paragraph (1) of Article 17 of the AML/CFT Law which requires that all reporting subjects shall determine, on an ongoing basis, the risk of ML and TF presented by their customers and any other persons to whom they provide financial services.

1012. Notwithstanding it should be noted that the provisions under Article 17 and Article 21 of the AML/CFT Law only apply to potential customers, possibly extending to current customers as they are to be applied on an ongoing basis. Nonetheless these provisions do not cover beneficial owners and there are no obligations to determine whether a customer eventually becomes a PEP.

1013. Indeed, while paragraph (1) of Article 17 of the AML/CFT Law has been amended requiring reporting subjects to identify the beneficial owner of a legal person and consequently to establish whether that beneficial owner poses a high risk in which case they are to verify the identity, the said paragraph (1) of Article 17 does not require the establishment of whether the beneficial owner constitutes a PEP within the definition of the Law. In dealing with the application of enhanced due diligence for PEPs as posing a high risk, and in differentiating between domestic and foreign PEPs, Article 21 of the AML/CFT Law as amended does not address the issue of whether the beneficial owner is a PEP, although this Article requires reporting subjects to determine whether their *clients*

136. Paragraph (5) of Article 21 makes reference to 'reporting subjects shall take measures set out in Article 19 paragraph 1' of the AML/CFT Law which relates to wire transfers. This error is repeated in the FIU Administrative Instruction on PEPs. Presumably this should read either 'Article 17 paragraph (1)' or Article 21 paragraph (1)' or both and which paragraphs are linked with high risk situations

are domestic or foreign PEPs in which case enhanced due diligence is to be applied to foreign PEPs. Consequently, while some measures have been taken to clarify the identification of the beneficial owner, and in establishing whether a client falls within the definition of a PEP, the AML/CFT Law as amended still falls short from requiring reporting subjects to identify whether the beneficial owner of a legal entity constitutes a PEP as defined in the AML/CFT Law.

1014. The assessment team is further informed that the CBK will require banks and financial institutions to identify the PEP status of the beneficial owner in its forthcoming Regulation replacing Rule X and the Advisory Letter.

1015. During the Cycle 2 on-site meeting with the banks the assessment team was informed that banks make use of a declaration signed by the prospective customer stating his/her position with regards to the criteria that constitute a PEP status. The banks however further informed that they have requested access to a list maintained by the Anti-Corruption Agency which includes names of potential domestic PEPs. Banks are keen in obtaining access to this list which, according to them, will help to facilitate the identification of domestic PEPs. This was confirmed by the CBK. The assessment team is informed that up to the time of the on-site visit access had not been provided.[137]

1016. Although access to the list of the Anti-Corruption Agency could assist banks in their identification of domestic PEPs it is of utmost importance that banks do not rely on the list only first because the list may not be comprehensive and second because banks must apply their own risk assessment and judgement on the PEP status of a potential customer or beneficial owner.

1017. The FIU Administrative Instruction No. 04/2014 on PEPs, while making references to the obligation under the AML/CFT Law to identify the beneficial owner in accordance with the provisions of Article 17, likewise falls short in requiring reporting subjects to identify the PEP status of the beneficial owner.

1018. Thus, any amendments to the CBK Rule X as detailed above through the proposed CBK Regulation will only apply to the financial sector creating an inconsistency in the application of the Law. Hence the requirement to revise the AML/CFT Law accordingly remains valid.

1019. It is therefore recommended that, in a review of the AML/CFT Law to introduce specific obligations for a risk based approach or in any guidance issued by the authorities for the application of a risk based approach by reporting subjects, consideration be given for the inclusion of such measures to identify whether a beneficial owner is a PEP or whether a customer eventually becomes a PEP as part of the risk based approach and outside the enhanced due diligence procedures to be applied for higher risk customer. The FIU may also wish to eventually review its Administrative Instruction No. 04/2014 accordingly.

1020. Moreover it is recommended for the Kosovo authorities to consider including the exclusion of middle ranking and more junior officials in the definition of PEP.

***Senior management approval for PEP business relationships – Essential Criterion 6.2***

1021. EC 6.2 requires financial institutions to obtain senior management approval for establishing a business relationship with a PEP. The FATF Standard does not define 'senior management' for this purpose.

1022. Article 21 of the AML/CFT Law requires banks and financial institutions to obtain the approval from a senior officer of a reporting subject before establishing business relationships with foreign PEPs but not for domestic ones.

1023. While the Advisory Letter 2007/1 is silent on this issue, Rule X of the CBK provides a more generic obligation in that *A bank or financial institution shall not enter into or maintain a business relationship with a higher risk customer unless a senior member of the management of the bank or financial institution has given approval in writing.*

137. The assessment team was eventually informed that the list of the Anti-Corruption Agency was finalised and disseminated to all banks and financial institutions once it was checked by the FIU following the on-site visit in April 2014.

1024. For the purposes of EC 6.2, the requirements appear to be adequately fulfilled through Article 21 of the AML/CFT Law and Rule X of the CBK. It is, however, recommended to consider the application of this requirement to situations of domestic PEPs who could also pose a higher risk.

***Continuation of business relationship with PEPs – Essential Criterion 6.2.1***

1025. EC 6.2.1 requires that senior management approval is obtained for the continuation of the business relationship where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.

1026. As detailed in the previous analysis, Article 21 of the AML/CFT Law requires senior management approval before the establishment of a business relationship with a foreign PEP but does not refer to such a requirement for the continuation of the business relationship. Otherwise, the Law is silent on measures to be taken when a customer has already been accepted.

1027. Hence there is no obligation to apply the same procedures for obtaining senior management approval for the continuation of the business relationship if the customer or the beneficial owner eventually is found to be or becomes a PEP.

1028. Moreover, the obligation does not apply in the first instance to beneficial owners. Also the AML/CFT Law does not contemplate ongoing assessments as to whether a customer has become of a PEP status but only requires ongoing strengthened monitoring where the customer has already been identified as a PEP.

1029. Therefore, further to the recommendations under the analysis of EC 6.1 above it is important that any provisions introduced in the Law for the identification of the PEP status of a potential customer, an existing customer or a beneficial owner and the application of the appropriate enhanced measures, these be also extended on an ongoing basis to identify whether a customer or a beneficial owner has eventually acquired the status of a PEP and to apply the contemplated measures in such circumstances.

***Source of wealth and Source of funds – Essential Criterion 6.3***

1030. EC 6.3 requires that part of the enhanced due diligence measures to be applied to a person who is identified to fall within the defined PEP status is for financial institutions to take reasonable measures to establish the source of wealth and the source of funds.

1031. Article 21 of the AML/CFT Law requires that with regard to transactions, relationships or services provided to foreign PEPs, banks and financial institutions take adequate measures to establish the origin of the assets used in the relationship or transactions.

1032. Moreover, in addressing the application of enhanced CDD for higher risk customers, Advisory Letter 2007/1 of the CBK establishes other measures to be applied in addition to the scrutiny of the source of wealth and the source of funds of the customer. This is likewise reflected in Rule X of the CBK.

1033. Although Article 21 of the AML/CFT Law and the provisions of the Advisory Letter 2007/1 of the CBK appear to cover the obligations under EC 6.3, there is a minor shortcoming in the Law which is then covered by the Advisory Letter.

1034. It should first be mentioned that EC 6.3 requires two measures to be taken. First the establishment of the source of wealth that the customer possesses and may have accumulated over the years. Second is the source of funds to be applied to the first and following transactions undertaken by the customer within his status as a PEP.

1035. The words 'the origin of the assets used in relationship or transaction' in Article 21 of the AML/CFT Law may be subject to interpretation as to whether they are referring to the source of the accumulated wealth or to the source of the funds that will establish the relationship and the transactions or to both.

1036. It is therefore recommended that the text of Article 21 of the AML/CFT Law be revised in line with that used in the Advisory Letter and Rule X of the CBK for the sake of consistency and to avoid any ambiguity to the industry.

1037. The assessment team is informed that the proposed CBK Regulation will define the terms used in the Law to the extent that whereas 'source of wealth' refers to the *assets* that the customer possesses and may have accumulated over the years, the 'source of funds' refers to the *funds* to be applied to the first and following transactions undertaken by the customer within his status as a PEP.

***Enhanced on-going monitoring of a PEP relationship – Essential Criterion 6.4***

1038. EC 6.4 requires financial institutions to undertake enhanced ongoing monitoring of the relationship. While not providing guidance as to what constitutes 'enhanced ongoing monitoring', this is understood to refer for example to more frequent monitoring of the accounts and transactions; more frequent updating of the CDD information; more frequent assessment of the customer profile; and similar.

1039. Article 21 of the AML/CFT Law requires that with regard to transactions, relationships or services provided to foreign PEPs banks and financial institutions *ensure continuous and strengthened monitoring of the account and the relationship.*

1040. Section 7 of Rule X of the CBK requires that: *Banks and financial institutions shall apply intensified monitoring for higher risk customers. Every bank and financial institution should set key indicators for such accounts taking note of the background of the customer, such as the country of origin and source of funds, the type of transactions involved, and other risk factors as set out in section 6 of this Rule.*

1041. Article 21 of the AML/CFT Law seems to adequately cover the requirements under EC 6.4.

1042. Notwithstanding, the industry, and consequently the effectiveness of the system, would benefit from guidance on the application of enhanced ongoing monitoring of high risk accounts and business relationships, such as those with PEPs.

***PEPs who hold prominent public functions domestically – Additional Element 6.5***

1043. AE 6.5 enquires whether the obligations for PEPs with a prominent public function in another country are also applicable to PEPs who have a domestic prominent public function.

1044. According to the definition of PEP in the AML/CFT Law which refers to any person who has been entrusted with a prominent public function a PEP could also be a domestic person. Indeed Article 21 of the AML/CFT Law is very specific that reporting subjects shall determine whether a person is a domestic or a foreign PEP.

1045. However, when imposing enhanced due diligence measures and enhanced monitoring through Article 21, the AML/CFT Law makes references to a foreign PEP.

1046. Where a customer is determined to be a domestic PEP Article 21 of the AML/CFT Law is ambiguous as to what measures should be applied as it makes references to an Article in the AML/CFT Law which is not relevant for the application of customer due diligence.[138]

1047. While it is appropriate to note that the 2012 FATF Standards have now included domestic PEPs (although at a different level than foreign PEPs and depending on a risk sensitivity basis), it might be appropriate to clarify the circumstances on the application of customer due diligence to domestic PEPs in the AML/CFT Law.

***United Nations Convention against Corruption (2003) – Additional Element 6.6***

1048. AE 6.6 seeks to establish whether the country has signed, ratified and fully implemented the United Nations Convention against Corruption of 2003.

138. Paragraph (5) of Article 21 makes reference to 'reporting subjects shall take measures set out in Article 19 paragraph 1' of the AML/CFT Law which relates to wire transfers. This error is repeated in the FIU Administrative Instruction on PEPs under Article 7(2). Presumably this should read either 'Article 17 paragraph (1)' or Article 21 paragraph (1)' which paragraphs are linked to high risk situations

1049. According to the replies to the relevant question in the Questionnaire, and as explained under Recommendation 35 below, Kosovo has not signed the Convention.

***EU Commission Directive 2006/70/EC – EU Third AML Directive Article 3(8)***

1050. Article 2(4) of the EU Implementation Directive 2006/70/EC with respect to Article 3(8) of the EU Third AML Directive provides that, on a risk sensitivity basis, countries shall require their financial institutions to no longer consider a person to be within the PEP status if that person has ceased to be entrusted with a prominent public function for a period of 12 months.

1051. The AML/CFT Law and the FIU Administrative Directive are silent on this matter.

1052. Kosovo appears not to have adopted this provision of the EU Implementation Directive 2006/70/EC.

***Effectiveness***

1053. Some factors identified in the assessment of the application of the PEP notion impact on the effectiveness of the application of the concept. In particular is the lack of guidance on the applicability of the concept on a risk sensitivity basis and the ongoing monitoring of customers with a current or an eventual PEP status. This is accentuated with the absence of any requirements to identify the PEP status of the beneficial owner and the legal ambiguity on the application of enhanced due diligence measures to domestic PEPs.

### 3.3.2. Recommendations and Comments

1054. Although the AML/CFT Law addresses the issue of PEPs there are some gaps in the Law that need to be addressed for better harmonisation with the provisions of FATF Recommendation 6.

1055. The definition of a PEP in the AML/CFT Law does not exclude middle ranking and more junior officials from the purposes of the definition. Moreover there are legal ambiguities on the application of enhanced customer due diligence to domestic PEPs while there is no obligation to obtain senior management approval on the continued maintenance of relationships with PEPs.

1056. The gaps and weaknesses identified in the AML/CFT Law within the context of the EC for FATF Recommendation 6 could be summarised as follows, although a reading of the Description and Analysis for the specific criteria should not be excluded:

- the definition of a PEP is incomplete and not fully consistent with the FATF definition with reference to the exclusion of middle ranking and more junior officials (EC 6.1);
- there is no obligation to have appropriate risk management systems in place although this is implied through Article 17 (EC 6.1)
- the obligation to determine if a person is a PEP does not require the identification of the PEP status of the beneficial owner (EC 6.1);
- the obligation for senior management approval for the continuation of relationships with customer who are eventually identified as PEPs is missing (EC 6.2.1); and
- the obligation to establish the source of wealth in the AML/CFT Law is not clear (EC 6.3).

1057. In the light of these gaps or weaknesses various recommendations are made to update the AML/CFT Law to meet the criteria for Recommendation 6. It is advisable that recommendations made are read within the context of the Description and Analysis of the specific EC.

- harmonise the definition of a PEP with the FATF definition in the AML/CFT Law with reference to middle ranking and more junior officials;
- impose legal obligation to identify if a beneficial owner of a legal entity falls within the definition of PEP;
- amend Article 21 of the AML/CFT Law to ensure that procedures are applied to identify if a customer or a beneficial owner is eventually identified as a PEP or becomes a PEP;
- clarify in Article 21 of the AML/CFT Law that the identification of the source of funds is applicable on an ongoing basis to all transactions with PEPs;

- clarify the obligation to establish the source of wealth in Article 21 of the AML/CFT Law; and
- provide guidance with an obligation to have appropriate risk management systems in place.

### 3.3.3. Rating for Recommendation 6

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.6** | **PC** | • shortcomings in the definition of a PEP;<br>• lack of legal clarity on the application of enhanced measures to domestic PEPs;<br>• no obligation to identify if a beneficial owner is or becomes a PEP;<br>• no obligation for senior management approval for continuation of business relationship with a PEP;<br>• no obligation to have appropriate risk management systems in place;<br>• legal obligation to identify source of wealth not clear; and<br>• effectiveness issues related to extended definition of PEP, guidance on continued monitoring and beneficial owner status. |

## 3.4. Cross-border correspondent banking (R.7)

### 3.4.1. Description and Analysis

1058. The FATF Glossary provides a definition of cross border correspondent banking as being *the provision of banking services by one bank ("the correspondent bank") to another bank ("the respondent bank").*

1059. Recommendation 7 deals with cross border correspondent banking and other similar relationships, the latter being defined as, for example, relationships established for securities transactions or funds transfers, whether for the cross border financial institution as principal or for its customers.

1060. Therefore Recommendation 7 seeks to establish enhanced procedures that need to be applied by the correspondent bank in providing banking services to the respondent bank further to the customer due diligence measures established under Recommendation 5.

1061. The AML/CFT Law does not include a definition of correspondent banking relationships although it provides for the application of enhanced measures for such relationships. The Law however is not clear whether it refers to the "correspondent" or the "respondent" institution.

1062. The CBK Advisory Letter contains a definition of 'correspondent banking' which is close to the FATF definition. There is no definition in Rule X although it is understood that the proposed CBK Regulation will also carry a detailed definition of the term.

1063. In the analysis of Recommendation 18 under Section 3.16, this Report recommends the inclusion of a definition of "correspondent banking" in the AML/CFT Law which recommendation becomes also applicable for the purposes of the analysis of Recommendation 7.

1064. In the course of the on-site visit banks informed the assessment team that they do not provide banking services to other foreign banks although they do avail themselves of correspondent banking relationships where they act as the respondent institution and this mainly by subsidiaries of foreign banks in Kosovo through their parent institution.

1065. The CBK informed that since the Money Laundering Prevention Division has been recently established it has not yet had the opportunity to assess banks on their correspondent banking

relationships although the CBK opines that banks' internal procedures reflect the provisions of the AML/CFT Law.

1066. Notwithstanding, paragraph (4) of Article 21 of the AML/CFT Law requires the application of enhanced customer due diligence procedures, although it does not specifically require the application of the enhanced measures in addition to the normal due diligence measures and, as indicated above, it is not clear whether it refers to the "correspondent" or the "respondent" institution.

1067. Without prejudice to their validity as discussed earlier in this Report, guidance on correspondent banking relationships is further provided to the industry both through the CBK Advisory Letter 2007/1 and the CBK Rule X. Both documents provide clarification on the interpretation of paragraph (4) of Article 21 by referring to the "respondent" institution. Notwithstanding their validity, reference to both documents will be made in the following analysis for Recommendation 7.

1068. The assessment team however has been informed that the proposed CBK Regulation replacing both the Advisory Letter and Rule X will retain and enhance the guidance provided in the latter two documents. However since the Regulation has not yet been published and hence not enforceable any reference in the following analysis to the Regulation will only be made for the sake of clarity and continuity.

1069. Consequently the analysis of implementation of Recommendation 7 that follows will address the obligations under the AML/CFT Law and any relevant guidance to banks and financial institutions in this regard since, as stated above, banks in Kosovo do not provide correspondent banking relationships to other foreign banks.

***Gather sufficient information about respondent institution – Essential Criterion 7.1***

1070. EC 7.1 requires that before providing banking services to a foreign bank under a correspondent banking relationship, banks gather sufficient information about the respondent bank to understand fully the nature of the respondent's business and to determine, from publicly available information, the reputation of the institution and the quality of supervision including whether the respondent institution has been subject to a ML or FT investigation or regulatory action.

1071. Paragraph (4.1) of Article 21 of the AML/CFT Law requires banks and credit institutions (credit institutions are not defined in the AML/CFT Law, the Law on the CBK or the Law on Banks and are not considered as reporting subjects under the AML/CFT Law) to gather sufficient information in order to fully understand the nature of the business of the foreign (no reference to "respondent") institution and to determine, based on public registers, lists, documents or records knowable by anyone, its reputation and quality of supervision to which it is subjected.

1072. By comparison with the EC 7.1, the requirements under the AML/CFT Law do not require banks to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action.

***Assess the respondent institution's AML/CFT controls – Essential Criterion 7.2***

1073. EC 7.2 requires banks providing banking services to a foreign bank to examine and assess the AML/CFT internal controls of the respondent institution and to ascertain that such measures are adequate and effective.

1074. Paragraph (4.2) of Article 21 of the AML/CFT Law requires banks and credit institutions (see note under EC 7.1) to assess the quality of controls in relation to combat ML and/or the FT to which the corresponding (no reference to "respondent") entity is subjected.

1075. The CBK informed that although banks in Kosovo do not provide banking services through correspondent banking relationships to foreign banks, should they eventually do so, they would use the Wolfsberg Questionnaire as a source of gathering information to assess the AML/CFT internal controls of the respondent institution.

***Obtain approval from senior management – Essential Criterion 7.3***

1076. EC 7.3 requires banks to obtain approval from senior management before establishing new correspondent relationships. The Glossary to the Methodology does not provide a definition of who would constitute senior management within the institution and therefore interpretation of this terminology is left at the discretion of countries or institutions themselves.

1077. The AML/CFT Law likewise does not provide a definition of senior management. It is only through the Law on Banks that one finds a related definition under the term "Senior Manager" which comprises:

> "the chief executive officer, chief financial officer, chief operating officer, and chief risk officer of a bank and any person, other than a director, who (i) reports directly to the board or participates or has authority to participate in major policymaking functions of the bank, whether or not such person has an official title or receives compensation for such actions, and (ii) is designated as a senior manager by the CBK. In the case of a foreign bank licensed to operate one or more branches in Kosovo, the manager of the principal branch in Kosovo and any other manager or deputy manager of a branch in Kosovo will be deemed to be a member of senior management".

1078. Indeed, paragraph (4.3) of Article 21 of the AML/CFT Law requires that banks obtain the approval of the Director General, or his designated person or employee performing an equivalent function before establishing new banking relationships. As it is not clear in the AML/CFT Law whether this is with reference to the provision or the receipt of banking services by banks in Kosovo, a broader interpretation would cover both instances.

1079. Rule X requires that a bank shall obtain approval from senior management before establishing new correspondent relationships. It is understood that this terminology will be retained in the proposed CBK Directive.

***Document respective AML/CFT responsibilities – Essential Criterion 7.4***

1080. EC 7.4 requires banks to document the respective AML/CFT responsibilities of each institution. By way of explanation the Methodology states that there is no need that the two institutions have to reduce the respective responsibilities into a written form provided there is a clear understanding as to which institution will perform the required measures.

1081. Paragraph (4.4) of Article 21 of the AML/CFT Law makes it mandatory that such agreement is in writing by requiring banks to define in writing the terms of the agreement with the institution and the corresponding obligations of each institution.

1082. While Rule X requires that a bank should document the respective AML/CFT responsibilities of each institution, the Advisory Letter on the other hand requires that banks should document the respective AML/CFT responsibilities of each institution. The Advisory Letter however, contrary to the mandatory provisions of the Law for a written document on the responsibilities of each institutions, states that is not necessary that the two banks always have to reduce the respective responsibilities into a written form provided there is a clear understanding as to which institution will perform the required measures. It appears that the Advisory Letter adopts the text of EC 7.4 rather than the obligations under the AML/CFT Law.

1083. It is understood that the proposed CBK Regulation will reflect the provisions of the AML/CFT Law.

***Maintenance of 'payable-through accounts' – Essential Criterion 7.5***

1084. EC 7.5 requires that where the relationship allows the respondent institution to use "payable through accounts" the bank providing the banking service should ensure that the respondent institution implements full normal CDD measures on its customers that have direct access to the respondent institution's accounts and that the respondent institution is able to make all relevant customer identification documents and data available to the correspondent bank upon request.

1085. The Glossary to the FATF Methodology defines "payable through accounts" as *correspondent accounts that are used directly by third parties to transact business on their own behalf*.

1086. Paragraph (4.5) of Article 21 of the AML/CFT Law requires that banks *ensure that the credit institution has verified the identity of customers who directly access the transitory accounts, which has consistently fulfilled the requirements of adequate verification of clients and that, upon request, the intermediary can provide the financial counterpart data obtained as a result of the performance of such obligations*. This indicates that the AML/CFT Law allows Kosovo banks to enter into correspondent banking relationships with cross-border respondent banks even where the respondent institution allows the use of its accounts by third parties. Otherwise the requirements under Article 21 in this respect reflect the requirements under EC 7.5.

1087. However the AML/CFT Law does not refer to "payable through accounts" but to *transitory accounts.* However, the AML/CFT Law defines "payable through" as *correspondent accounts used directly by a third party to transact business in their own behalf*. Although this could be a linguistic matter, it is advisable that in order to avoid legal ambiguity the Law should consistently refer to terminology as defined.

1088. While Rule X is silent on this matter, the Advisory Letter requires that banks have to be satisfied that the respondent bank has performed the customer due diligence for those customers that have direct access to its accounts, and that the respondent is able to provide relevant customer identification information on request of the correspondent.

1089. The assessment team is informed that the provisions in the Advisory Letter will be reflected in the proposed CBK Regulations.

***Applicability to respondent banks in EU Member States or in other jurisdictions – EU Third AML Directive Article 13 (3))***

1090. Article 13(3) of the EU Third AML Directive establishes enhanced due diligence measures that are to be applied in respect of cross-border banking relationships with respondent institutions from third countries.[139]

1091. Paragraph (4) of Article 21 in dealing with enhanced measures to be applied for correspondent banking relationships does not distinguish between banks from EU Member States or other jurisdictions. Paragraph (4) of Article 21 states that *In case of banking relationships with entities belonging from other Countries, the banks and credit institutions must:* Therefore the enhanced due diligence measures that are to be applied are similar for all correspondent banking relationships with any foreign bank registered in any country – and in accordance with the FATF requirements.

***Effectiveness***

1092. Since banks have informed that they do not provide correspondent banking services to banks from outside Kosovo it is not possible to evaluate the effectiveness of the legislative and regulatory provisions in this respect, even though in general the international standards are reflected in the domestic laws and regulations.

1093. Moreover, the CBK has informed that since the Money Laundering Prevention Division has been established in October 2013 it is not in a position to evaluate the bank's internal procedures in this regard although, according to the CBK, such procedures would be checked during on-site visits. The assessment team questions this claim by the CBK since, irrespective of the establishment of the independent Division in October 2013, the CBK had assumed supervisory responsibilities for the purposes of the AML/CFT Law prior to October 2013 and prior to the signing of the MoU with the FIU in terms of Article 36A of the AML/CFT Law.

139. Within the context of the EU Directive the term "third countries" is applied to mean those countries that are not EU Member States.

### 3.4.2. Recommendations and comments

1094. In general the requirements of the EC for Recommendation 7 are reflected in the AML/CFT Law and, without prejudice to the stance of this Report on their validity, in the relevant CBK documents for Rule X and the Advisory Letter.

1095. Notwithstanding and as identified in the above analysis, there are some shortcomings which, if addressed, would enhance harmonisation with international standards. These shortcoming can be summarised as follows:

- the AML/CFT Law does not include a definition of correspondent banking relationships;
- in the absence of such definition, it is not clear whether the AML/CFT Law refers to "respondent" or "correspondent" institutions;
- there is no obligation in the AML/CFT Law to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action (EC 7.1);
- legal ambiguity on use of terminology referring to 'payable through accounts" (EC 7.5);

1096. In the light of these gaps or weaknesses various recommendations are made to update the AML/CFT Law to better reflect the criteria for Recommendation 7. It is advisable that recommendations made are read within the context of the Description and Analysis of the specific EC.

- include of a definition of "correspondent banking" in the AML/CFT Law;
- clarify paragraph (4) of Article 21 of the AML/CFT Law to refer to "respondent" institutions in accordance with the definition of "correspondent banking";
- amend paragraph (4.1) of Article 21 of the AML/CFT Law to require banks to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action;
- ensure the proposed CBK Regulation reflects paragraph (4.4) of Article 21 of the AML/CFT Law with respect to the documentation of responsibilities; and
- remove legal ambiguity on use of terminology for "payable through accounts" as defined in the AML/CFT Law.

### 3.4.3. Rating for Recommendation 7

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.7** | **LC** | • no definition of correspondent banking relationship;<br>• lack of legal clarity in distinguishing between "correspondent" and "respondent" banks;<br>• no obligation to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action; and<br>• concerns on effectiveness. |

## 3.5. Misuse of technological developments and non face-to-face relationships (R.8)

### 3.5.1. Description and Analysis

1097. The objective of Recommendation 8 is twofold. First is the requirement to have policies in place for the prevention of the misuse of technological developments in ML or TF activities. Second is the requirement for policies and procedures to be in place to address specific risks associated with non-face to face business relationship or transactions i.e. where the customer is not physically present.

1098. To an extent the AML/CFT Law addresses both objectives of Recommendation 8. However, while Article 23 requires banks and financial institutions to have internal programmes in place for

the prevention of ML and the FT, more specifically it requires banks and financial institutions to promulgate written internal procedures and controls for the prevention and detection of ML, paragraph (2) of Article 23 defines the outline of such procedures without being exhaustive but without specific references to the two objectives under Recommendation 8.

1099. However, while Article 23 refers to "customer identification procedures" as part of the internal programmes and could thus be extended to cover non-face to face business relationships and transactions, there is no specific reference to technological developments although this would still be covered by the generality of the requirements under the Law.

1100. While both Rule X and the Advisory Letter provide guidance on non-face to face business relationships and transactions, both documents are silent on the prevention of the use of technological developments for ML or TF purposes.

1101. The assessment team is informed that while the proposed CBK Regulation remains silent on technological developments, it will provide enhanced guidance on non-face to face business relationships and transactions.

***Policies or measures to prevent misuse of technological developments – Essential Criterion 8.1***

1102. EC 8.1 requires financial institutions to have policies in place or to take such measures as may be needed to prevent the misuse of technological developments in ML or TF schemes.

1103. Paragraph (7) of Article 21 of the AML/CFT Law, in dealing with enhanced customer due diligence, requires that institutions and persons subject to the AML/CFT Law pay particular attention to any risk of ML or TF related to products or transactions which promote anonymity and to take any measures necessary to prevent its use for the purpose of ML or TF.

1104. It is worth noting that the provisions of paragraph (7) of Article 21 go beyond the requirements under Recommendation 8 in that it also covers risks related to products which promote anonymity.

1105. In the course of the meeting with the CBK during the second visit the assessment team was informed that in practice banks have internal policies and procedures with obligations for managing products that could pose a higher risk. If banks want to introduce new products they are required first to develop internal policies and procedures for managing the risk present in such products. If practice is not in compliance with these policies and procedures then banks have to identify whether what is applied in practice or their written policies and procedures provide for the better management of the risk and either change practice or upgrade the policies and procedures as may be necessary.

1106. This was confirmed by the banks that met with the assessment team. In replying to a question as to how do banks ensure that technological developments and new products are not used for ML or the FT, banks confirmed that they carry out a risk assessment when putting new products on the market. To this effect banks claim they ensure that transactions in these products are harmonised with their AML/CFT systems so that any identified risks are managed within their internal control systems.

***Policies and procedures to address specific risks in non-face-to-face relationships or transactions – Essential Criterion 8.2***

1107. EC 8.2 requires that banks and financial institutions have in place appropriate policies and procedures to address any specific risks associated with non-face to face business relationships and transactions to be applied both when establishing the relationship and in the ongoing due diligence monitoring.

1108. The FATF Methodology provides examples of what constitutes non-face to face relationships and transactions. These include relationships concluded over the internet or through the post; services provided over the internet or other interactive computer services; telephone banking; transmission of instructions or application through facsimile or similar means and other similar channels of providing services.

1109. The AML/CFT Law is not specific in allowing or prohibiting non-face to face business relationships to be established and operated. Indeed the Law acknowledges that non-face to face business relationships present higher risks for banks and financial institutions and therefore it requires mandatory enhanced due diligence to be applied when establishing the business relationship.

1110. During the on-site visit the CBK stated that banks do not undertake such business as the AML/CFT Law is ambiguous whether it prohibits it or allows it except that the Law refers to the application of enhanced due diligence measures. The CBK believes that the ambiguity within the AML/CFT Law needs to be addressed and clarified through specific provisions. In the meantime the CBK draft Regulation will address this issue and gives guidance through the policy of the CBK in this regard but the law prevails and therefore it should be amended for legal clarity.

1111. Banks met by the assessment team during the on-site visit expressed similar views to those of the CBK and strongly feel that the legal ambiguity needs to be removed.

1112. Article 23 of the AML/CFT Law addresses the obligation for banks and financial institutions to maintain internal programmes. Thus paragraph (2) of Article 23 requires that banks and financial institutions promulgate written internal procedures and controls for the prevention and detection of ML and shall enforce them. Such procedures shall include, but need not be limited to, a list of requirements that is provided. One of such requirements is the client identification procedures. When read within the context of the provisions of paragraph (1) of Article 17 dealing with the risk assessment of clients, within the provisions of paragraph (1) of Article 21 dealing with the ongoing enhanced due diligence measures, and, more specifically within the context of paragraph (2) of Article 21 dealing with non-face to face business relationships, it can be concluded that such internal programmes shall include procedures to be applied for non-face to face business relationships and transactions.

1113. While the Advisory Letter is silent on the requirement for banks and financial institutions to have internal procedure in place, Rule X provides some guidance in accordance with the provisions of Article 23 of the AML/CFT Law. The assessment team is informed that guidance in this respect in the proposed CBK Regulation will be strengthened.

***Measures to include specific and effective CDD procedures – Essential Criterion 8.2.1***

1114. EC 8.2.1 requires that measures for managing risk in non-face to face business relationships should include specific and effective CDD procedures. The FATF Methodology provides examples of such enhanced measures to include certification of documents; requirement of additional documents; third party introduction and the requirement that first payment be effected through an account in the potential customer's name held with another bank of repute.

1115. The AML/CFT Law considers non-face to face relationships as presenting a mandatory higher risk of ML and FT for banks and therefore requires the application of mandatory enhanced measures as defined in the Law and which include taking additional measures to verify or certify the documents supplied, or requiring confirmatory certification by a bank or financial institution covered by the AML/CFT Law; and/or ensuring that the first payment of the operations is carried out through an account opened in the customer's name in another bank.

1116. Advisory Letter 2007/1 is rather silent on non-face to face relationships except to the extent of providing examples which would constitute non-face to face relationships and examples of enhanced due diligence. On the other hand Rule X provides information on customer due diligence for non-face to face relationships but basically echoes the provisions of the AML/CFT Law.

***Focus on products or transactions regardless of use of technology (EU Third AML Directive Article 13 (6))***

1117. Article 13(6) of the EU Third AML Directive requires that banks and financial institutions pay special attention to products and transactions that might favour anonymity and thus pose a higher risk of ML or FT and to take measures to prevent such risks.

1118. Paragraph (7) of Article 21 of the AML/CFT Law replicates the provisions of the EU Directive in requiring that the institutions and persons subject to this law shall pay particular attention to any risk of ML or TF related to products or transactions *which promote anonymity and take any measures necessary to prevent its use for the* purpose of ML or TF.

1119. As detailed above under the analysis of EC 8.1 the CBK and the banks have confirmed that internal procedures are in place to evaluate such risks and to apply measures accordingly.

***Effectiveness***

1120. While banks and financial institutions appear to manage risks arising out of products, transactions and technological developments, the legal ambiguity on non-face to face business relationships raises concerns as the industry does not appear to be prepared for this activity even though according to their web-sites banks offer internet banking services.

### 3.5.2. Recommendations and comments

1121. As stated above Recommendation 8 has two objectives. The first objective relating to technological developments that could be used for ML and FT activities seems to be addressed by the AML/CFT Law. However this Report identifies some concerns and gaps as regards the second objective with reference to non-face to face relationships and transactions.

1122. Foremost among these concerns is the legal ambiguity that seems to exist within both the authorities and the industry as to whether the AML/CFT Law allows banks and financial institutions to enter into non-face to face relationships and to what extent.

1123. While the CBK and the banks and financial institutions are more inclined to interpret the Law as not allowing for such relationships, such relationships are recognised not only under the AML/CFT Law which provides for the application of mandatory enhanced due diligence, but also under the rules and regulations issued by the CBK, including the proposed Regulation.

1124. Moreover, it appears from the web-sites of most banks in Kosovo that they provide for internet banking which in itself may include an element of non-face to face activities.

1125. It is therefore strongly recommended that any legal ambiguity in this regard is clarified through legislative provisions and that additional guidance be provided to the industry to ensure that such relationships are closely monitored under the internal risk based systems for customer categorisation and monitoring.

### 3.5.3. Rating for Recommendation 8

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.8** | **LC** | • legal ambiguity on the application of non-face to face business relationships; and<br>• consequent effectiveness concerns. |

## 3.6. Third Parties and Introduced Business (R.9)

### 3.6.1. Description and Analysis

1126. Recommendation 9 provides that countries may permit banks and financial institutions to rely on intermediaries or other third parties to perform some elements of the CDD process or to introduce business under certain pre-set conditions. It is important that where such reliance is permitted the ultimate responsibility for customer identification and verifications remains with the bank or financial institution relying on the intermediary or the third party. Moreover, it is up to the countries concerned to determine in which countries the third party may be based giving due consideration to the extent to which such countries adequately apply the FATF Recommendations.

1127. According to the FATF Methodology such reliance does not apply either where this is done under an outsourcing or agency relationships under a contractual arrangement or where there are business relationships, accounts or transactions between financial institutions for their clients.

1128. The AML/CFT Law is silent on reliance on third parties for undertaking some elements of the CDD process or on outsourcing. Consequently both the Advisory Letter and Rule X are also silent. Therefore the Law and the regulations do not appear to allow such reliance. But neither do they specifically prohibit it and hence there are no conditions or obligations should there be reliance by a reporting subject on another intermediary.

1129. The assessment team is informed that consequently the proposed CBK Regulation will likewise be silent on reliance on third parties for carrying out some of the elements of the CDD process and on introduced business.

1130. Notwithstanding, in the replies to the Cycle 2 Questionnaire with regards to FATF Recommendation 9 the replies provided by the Kosovo Bankers Association, the CBK and the FIU all indicate that banks and financial institutions are allowed under the AML/CFT Law to rely on third parties for some of the elements of the CDD process. The assessment team does not concur with this interpretation of the law.

1131. However, in the course of the Cycle 2 on-site visit the CBK informed that the AML/CFT Law is silent on reliance on third parties or introduced business and that in the case of subsidiaries of foreign financial institutions the subsidiary in Kosovo has to undertake the full CDD and cannot rely on the parent or sister companies. This said however, according to the CBK, the Law does not prohibit it either and hence there appears to be a legal ambiguity or legal interpretation.

1132. On the other hand the banks met by the assessment team while agreeing that the AML/CFT Law is basically silent on the matter and only speaks on the obligation of the application of CDD it does not specify whether this can be done by a third party. Notwithstanding subsidiaries of foreign financial institutions however make such reliance within the group of which they form part. According to these banks this is done either through reliance or through introduction of business, which they consider as being the same, and the information required is always provided immediately. Moreover, although there are no specific conditions for such reliance, whenever the customer identification documents were needed these are always provided within the group of which the subsidiary forms part.

1133. Such comments create concerns on the reliability of the interpretation of the AML/CFT Law by the authorities and the industry. Moreover, it appears that there is no distinction made between reliance on third parties and introduced business.

***Obtain from third party the necessary information on customer identification – Essential Criterion 9.1***

1134. EC 9.1 requires that countries should ensure that where financial institutions rely on a third party to perform some elements of the CDD process they should immediately obtain from the third party the necessary customer information.

1135. Although the AML/CFT Law is silent on the matter, and notwithstanding that the CBK believes that such reliance is not happening in practice, the banks informed that when they do rely within the group of which they form part, information is always provided immediately.

1136. Notwithstanding, there are no legal provisions to this effect and in doing so banks may be acting beyond the provisions of the Law and may not be covered for any risks that may arise.

***Adequate steps to ensure identification and other documentation is made available by third party – Essential Criterion 9.2***

1137. EC 9.2 requires that financial institutions ensure that the relevant identification and verification documentation related to the CDD requirements will be made available from the third party immediately upon request.

1138. Notwithstanding that there are no provisions to this effect in the AML/CFT Law which does not recognise third party reliance procedures, the banks have confirmed that in their reliance within the group of which they form part, such documentation has always been made available to them when requested.

1139. Notwithstanding, there are no legal provisions to this effect and in doing so banks may again be acting beyond the provisions of the Law and may not be covered for any risks that may arise.

***Third party should be regulated and supervised – Essential Criterion 9.3***

1140. EC 9.3 requires that the third party upon whom reliance is made is regulated and supervised with measures in place to comply with relevant CDD requirements.

1141. Since the AML/CFT Law is silent on reliance on third parties there are no legislative provisions to this effect.

1142. Moreover in practice banks have informed that they only place reliance within the group to which they belong. It follows therefore that banks do not ensure that that member of the group is regulated and supervised - although subsidiary banks in Kosovo mainly form part of European banking groups.

***Third party should be from jurisdictions that adequately apply FATF Recommendations – Essential Criterion 9.4***

1143. EC 9.4, while leaving countries the discretion to determine in which countries the third party may be based, requires competent authorities to ensure that such countries adequately apply the FATF Recommendations by reference to country reports published by the FATF, the IMF or the World Bank or other FATF Style Regional Bodies (FSRBs).

1144. In the absence of any legislative requirements to this effect, and within the context that banks have declared that they only place reliance within the group to which they belong, in practice this obligation is not observed even if subsidiary banks in Kosovo mostly belong to banks in European countries but reliance, in practice, can also be made on sister-companies which may not necessarily be based in a European country.

***Ultimate responsibility remains with the financial institution relying on third party – Essential Criterion 9.5***

1145. According to EC 9.5, where a financial institution relies on a third party to carry out some elements of the CDD process, the responsibility for customer identification and verifications remains with that financial institution relying on the third party.

1146. Since banks have informed that, notwithstanding that the Law does not speak about third party reliance, they do at times rely on the parent or sister-institutions to undertake some elements of the due diligence process or to introduce business, the ultimate responsibility for such measures is not a question that is raised since this is considered as a group wide internal activity.

***Effectiveness***

1147. It is difficult to measure effectiveness when the AML/CFT Law is silent on reliance on third parties and introduced business, the Kosovo Bankers Association, the CBK and the FIU all indicated that the AML/CFT Law allows reliance (see replies to Cycle 2 Questionnaire on Recommendation 9 – but an opinion that was reversed during the on-site visit) while banks that are subsidiaries of foreign financial institutions declare that at times they do place reliance on members of the same banking group to which they belong.

1148. While in practice this is internationally done within a group, normally legal provisions are in place to allow such action. Indeed, if one were to interpret this within the context of the provisions of the AML/CFT Law on confidentiality it transpires that even if subsidiary banks in Kosovo wish to share information on STRs within the group to which they belong they need the authorisation of the FIU. Banks have further informed that in order to disclose other information not related to STRs even within the group to which they belong they need the authorisation of the Personal Data Protection Agency.

1149. Moreover, while the CBK has informed that even subsidiary banks in Kosovo have to undertake full CDD themselves – contrary to its claim in the Questionnaire that third party reliance is allowed under the Law - subsidiary banks in Kosovo have informed the assessment team that at

times they place reliance or accept introduced business within the group, and particularly on or from the parent institution,

### 3.6.2. Recommendations and comments

1150. The AML/CFT Law is silent on reliance on third parties without either prohibiting it or allowing it outright. This has lent itself to interpretation particularly as banks that are subsidiaries in Kosovo of international banks interpret this silence that the Law does not prohibit it and that at least they are allowed to place reliance on third parties if this is done within the group to which they belong.

1151. Consequently the fact that subsidiary banks in Kosovo place reliance within the group to which they belong raises concerns as, in the absence of conditional criteria in accordance with the provisions of the FATF Recommendation 9, such reliance can be made without any criteria at all, including reliance on sister-institutions that may be based in countries which do not adequately implement the FATF Recommendations.

1152. There is therefore an urgent need for clarifications and guidance on reliance on third parties or for accepting introduced business.

1153. In this respect it is strongly recommended that specific legislative provisions are included in the AML/CFT Law which either prohibit or allow reliance on third parties, even if this is to be allowed only intra-group. If this is to be allowed, even intra-group, then the Law should further provide under which conditions reliance can be placed or introduced business accepted. However, pending legislative changes, and on the basis that the AML/CFT Law is silent on the matter, the FIU should ensure that instructions to this effect (prohibition) be issued to all reporting subjects.

### 3.6.3. Rating for Recommendation 9

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.9** | **NC** | • absence of clear legal provisions;<br>• consequent absence of criteria for reliance which is being done in practice; and<br>• effectiveness implications for the system arising of absence of legal provisions. |

## 3.7. Secrecy laws consistent with the Recommendations (R.4)

### 3.7.1. Description and Analysis

1154. Recommendation 4 requires that relevant secrecy laws do not inhibit the effective implementation of the FATF Recommendations.

1155. According to EC 1 for Recommendation 4 in the FATF Methodology *Areas where this may be of particular concern are the ability of competent authorities to access information they require to properly perform their functions in combating ML or FT; the sharing of information between competent authorities, either domestically or internationally; and the sharing of information between financial institutions where this is required by R.7, R.9 or SR.VII.*

1156. Article 37 of the AML/CFT Law provides that: *Notwithstanding any contrary provisions of applicable law, professional secrecy may not be invoked as a ground for refusal to provide information that shall be disclosed pursuant to this Law; or that is collected and maintained pursuant to this Law and is sought by either the FIU or the police in connection with an investigation that relates to money laundering and is ordered by, or carried out under the supervision of, a Prosecutor or Pre-Trial Judge.* This provision is without prejudice to information that is subject to lawyer-client privilege.

1157. Advisory Letter 2007/1 and Rule X of the CBK are silent on the confidentiality issue.

1158. Under Article 79, the Law on Banks empowers the CBK to exchange information on supervisory matters with financial supervisory authorities in Kosovo and in other countries. According to this Law the exchange of such information may include confidential information, provided that the CBK has satisfied itself that the information will be used for supervisory purposes and will be subject to confidentiality treatment that is similar to that which the CBK would be required to apply.

1159. Moreover, under Article 80 the Law on Banks further provides that any non-public information collected by the CBK from a bank and any non-public information provided to the CBK by any other regulatory or supervisory authority to carry out CBK responsibilities under the Law on Banks shall be subject to the requirements of the Law on the CBK and may only be disclosed outside the CBK as provided in that Law.

1160. On its part, through paragraph (2) of Article 74, the Law on the CBK provides that notwithstanding the strict prohibition of disclosing information provided through paragraph (1) of Article 74, non-public information may be disclosed outside the CBK, in accordance with procedures established by the Executive Board, if such disclosure:

- is made in accordance with the express consent of the natural or legal person about whom the information relates;
- fulfils a duty to disclose as imposed by criminal Law, including to assist criminal Law Enforcement or on the order of a court acting on criminal matter;
- is made to the external auditors of the CBK;
- is given to regulatory and supervisory authorities or to public international financial institutions, in the performance of their official duties; or
- is required by the interests of the CBK itself in legal proceedings requiring disclosure.

1161. On analysis, FATF Recommendation 4 requires the lifting of confidentiality provisions particularly in instances for:

- access of information by relevant competent authorities;
- sharing of information between competent authorities, domestically and internationally;
- sharing of information between financial institutions for correspondent banking services;
- sharing of information between financial institutions for reliance on third parties for part of the CDD requirements where such reliance is allowed by law; and
- information sharing on wire transfer services.

1162. With the exception of the sharing of information for third party reliance as this measure is not specifically allowed by the AML/CFT Law although it is not prohibited – see analysis of FATF Recommendation 9 in this Report - the AML/CFT Law allows for the provision and sharing of information in all other instances as defined above between financial institutions.

1163. Consequently, the lifting of confidentiality provided for in any other law through Article 37 of the AML/CFT Law in situations where the information is required to be disclosed pursuant to the AML/CFT Law would meet the requirements for Recommendation 4 to a large extent.

1164. In the analysis of FATF Recommendation 29 this Report argues that the delegated supervisory powers for the financial sector to the CBK do not automatically empower the CBK to apply its prudential supervisory powers under the Law on Banks and the Law on the CBK for the purposes of the AML/CFT Law. Hence the rights of the CBK to demand information that it can share with other competent authorities for the purposes of FATF Recommendation 4 is questionable also.

1165. In this respect, it should indeed be noted that the power of the CBK to exchange information in accordance with Article 79 of the Law on Banks is limited to supervisory matters of the CBK within the context of the Law on Banks. Hence the empowerment refers to information sharing for prudential supervisory purposes since, as is demonstrated under the analysis for Recommendation 23 of this Report, the Law on Banks does not provide supervisory powers to the CBK for the purposes of the AML/CFT Law although such powers are delegated to the CBK by the FIU through Article 36A of the AML/CFT Law.

1166. Moreover, whereas the gateways provided under paragraph (2) of Article 74 of the Law on the CBK do not specifically cover the requirements under Recommendation 4, the exception to the

general prohibition under paragraph (1) of Article 74 of the Law on the CBK - *except when necessary to fulfil any task or duty imposed by this Law or any other Law* - is more subject to interpretation, particularly when read within the context of the provisions of Article 37 of the AML/CFT Law which deals with professional secrecy.

1167. Thus, since all confidentiality gateways under the Law on Banks and the Law on the CBK are meant to cover situations related to situations of prudential supervisory matters, it is recommended to strengthen legal certainty for the lifting of confidentiality for the purposes of the AML/CFT Law.

1168. On the other hand, the AML/CFT Law in empowering the FIU with the supervisory responsibilities for all reporting subjects under the Law also empowers the FIU to demand and obtain information and to share information with other relevant domestic or foreign authorities.

***Effectiveness***

1169. The current provisions for lifting of confidentiality for the purposes of the provisions of the AML/CFT Law do not impact on the effectiveness of the overall regime since most sharing of information under the AML/CFT Law is normally undertaken between FIUs although sharing of information between supervisory authorities for the purposes of the prevention of ML and the FT cannot be excluded.

### 3.7.2. Recommendations and comments

1170. It is therefore recommended that, in order to remove any divergences in interpretation and thus to ensure legal clarity a new bullet point be added to paragraph (2) of Article 74 of the Law on the CBK, in particular since the CBK has been delegated supervisory powers under and for the purposes of the AML/CFT Law, as follows:

- is made to the FIU for the purposes of its obligations under the Law on the Prevention of Money Laundering and the Financing of Terrorism or to appropriate domestic or foreign competent authorities where such confidential information is relevant for the prevention of money laundering or the FT.

1171. Moreover the recommendations made in this Report for the analysis of Recommendation 29 become more relevant for the purposes of Recommendation 4 for the CBK to demand information and documents for the purposes of the AML/CFT Law.

### 3.7.3. Rating for Recommendation 4

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.4** | **LC** | • there is a need for legal clarity for lifting confidentiality for the CBK with regards to the provisions of the AML/CFT Law beyond prudential matters. |

## 3.8. Record Keeping (R.10*)

### 3.8.1. Description and Analysis

1172. Recommendation 10 requires financial institutions to maintain appropriate records on transaction and identification requirements for a period of five (5) years and to make such records available to the relevant competent authorities upon appropriate authority. Although the FATF Methodology provides some guidance on the type of records to be maintained, transaction records should generally be those that can assist the authorities to reconstruct a transaction. Identification records mainly refer to the CDD information and should be such that a customer can be re-identified.

1173. According to the FATF Methodology, the obligation on financial institutions to maintain records as stipulated should be provided for in law or regulation and should therefore be mandatory.

1174. The analysis that follows identifies the obligation for record keeping for banks and financial institutions mainly through the requirements under the AML/CFT Law but does not exclude the possibility of record retention obligations under other laws.

***Obligation to maintain necessary records on all transactions – Essential Criterion 10.1****

1175. EC 10.1 requires financial institutions to maintain all necessary records on both domestic and international transactions for at least five (5) years following the completion of the transactions. Upon proper authority, the relevant competent authorities may require financial institutions to maintain such records for a longer period in specific cases.

1176. Paragraph (6) of Article 17 of the AML/CFT Law requires banks and financial institutions to maintain adequate information such that a transaction can be reconstructed where:

- a transaction has been executed;
- there is an attempted execution of a transaction;
- there are complex and unusual transactions; and
- there are transactions with persons and entities from countries that do not apply adequate measures for the prevention of money laundering and the financing of terrorism.

1177. The AML/CFT Law does not empower any competent authority to extend the retention period in specific cases over those established by the Law.

1178. Banks and financial institutions are required to retain the above detailed records for a period of five (5) years after the execution or attempted execution of the transaction. It is worth noting that the AML/CFT Law goes beyond the FATF Standards and requires the maintenance of records even for attempted transactions – a requirement that should be commended.

1179. The obligation to retain records as specified in the above last two bullet points is further re-enforced under paragraph (3) of Article 20 of the AML/CFT Law.

1180. Advisory Letter 2007/1 of the CBK does not provide any additional guidance on the retention of transaction records except to the extent that it requires Foreign Exchange Offices and Money Transfer Operators, in the absence of an ongoing business relationship, to keep copies of the transaction data for a period of five (5) years following a transaction.

1181. Section 8 of Rule X of the CBK reflects the obligation under the AML/CFT Law to retain a record of all transactions. Moreover, in further reflecting the five (5) year retention period, Section 8 of Rule X of the CBK extends the retention period for banks and financial institutions for longer if requested by CBK, the FIU (the Rule still makes reference to the Financial Intelligence Centre) or any other competent authority in specific cases.

1182. Moreover, Section 8 of Rule X requires that *Where the bank or financial institution is aware that records relate to on-going investigations, such records should be retained until it is confirmed by the relevant law enforcement agency that the case has been closed.*

1183. The obligation to maintain records of transactions under Article 17 of the AML/CFT Law for a period of five (5) years following the completion of the transaction appear to adequately cover parts of the obligations under EC 10.1.

1184. The AML/CFT Law and Rule X however fall short in establishing the commencement of the five (5) year period for the retention of records of occasional linked transactions that together meet or exceed the threshold of €10,000 established by the AML/CFT Law. The usual standard is for the five (5) year retention period to commence with the completion of the last transaction in such a series of transactions. The assessment team is informed that this issue should be addressed by the proposed CBK Regulation.

1185. Moreover, the AML/CFT Law does not reflect the additional requirement under EC 10.1 for financial institution to retain records for a longer period if so requested by competent authorities under proper authority.

1186. This empowerment is however reflected in Rule X of the CBK under Section 8. There are two main issues challenging this extended power through Rule X. First the standard requirement should be found under primary law or regulation as in this case the CBK is assuming powers beyond those provided by the Law. Second the validity of most parts of Rule X of the CBK is questioned through this Report and, in any case, Rule X does not meet the criteria for a 'regulation' in terms of the FATF Methodology.

1187. Even if accepted, the empowerment under Rule X would not apply to all reporting subjects and is thus creating an uneven playing field in the implementation of the AML/CFT Law.

1188. Thus this Report finds that the timing for the five (5) year maintenance period for series of occasional linked transactions, which will be addressed through the CBK proposed Regulation, and, more importantly, the power for the relevant authorities to extend the five (5) year retention period under proper authority are absent in the AML/CFT Law.

1189. It is therefore recommended that a new paragraph (6.3) to Article 17 of the AML/CFT Law be added to include the following:

> *Article 17 para. (6.3)*: Where the record refers to a series of linked occasional transactions the five (5) year retention period shall commence with the execution of the last transaction in the series.

1190. It is further recommended that a new paragraph (7) of Article 17 is added as follows empowering only the FIU to extend the retention period since the FIU is the authority to receive and process STRs and would have information on the status of the report:

> *Article 17 para. (7)* In specific cases determined by the FIU for the purposes of its functions, the FIU may extend the period of five (5) years established under paragraph 6 of this Article by written order to the reporting subjects concerned.

***Record sufficient to permit reconstruction of individual transactions – Essential Criterion 10.1.1***

1191. EC 10.1.1 requires that the details maintained in a transaction record be sufficient for the authorities to reconstruct an individual transaction such that it can provide evidence in any eventual possible prosecution of a criminal activity.

1192. Article 17 of the AML/CFT Law in creating the obligation to maintain transaction records to enable reconstruction of transaction falls short in providing guidance accordingly.

1193. While Advisory Letter 2007/1 is silent on this issue, in reflecting the provisions of the Law for the maintenance of transaction records, Section 8 of Rule X of the CBK provides guidance on the type of records of the components of a transaction that should be retained. These include:

- the name of the customer and the beneficial owner (and holder of a power of attorney, if applicable) and their addresses or other identifying information as normally recorded by the bank or financial institution;
- the nature and date of the transaction;
- the type and amount of currency involved; and
- the type and identifying number of any account involved in the transaction.

1194. The provisions for guidance under Section 8 of Rule X of the CBK, which the assessment team understands will be retained in the proposed CBK Regulation, contribute extensively for banks and financial institutions to maintain appropriate transaction records that are conducive to the reconstruction of the transaction.

1195. By way of commenting on the effectiveness of the entire preventive system under the AML/CFT Law the Kosovo authorities may wish to consider that guidance under Rule X, and eventually under the proposed CBK Regulation, is applicable only to the financial sector thus, in

this case, creating an uneven playing field with the rest of the reporting subjects in the implementation of the AML/CFT Law.

1196. Although further guidance on the method of retaining records – electronic, physical, or otherwise – would further benefit the system, the requirements under EC 10.1.1 are currently adequately met for the financial sector.

***Records of identification data, account files and business correspondence - Essential Criterion 10.2****

1197. EC 10.2 requires financial institutions to maintain all necessary records of the identification data, account files and business correspondence for at least five (5) years following the termination of an account or a business relationship. Upon proper authority, the relevant competent authorities may require financial institutions to maintain such records for a longer period in specific cases.

1198. Paragraph (6) of Article 17 of the AML/CFT Law requires banks and financial institutions to maintain copies of documents that attest the identity of a client, property holders, taken in compliance with Article 17, account files and business correspondence, for at least five (5) years, following the termination of the business relationship.

1199. The AML/CFT Law does not empower any competent authority to extend the retention period in specific cases beyond the period established under the Law.

1200. Section 8 of Rule X of the CBK requires that: *Banks and financial institutions shall also retain all necessary records relating to the customer, beneficial owner, or holder of power of attorney, account files, and business correspondence for at least five years following the termination of the business relationship, or in specific cases for a longer period if requested by the CBAK, FIC, or other competent authority. The records shall identify the staff member who carried out the identification of the customer (and beneficial owner, where applicable).* Thus Section 8 also provides additional guidance.

1201. Moreover, as already detailed above, Section 8 of Rule X further requires that *Where the bank or financial institution is aware that records relate to on-going investigations, such records should be retained until it is confirmed by the relevant law enforcement agency that the case has been closed.*

1202. The assessment team is informed that the above mentioned provisions of Section 8 of Rule X will be retained in the CBK proposed Regulation.

1203. Although *prima facie* it appears that the requirements under EC 10.2 may be met through the provisions of the AML/CFT Law and Rule X of the CBK, an analysis of these provisions indicates some important gaps, weaknesses or discrepancies.

1204. EC 10.2 requires that the identification records are maintained for a five (5) year period following the closure of an account or the termination of the business relationship. Paragraph (6) of Article 17 of the AML/CFT Law sets this period commencing from the termination of the business relationship only. Rule X on the other hand reflects Article 17 of the AML/CFT Law by requiring the period of five (5) year to commence following the termination of the business relationship.

1205. Moreover, likewise for EC 10.1, the AML/CFT Law does not reflect the additional requirement under EC 10.2 for financial institutions to retain identification records for a longer period if so requested by competent authorities under proper authority.

1206. Similarly as for EC 10.1, the empowerment to extend the retention period is however reflected in Rule X of the CBK under Section 8, and which, the assessment team is informed, will be retained in the CBK proposed Regulation. Consequently, there are two main issues challenging this extended power through Rule X. First the standard requirement should be found under primary law or regulation. Second the validity of most parts of Rule X of the CBK being questioned through this Report and, in any case, Rule X does not meet the criteria for a 'regulation' in terms of the FATF Methodology.

1207. Even if accepted, the empowerment under Rule X would not apply to all reporting subjects and is thus creating an uneven playing field in the implementation of the AML/CFT Law.

1208. Thus this Report finds that the power for the relevant authorities to extend the five (5) year retention period under proper authority for identification records is absent in the AML/CFT Law.

1209. It is therefore recommended to amend paragraph (6.1) of Article 17 of the AML/CFT Law to read as follows: *upon closing of an account or upon the termination of the business relationship, whichever is later.*

1210. With regards to the extension of the retention period, the recommendation made under the analysis of EC 10.1 above for a new paragraph (7) of Article 17 refers.

***Availability of records on a timely basis to domestic competent authorities – Essential Criterion 10.3****

1211. EC 10.3 requires financial institutions to ensure that all customer and transaction records and information maintained according to the established standards are available on a timely basis to domestic competent authorities upon appropriate authority.

1212. Article 17 of the AML/CFT Law requires banks and financial institutions to ensure that the maintained documentation and information as required are ready and available to the FIU, and to other competent authorities.

1213. The obligation to retain detailed records of complex and unusual large transactions under paragraph (3) of Article 20 of the AML/CFT Law specifies that the transaction information retained shall be made available if requested by a *supervisory authority* further to the FIU and other competent authorities as required under Article 17.

1214. Section 8 of Rule X of the CBK requires banks and financial institutions to make available *on request* to the CBK, the FIU (the Rule still makes reference to the Financial Intelligence Centre), and any other competent authority all records and available information on a customer, beneficial owner, or holder of a power of attorney and all requested transaction records, in a form and manner that is comprehensive, timely, and comprehensible.

1215. In substance the main requirements under EC 10.3 appear to be in place through the AML/CFT Law and Rule X of the CBK, the latter without prejudice to the concerns expressed in this Report, but as will be reflected in the CBK proposed Regulation. But since the Methodology requires that the requirements under Recommendation 10 should be covered by law or regulation and moreover the validity of Rule X as 'regulation' in terms of the Methodology is questionable, compliance with the requirements of EC 10.3 must be assessed against the AML/CFT Law only.

1216. In this regard it should be noted that in specifying the transaction records to be maintained, including those for special monitoring transactions under Article 20 of the AML/CFT Law, there seems to be an inconsistency on the availability of such information to the competent authorities. Whereas Article 17 requires banks and financial institutions to make records of transactions and ensure their availability to the FIU and to other competent authorities, Article 20 requires banks and financial institutions to make available information retained there-under to the FIU, *supervisory authorities* and other competent authorities *if requested*. Thus it is not clear why under Article 20 supervisory authorities are specifically referred to and why under Article 17 information is not made available if requested.

1217. It is therefore recommended to harmonise the provisions of Article 17 and Article 20 in this regard.

***Effectiveness***

1218. As already indicated in the analysis for Recommendation 10, some of the identified weaknesses or shortcomings could impact negatively on the effectiveness of the implementation of the record keeping obligations.

1219. Among these weaknesses one could refer to the ambiguities in the AML/CFT Law on the commencement period for a series of related transactions. The inconsistency in the Law and Rule X on the obligation to maintain records for a longer period and the lack of legal power for the FIU or other competent authorities to demand such extended period further negatively contribute to the effectiveness of the system.

1220. Moreover, any guidance provided by the CBK on this issue can be applied only to the financial sector thus creating an uneven playing field with negative impact on the entire system.

### 3.8.2. Recommendations and Comments

1221. Although in principle the provisions of the AML/CFT Law reflect the main criteria for Recommendation 10 there are serious conflicts, discrepancies or weaknesses that, if left unattended could develop into vulnerabilities for the effective implementation of the Law.

1222. The conflicts, gaps and weaknesses identified in the AML/CFT Law within the context of the Essential Criteria for FATF Recommendation 10 could be summarised as follows, although a reading of the analysis for the specific criteria should not be excluded:

- lack of provisions for the commencement retention period for a series of linked occasional transactions (EC 10.1);
- lack of guidance on the type and methodology of retention records (EC 10.1.1);
- lack of legal power for the relevant authorities to extend the five (5) year retention period under proper authority for transaction records (EC 10.1);
- lack of legal power for the relevant authorities to extend the five (5) year retention period under proper authority for identification records (EC 10.2);
- lack of harmonisation in the AML/CFT Law with international standards on the timing for the commencement of the five (5) year maintenance period for identification records (EC 10.2); and
- ambiguity within the Law on the availability of information to competent authorities (EC 10.3).

1223. A number of recommendations are made in the analysis for the specific EC to amend the preventive legal framework in this regard. Whereas it is advisable that such recommendations are read within the context of the analysis of each specific EC, the main recommendations refer to:

- including a new paragraph (6.3) to Article 17 in connection with the timing of the retention period for a series of linked occasional transactions;
- inserting a new paragraph (7) to Article 17 empowering the FIU to extend the retention period in specific cases for both transaction and identification documentation;
- amending paragraph (6.1) of Article 17 consistent with international standards; and
- harmonising Article 17 and Article 20 on the availability of retained records to competent authorities.

### 3.8.3. Rating for Recommendation 10

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.10** | **NC** | • lack of provisions for the commencement retention period for linked occasional transactions;<br>• lack of guidance on methodology of record retention;<br>• lack of legal power for the extension of the five (5) year retention period for both transaction and identification records when necessary;<br>• inconsistency with international standards on the timing for the commencement of the retention period for identification records;<br>• ambiguity on the availability of records to competent authorities; and<br>• effectiveness issues related to conflicting or lack of legal provisions and uneven playing field among the entire reporting subjects. |

## 3.9. Wire Transfers (SR.VII)

### 3.9.1. Description and Analysis

1224. SR VII on wire transfers requires countries to take measures to ensure that financial institutions, including money remitters, include accurate and meaningful originator information as defined on funds transfers and related messages that are sent and that the information should remain with the transfer or related message throughout the payment chain. SR. VII further requires financial institutions to conduct enhanced scrutiny of and monitor for suspicious activity funds transfers that do not contain complete originator information.

1225. According to the FATF Methodology SR VII is applicable to cross-border and domestic transfers between financial institutions but is not applicable to:

- use of debit or credit cards where these are not used as a payment system to effect a money transfer; and
- financial institution to financial institution transfers and settlement where the originator and beneficiary are financial institutions acting on their own behalf.

1226. The FATF Methodology defines a *wire-transfer* or *funds transfer* for the purposes of SR VII as any transaction carried out on behalf of an originator person (both natural and legal) through a financial institution by electronic means with a view to making an amount of money available to a beneficiary person at another financial institution. The originator and the beneficiary may be the same person.

1227. In the light of the different obligations and responsibilities imposed by SR VII on the parties to a wire transfer, the FATF Interpretative Note and the Methodology further provide definitions of various terms related to SR VII, such as *batch file transfer*; *beneficiary*; *cross border transfer*; *domestic transfer*; *originator*; and *unique identifier*.

1228. Moreover, SR VII distinguishes between the responsibilities and obligations of ordering financial institutions; intermediary financial institutions and beneficiary financial institutions.

1229. Paragraphs (1) to (5) of Article 19 of the AML/CFT Law are meant to provide to cover the EC and the additional element of SR VII.

1230. According to paragraph (4) of Article 19 the provisions of the first two paragraphs of this Article referring to obligations of financial institutions in dealing with wire transfers do not apply to transfers executed as a result of credit card or debit card transactions, provided that the credit card or debit card number accompanies the transfer resulting from the transaction, and to transfers between financial institutions where such transfers are for the account of the financial institutions acting on their own behalf.

1231. The AML/CFT Law defines a wire transfer as any transaction carried out on behalf of an originator person both natural and legal through a financial institution by electronic means with a view to making an amount of money available to a beneficiary person at another financial institution. Hence the definition in the AML/CFT Law is very close to that of the FATF.

1232. However, the AML/CFT Law falls short in providing any additional definitions related to money transfer activities although some terminology is used in the Law.

1233. Advisory Letter 2007/1 provides information and guidance on the provisions of the AML/CFT Law. Such guidance is also reflected in Rule X which attempts to make some distinction between the parties to a wire transfer.

1234. The assessment team is informed that the proposed CBK Regulation, while retaining and consolidating the aforementioned guidance and information, will provide additional guidance including definitions for terminology applied and retention of records by the respective parties to a wire transfer.

1235. Paragraph (3) of Article 19 of the AML/CFT Law states that the competent authority may issue regulations regarding cross - border transfers executed as batch transfers and domestic transfers – even though such terminology is not defined in the Law.

1236. While it is not clear who is the 'competent authority' for the purposes of paragraph (3) of Article 19 of the AML/CFT Law it transpires that while the FIU has not issued any such regulations, the CBK referred the assessment team to its Regulation for International Payments issue in January 2014.

1237. While the CBK Regulation for International Payments states that it is being issued pursuant to paragraph (1.4) of Article 17 of the AML/CFT Law, and in terms of the provisions of paragraph (3) of Article 19 of the AML/CFT Law, it does not necessarily cover the obligations under Special Recommendation VII although it provides some definitions that could be applied for the purposes of SR VII.

1238. The assessment team therefore questions the legal basis for the issue of the CBK Regulation for International Payments. First because it refers to paragraph (1.4) of Article 17 of the AML/CFT Law which paragraph has now been deleted and, in any case, the previous paragraph did not provide any powers in this regard as it only dealt with the ongoing monitoring of transactions under the definition of the CDD process. Second because as the legal basis it quotes paragraph (3) of Article 19 of the AML/CFT Law which refers to the 'competent authority' a term that is not defined and which, by interpretation of the Law, would be referring more to the FIU rather than the CBK which only has delegated supervisory powers. Indeed, paragraph (1.12) of Article 14 vests the power of issuing directives to the FIU to *issue administrative directives, instructions and guidance on issues related to ensuring or promoting compliance with this Law*. This view is consistent with the view of the assessment team on the issue of regulations by the CBK in terms of its delegated supervisory powers for the purposes of the AML/CFT Law.

1239. Moreover, and without prejudice to the foregoing regarding the reference to the competent authority, paragraph (3) of Article 19 of the AML/CFT Law refers to regulations regarding cross - border transfers executed as batch transfers and domestic transfers. The CBK Regulation does not make any reference to 'batch transfers' but only deals with single international transfers and it only applies to international transfers without any reference to domestic transfers.

1240. Consequently, even if for the sake of argument the assessment team were to accept the legal basis for the Regulation as being paragraph (3) of Article 19 of the AML/CFT Law, the Regulation would still not meet the purposes of the Law.

1241. Indeed, the assessment team considers the CBK Regulation for International Payments to be more of a prudential nature through which the CBK attempts to implement the provisions of the EU Payment Services Directive.[140]

1242. Consequently any reference in the following paragraphs to this Regulation will only be made for completion and clarification purposes without any prejudice to the conclusions of this Report on the powers of the CBK to issue regulations for the purposes of the AML/CFT Law.

***Obtain and maintain full originator information – Essential Criterion VII.1***

1243. EC VII.1 requires the ordering financial institution to obtain and maintain full originator information as defined and to verify such information in accordance with Recommendation 5 for all wire transfers of EUR/USD 1,000 or more. Full originator information is defined as:

- the name of the originator;
- the originator's account number or a unique reference number if no account number exists; and
- the originator's address which, if allowed, may be substituted with a national identity number, customer identification number or date and place of birth.

1244. There are similar provisions in paragraph (1) of Article 19 of the AML/CFT Law which however do not link the identification and verification process to the procedures for this obligation under Article 17 and Article 18 of the AML/CFT Law and does not establish a threshold.

140. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market. *OJ L319, 5 December 2007, pp 1-36.*

1245. During the on-site visit the CBK stated that banks and financial institutions are obliged under the AML/CFT Law to undertake CDD measures under Article 17 and Article 18 and not under Article 19 which deals with wire-transfer obligations.

1246. Banks met by the assessment team confirmed that they apply the measures for CDD under the relevant article of the Law since banks do not undertake occasional transactions of any kind, including wire transfers, unless the originator has an account with the bank and would therefore have undergone the CDD measures in accordance with their procedures for account opening. However this is not the case with money remitters who would have to identify and verify the originator information before effecting the wire transfer.

1247. Notwithstanding it may be appropriate, for the sake of clarity, that paragraph (1) of Article 19 be slightly amended to include the word 'in accordance with this Law' at the end of the first sentence.

1248. Moreover, while paragraph (6.1) of Article 17 links the retention of identification records to the said Article "copies of documents that attest the identity of a client…. taken in compliance with this Article" the absence of any linkages between Article 19 and Article 17 put to question the retention of identification records related to wire transfers and in particular for money remitters.

1249. In the analysis of EC 5.2 for Recommendation 5 the assessment team question the legal clarity of the application of a threshold for the purposes of occasional transactions that are wire transfers. It has been explained by the Kosovo authorities that the legislator opted not to make use of the threshold option (€1,000) and therefore included paragraph (2.2.2) 'a domestic or international wire transfer of funds' where the identification and verification procedures have to be applied for any amount representing a wire transfer.

1250. In the course of the on-site visit banks met by the assessment team explained that while banks have no problem as an originator of a wire transfer must have an account with the bank to effect a wire transfer, in the case of money remitters they have to apply the full customer due diligence measures without any limit as the threshold of €1,000 established by the international standards is not applied in Kosovo.

1251. While the Advisory Letter does not make references to the originator information on outgoing wire transfers, Rule X basically repeats the text of the AML/CFT Law. On the other hand the CBK Regulation for International Payments does not deal with identification procedures which are directly addressed under the AML/CFT Law.

***Include full originator information for cross-border wire transfers – Essential Criterion VII.2***

1252. EC VII.2 requires that for cross-border transfers equal to or above the threshold the ordering financial institution should be required to include full originator information in the message or payment form accompanying the wire transfer.

1253. EC VII.2 however makes exceptions where several cross-border wire-transfers equal to or in excess of the threshold from the same originator are bundled in batch files for transmission to beneficiaries in another country provided that the batch file contains the full originator information that is fully traceable within the recipient country.

1254. Paragraph (1) of Article 19 of the AML/CFT Law requires that the originator information shall be included in the message or payment form accompanying the transfer, while allowing for the use of a unique reference number where there is no account number. The Law however does not make any distinction whether the wire transfer is an international or a domestic one.

1255. Moreover, and as already indicated above under EC VII.1, the AML/CFT Law does not provide any information regarding procedures to be applied in case of batch files but leaves this at the discretion of the 'competent authority' when issuing regulations in accordance with paragraph (3) of Article 19. As already explained above also under the analysis of SR VII the CBK Regulation, even if accepted as being issued for the purposes of Article 19 of the AML/CFT Law, does not address the issue of batch files.

1256. In practice it is not clear whether banks or money remitters make use of batch file procedures for cross-border transfers. Notwithstanding, since the AML/CFT Law mandates the

competent authority, at its discretion, to issue regulations for this purposes, the industry may be misguided through the CBK Regulation on International Transfers which is purported to be issued for the purposes of Article 19 of the AML/CFT Law.

1257. While the Advisory Letter does not address this issue, Rule X basically repeats the provisions of the AML/CFT Law. On the other hand Article 4 of the CBK Regulation for International Payments deals with the contents of a payment transfer, reflecting what is required under international funds transfer systems.

***Originator information for domestic wire transfers – Essential Criterion VII.3***

1258. EC VII.3 requires that for domestic wire transfers financial institutions either include the full originator information or include only the originator's account number or a unique identifier within the message or the payment form. However there is a condition on the latter which can only be permitted if full originator information can be made available to the beneficiary financial institution and to the appropriate authorities within three business days of receiving a request. Moreover, domestic law enforcement authorities can compel immediate production of this information.

1259. As detailed in the analysis for EC VII.2, the AML/CFT Law does not make any distinction whether the wire transfer is an international or a domestic one. Paragraph (1) of Article 19 of the AML/CFT Law requires that the originator information shall be included in the message or payment form accompanying the transfer, while allowing for the use of a unique reference number where there is no account number.

1260. While the use of full originator information for domestic payments would be in accordance with EC VII.3, the use of a unique reference number where there is no account number falls short in meeting the criterion.

1261. There are no provisions in the AML/CFT Law that the use of a unique reference number should be subject to two conditions. First that the full originator information can be made available within three days of a request by the beneficiary financial institution or relevant competent authorities and, second that domestic law enforcement authorities can compel immediate production of it.

1262. It is only Rule X of the CBK under Section 11 that requires that in the case of domestic electronic or wire transfers, it is sufficient for the ordering bank or financial institution to include only the originator's account number or, where no account number exists, a unique identifier, within the message or payment form, provided that full originator information can be made available to the beneficiary bank or financial institution and to the CBK or the FIU within three business days of receiving a request.

1263. This Report has expressed reservations on the validity of Rule X which in fact is in the process of being replaced by new CBK Regulation, and upon which the assessment team reserves concerns on the legal basis. Notwithstanding it is understood that the proposed CBK Regulation will retain the provisions of Rule X in this regard, although the AML/CFT Law does not specify the relevant conditions as aforementioned.

1264. On the other hand the CBK Regulation for International Transfers is silent on this matter as it only deals with international wire transfers.

1265. There is therefore an urgent need for a review of the provisions of paragraph (1) of Article 19 of the AML/CFT Law and a harmonisation of the relevant guidance in the respective regulations.

***Intermediary and beneficiary financial institutions to ensure all originator information is to be transmitted with the transfer – Essential Criterion VII.4***

1266. EC VII.4 requires that intermediary and beneficiary institutions in the payment chain should ensure that all originator information that accompanies a wire transfer is transmitted with the transfer and where this is not possible because of technical limitations a record of the information is to be retained for five years.

1267. Paragraph (2) of Article 19 of the AML/CFT Law requires all banks and financial institutions to maintain all such information and transmit it when they act as intermediaries in a chain of payments.

1268. Although as explained earlier there are no definitions in the Law, the term intermediary institution within the context of Article 19 is interpreted to refer to the intermediary institution within the context of the provisions of SR VII.

1269. Although paragraph (2) of Article 19 makes references to the maintenance of all such information there are no references to the retention of information where there are technical difficulties. Moreover, as indicated earlier, since there is no link with the CDD procedures under Article 17, it is questionable whether the maintenance of information requirement refers to the retention of identification information for the purposes of the AML/CFT Law.

1270. There is therefore a need to revise the provisions of Article 19 in this regard and thus to remove any legal ambiguities that arise out of the stand-alone provisions for wire transfers.

***Beneficiary institutions to adopt effective risk based procedures for handling wire-transfers with incomplete originator information – Essential Criterion VII.5***

1271. EC VII.5 requires that beneficiary institutions adopt effective risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. Such procedures should be conducive for the beneficiary financial institution to decide whether to consider the transaction suspicious and hence report to the FIU; whether to restrict or terminate its business relationship with those financial institutions that continuously fail to meet the criteria.

1272. While banks and financial institutions who receive wire transfers that do not contain the complete originator information are required to take measures to obtain and verify the missing information from the ordering institution or the beneficiary, should they not obtain the missing information they shall refuse acceptance of the transfer and report it to the FIU. Banks and financial institutions however are not required by the AML/CFT Law to have effective risk-based procedures for this purpose.

1273. Rule X and the Advisory Letter do not refer to the adoption of risk-based procedures as they only reflect the Law. The assessment team is informed that while retaining the present guidance in this respect, the proposed CBK Regulation shall require banks to have risk-sensitive procedures in place for the purpose of scrutinising wire transfers, including where originator information is not provided on incoming wire transfers.

1274. Notwithstanding it is advisable that the relevant provisions in the AML/CFT Law are revised accordingly with a legal mandate for banks and financial institutions to have risk-sensitivity procedures established as part of their risk-based approach.

***Measures in place to effectively monitor compliance – Essential Criterion VII.6***

1275. EC VII.6 requires countries to have measures in place to effectively monitor the compliance of financial institutions with rules and regulations implementing SR VII.

1276. As discussed in this Report, more specifically in the analysis of FATF Recommendation 23, the CBK, through its MoU with the FIU in terms of Article 36A of the AML/CFT Law, has been delegated a supervisory remit for the purposes of the AML/CFT Law for the entire financial sector.

1277. As wire transfers can only be effected by banks and financial institutions, including money remitters, which are recognised as reporting subjects for the purposes of the AML/CFT Law, they would fall within the supervisory remit of CBK for the purposes of the AML/CFT Law – for a full assessment of the supervisory remit of the CBK please refer to the analysis of FATF Recommendation 23 and FATF Recommendation 29 in this Report.

***Sanctions should apply for obligations under SR VII – Essential Criterion VII.7***

1278. EC VII.7 requires that the criteria 17.1 to 17.4 for Recommendation 17 apply also for wire transfer activities. EC 17.1 -17.4 require effective, proportionate and dissuasive criminal, civil or administrative sanctions are available for failure to comply with the AML/CFT obligations; that a competent authority is designated to impose sanctions; sanctions should be applicable to both legal persons and their directors and senior management; and that the range of sanctions is broad and proportionate to the severity of the offence.

1279. Since the activity of wire transfers is an activity limited to banks and financial institutions, and since banks and financial institutions are recognised as reporting subjects for the purposes of the AML/CFT Law, it follows that the all types of sanctions contemplated by the AML/CFT Law are applicable to banks and financial institutions, even when they undertake money transfer activities.

1280. It also follows that the weaknesses, gaps and shortcomings identified in the analysis of Recommendation 17 in this Report become applicable to banks and financial institutions when they provide wire transfer services – for this purpose please refer to the analysis of Recommendation 17 in this Report.

***Countries may require that all incoming and outgoing cross-border wire transfers (including below the €1,000 threshold) contain full and accurate originator information – Additional Element VII.8 and Additional Element VII.9.***

1281. Although AE SR.VII.8 and AE SR.VII.9 are not mandatory, they recognise that countries may determine not to adopt the threshold of €1,000 and require their financial institutions to identify and verify the details of the originator of an incoming or outgoing money transfer transaction for any amount – even though this may present a heavier burden on institutions.

1282. Notwithstanding what appears to be an ambiguity in the interpretation of the AML/CFT Law as determined in this Report in the analysis of EC 5.2 for Recommendation 5, it appears that the Kosovo legislator has opted not to adopt a threshold.

1283. Hence the obligations under Article 19 of the AML/CFT Law would apply in all instances of wire transfers irrespective of the amount involved.

***Effectiveness***

1284. The provisions in the AML/CFT Law for wire transfers are incomplete and leave gaps with international standards which may impact on the effectiveness of the system both for CDD and for record keeping.

1285. Although concerns on effectiveness may be partly mitigated in the case of banks since they do not effect occasional transactions and hence a person has to open an account in order to effect a wire transfer, this is not the case with other financial institutions that are authorised to act a money remitters or to provide money transfer services.

1286. Moreover the reduced supervisory examinations by the CBK consequent to the recent setting up of the Money Laundering Prevention Division may add to effectiveness concerns for financial institutions with a remit to effect wire transfers.

### 3.9.2. Recommendations and comments

1287. The analysis of SR VII has identified various gaps and weaknesses in the legislation and the consequent regulations that need to be addressed.

1288. First and foremost, the provisions of the AML/CFT Law under Article 19 are too limited to implement the full provisions of SR VII and thus create legal ambiguity and interpretation.

1289. The gaps and weaknesses identified in the AML/CFT Law and other regulations within the context of the Essential Criteria for FATF Special Recommendation VII on wire transfers could be summarised as follows, although a reading of the analysis for the specific criteria should not be excluded:

- absence of definition of relevant terminology used;
- validity and legal basis of CBK Regulation for International Payments for the purposes of the AML/CFT Law;
- no link to CDD measures between Article 19 - *wire transfers* and Article 17 - *customer due diligence* (EC VII.1);
- legal ambiguity on the retention of records related to wire transfers for the purposes of Recommendation 10 (EC VII.1);

- absence of guidance for use of wire transfers in batch-files (EC VII.2);
- unconditional use of a unique reference number where there is no account number for domestic payments (EC VII.3);
- no references to the retention of information by intermediary financial institution where there are technical difficulties (EC VII.4);
- absence of legal mandate for banks and financial institutions to have risk-based procedures established as part of their risk-based approach to srcutinise wire transfer transactions (EC VII.5);
- weaknesses and gaps identified in the analysis of Recommendation 17 apply to wire transfers (EC VII.7).

1290. A number of recommendations are made in the analysis for the specific EC to harmonise the wire transfers regime to international standards and to provide legislative clarity. Whereas it is advisable that such recommendations are read within the context of the analysis of each specific EC, the main recommendations refer to:

- introduction of appropriate definitions of parties to wire transfers and terminology used;
- complete revision of the provisions of Article 19 with the objective of clarifying the roles, obligations and responsibilities of the main parties to a wire transfer: originating institution; intermediary institution; beneficiary institution;
- linkage of the requirement to obtain and maintain originator information with the CDD obligations under the AML/CFT Law; and
- provision for the maintenance of records by the main parties to the wire transfer activities in accordance with the record retention provisions under the AML/CFT Law.

### 3.9.3. Rating for Special Recommendation VII

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.VII** | **PC** | • absence of legal clarify due to lack of definition of terminology used;<br>• no link to CDD measures between Article 19 - *wire transfers* and Article 17 - *customer due diligence*;<br>• legal ambiguity on the retention of records related to wire transfers for the purposes of Recommendation 10;<br>• absence of guidance for use of wire transfers in batch-files;<br>• unconditional use of a unique reference number;<br>• no obligation for banks and financial institutions to have risk-based procedures to scrutinise wire transfers;<br>• concerns on application of sanctions as analysed under Recommendation 17; and<br>• effectiveness concerns arising out of the limited provisions of Article 19 of the AML/CFT Law. |

## 3.10. Monitoring of transactions and relationships (R.11 and R.21)

### 3.10.1. Description and Analysis

**Recommendation 11**

1291. The requirement under Recommendation 11 for financial institutions to pay special attention to all complex, unusual, large transactions and all unusual patterns of transactions that may have no apparent economic or visible lawful purpose goes beyond the ongoing due diligence of monitoring customer transactions in relation to the customer business profile. The requirement also goes beyond the cash transaction reporting but heavily supports the suspicious transaction reporting obligation.

1292. Recommendation 11 further requires that the findings are documented and retained to be made available to the relevant competent authorities.

1293. Paragraph (1) of Article 20 of the AML/CFT Law requires all reporting subjects to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

***Complex, unusual large transactions or patterns of transactions – Essential Criterion 11.1***

1294. EC 11.1 requires financial institutions to pay special attention to all complex, unusual, large transactions and all unusual patterns of transactions that may have no apparent economic or visible lawful purpose.

1295. Paragraph (1) of Article 20 of the AML/CFT Law requires all reporting subjects to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

1296. During the on-site visit, in reply as to how the CBK ensures that banks are complying with the provisions of paragraph (1) of Article 20 of the AML/CFT Law the CBK replied that this is done through a review of the policies and procedures of the respective banks.

1297. While acknowledging the importance for the CBK to ensure that the obligation for the monitoring of large complex transactions is included in the internal policies and procedures, the assessment team is of the opinion that an effective checking of compliance would be through a review of the retained documentation on findings as, although not clearly, required under paragraph (3) of Article 20 of the AML/CFT Law.

1298. The banks met by the assessment team informed that the implementation of the requirements under Article 20 in respect of large complex transactions is done automatically through their systems depending on the thresholds for individual customers and the risk level. Alerts are issued by the system and those 'alerted' transactions are manually monitored. The assessment team is informed that one can tune the system for the number of alerts depending on the thresholds set, which are generally set at the number of alerts that can be handled by the Compliance Officer.

1299. With the process being automated in order to assist banks in identifying which transactions need to be monitored, the assessment team would comment that the effectiveness of the automated system depends on how the alert thresholds are set. In the view of the assessment team it makes a difference if one threshold is set across the board for all accounts as opposed to if the threshold is set on an individual basis depending on the business profile of each customer.

***Examination of background and purpose of such transaction and document findings – Essential Criterion 11.2***

1300. EC 11.2 requires that transactions falling within the context of the parameters set by Recommendation 11 must be subject to an examination, to the extent possible, of their background and purpose such that financial institutions can better understand the complexity of

these unusual large transactions. Secondly, EC 11.2 requires that financial institutions document their findings.

1301. Article 20 of the AML/CFT Law requires reporting subjects to pay special attention to these types of transactions but it does not specify that reporting subjects should examine the background and purpose of the transaction.

1302. Moreover, paragraph (3) of Article 20 requires reporting subjects to maintain in writing the specific information regarding these transactions and the identity of all parties involved. The obligation however falls short in requiring the retention of the findings of the examinations as opposed to the information and identity of all parties involved.

1303. The CBK Advisory Letter 2007/1 makes references to transactions falling within the context of FATF Recommendation 11 only to the extent of these being indicators of suspicious transactions. On the other hand CBK Rule X is silent. The assessment team is informed that while retaining the reference in the Advisory Letter the proposed CBK Regulation is not intended to provide further guidance on this matter.

1304. It is therefore recommended that Article 20 of the AML/CFT Law be revised to the extent that the provisions require:

- the examination, to the extent possible, of the background and purpose of these transaction;
- the documentation of the findings; and
- the retention of the findings as part of the report required under paragraph (3) of Article 20 on the information surrounding the transaction and the parties involved.

***Findings made available to competent authorities and auditors – Essential Criterion 11.3***

1305. EC 11.3 requires that the documented findings of transactions falling within the parameters of Recommendation 11 be retained and made available to competent authorities and auditors for at least five years.

1306. As detailed above in the analysis for EC 11.2 there is no obligation to document the findings and thus the Law requires only the retention of a report indicating the specific information regarding these transactions and the identity of all parties involved.

1307. Notwithstanding, the record retention provisions under Article 17 of the AML/CFT Law requires that records drawn up for the purposes of Article 20 of the Law are to be maintained for a period of five (5) years in accordance with other transaction records.

1308. It is therefore reiterated that Article 20 of the AML/CFT Law needs to be reviewed as detailed under the analysis of EC 11.2 above.

***Effectiveness***

1309. The identified legislative weaknesses, the depth of the supervision on compliance, and the concerns raised on the threshold for the automation of the identification of transactions with Recommendation 11 characteristics raise concerns on the effectiveness of the appropriate implementation of the requirements under the FATF Recommendation 11.

**Recommendation 21**

1310. Recommendation 21 requires financial institutions to give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. It further requires that when transactions have no apparent economic or visible lawful purpose, then financial institutions should apply the provisions of Recommendation 11. Finally, Recommendation 21 requires that where such countries continue not to apply or insufficiently apply the FATF Recommendations, then countries should be able to apply appropriate counter-measures. In this respect the Methodology provides examples of counter-measures that could be applied.

1311. The provisions under the AML/CFT Law through Article 20 are rather limited and only partly reflect the first objective of the Recommendation.

1312. It should be noted that Recommendation 21 plays an important role for countries to comply with and implement the list of high-risk countries issued by the FATF including the application of countermeasures.

***Countries that inadequately apply the FATF Recommendations – Essential Criterion 21.1***

1313. EC 21.1 requires financial institutions to give special attention to business relationships and transactions with persons (including legal persons and other financial institutions) from or in countries which do not or insufficiently apply the FATF Recommendations.

1314. Paragraph (2) of Article 20 of the AML/CFT Law attempts to reflect the provisions of EC 21.1 and which it does to a large extent, in requiring reporting subjects to pay special attention to relationships with persons, including legal persons and arrangements, in the circumstances contemplated by EC 21.1. It fails however to make references to relationships with other financial institutions.

1315. In dealing with additional guidance on cross-border correspondent banking relationships and similar arrangement, however, Advisory Letter 2007/1 requires banks to pay particular attention when maintaining a correspondent banking relationship with non-resident banks incorporated in jurisdictions that do not meet international standards for the prevention of ML and FT.

1316. However, since it appears that in this section the Advisory Letter attempts to address issues related with FATF Recommendation 7 on cross-border banking, it is not clear to what extent the Advisory Letter, the validity of which is questioned by this Report, is also covering other correspondent relationships and relations with foreign financial institutions.

1317. While addressing cross-border banking relationships and high-risk business relationships, Rule X likewise appears to do so for the purposes of FATF Recommendation 7 on correspondent banking relationships and is otherwise silent on provisions reflecting EC 21.1.

1318. The assessment team is informed that the proposed CBK Regulation will reflect the provisions of the Advisory Letter and Rule X. Moreover, in addressing the application of enhanced CDD the proposed Regulation is expected to include new provisions that reflect the obligations under EC 21.1.

1319. It appears that EC 21.1 is interpreted to refer only to established correspondent banking relationships and not to any transactions involving a foreign bank or financial institution. Indeed, in reply to a question whether paragraph (2) of Article 20 is also applicable to financial institutions, while confirming in the affirmative, the CBK added that banks are required to ensure that banks with whom they establish correspondent banking relationships are banks of repute coming from reputable countries. However, in practice as already identified under the analysis of Recommendation 7, correspondent banking relationships are normally established with banks within the same group to which the Kosovo subsidiary belongs.

1320. Hence the assessment team concludes that while the obligations under the AML/CFT Law and the current regulations continue to fall short in fully reflecting the provisions of EC 21.1, it appears that the proposed CBK Regulation will enhance guidance on the implementation of EC 21.1.

1321. It is therefore recommended that paragraph (2) of Article 20 of the AML/CFT Law be reviewed and clarified to include reference to 'other financial institutions' following the words *including legal persons and arrangements* and thus be in compliance with international standards while ensuring that the proposed CBK Regulation will eventually be in harmony with the legislation.

***Concerns about weaknesses in other countries – Essential Criterion 21.1.1***

1322. EC 21.1.1 requires that countries have effective measures in place to inform financial institutions about weakness in the AML/CFT systems of other countries.

1323. The AML/CFT Law appears to be silent on any obligations on the authorities to identify high risk countries or on providing guidance accordingly. Likewise are the Advisory Letter and Rule X of the CBK. Hence it appears that the responsibility for such identification lies with the reporting subjects themselves.

1324. The assessment team is informed that this issue is to be further addressed in the proposed CBK Regulation which clarifies the implementation of Recommendation 21. To this effect banks and financial institutions will be required to take account of public statements issued by the FATF on high risk and non-cooperative jurisdictions which identify jurisdictions which present an ongoing and substantial risk of ML and FT and upon which other jurisdictions are required to apply counter-measures; jurisdictions which do not cooperate in making progress in addressing their ML and FT deficiencies together with other jurisdiction who are committed to address their deficiencies. Banks and financial institutions shall also be required to check similar lists issued by other monitoring bodies such as MONEYVAL of the Council of Europe.

1325. In the course of the on-site visit the CBK informed that there is no guidance or indicators on high risk countries by the authorities and that consequently banks adopt their own lists of high risk countries mainly by following the lists issued by the FATF. The CBK expects that the NCCEC will issue a list of high risk countries however there are no provisions in any law or regulation to this effect.

1326. This was basically confirmed by the banks met by the assessment team who informed that banks and financial institutions have to determine the risk of a country based upon their own internal risk assessments. No lists are available from the CBK or the FIU and no guidance is provided and hence there is a concern that banks may not be harmonised in determining country risk. To this effect banks and financial institutions normally apply the FATF lists for those countries which the FATF considers as posing a higher risk of ML or the FT. Banks and financial institutions expect that the proposed CBK Regulation will provide some guidance in this respect.

1327. While positively acknowledging the guidance in the proposed CBK Regulation, the assessment team recommends that further guidance be provided to the banks and financial institutions on how to determine whether a jurisdiction, if not included in the FATF list, still presents a high risk for the financial sector in Kosovo.

1328. Moreover, since the proposed CBK Regulation is only applicable to the entire financial sector, there remains an uneven playing field for the rest of the reporting subjects who will remain without guidance from the authorities. It is therefore further recommended that similar guidance is issued by the FIU for reporting subjects falling within its supervisory remit.

1329. Finally, it is recommended that appropriate procedures be put in place to ensure that lists issued by the FATF or other bodies indicating an elevated risk in specific jurisdictions be made immediately available to all reporting subjects with guidance on the extent of implementation.

***Examination of background and purpose of such transactions – Essential Criterion 21.2***

1330. EC 21.2 is similar to the provisions under EC 11.2 and EC 11.3. Thus financial institutions are required to examine the background and purposes of those transactions that have no apparent economic or visible lawful purpose; to document findings; and to make the documented findings available to competent authorities and the auditors. The EC defines competent authorities as including supervisors, LEAs and the FIU).

1331. Consequently the findings, weaknesses and recommendations made under the analysis of EC 11.2 and EC 11.3 become fully applicable for the purposes of EC 21.2.

***Countermeasures – Essential Criterion 21.3***

1332. EC 21.3 requires that countries be able to apply appropriate counter-measures where a country continues not to apply or insufficiently apply the FATF Recommendations. This is an important element for Recommendation 21 particularly since, as stated above, banks and financial institutions in Kosovo tend to follow the country lists issued by the FATF.

1333. There are no provisions in any law or regulations empowering the competent authorities to take counter measures where a country continues not to apply or to insufficiently apply the FATF Recommendations.

1334. During the on-site visit the CBK informed that during on-site examinations the CBK ensures that banks and financial institutions are monitoring business relationships with customers from high risk countries. If the CBK identifies that a country poses a high risk and continues not to take action, the CBK has no procedures in place to take appropriate counter-measures but it would probably recommend to the bank or financial institutions to terminate the relationship.

1335. EC 21.3 is an important element of the implementation of the Recommendation in particular where jurisdictions are required to take action following the publication of the FATF public statements on high risk countries. Therefore it is strongly recommended that legislative provisions are made in the AML/CFT Law empowering the relevant competent authorities to take countermeasures. Such legal provisions should be accompanied, preferably through the main law, with guidance on the type of counter-measures to be applied.

***Effectiveness***

1336. The identified weaknesses for Recommendation 21 complemented with the weaknesses for Recommendation 11 raise concern on the effectiveness of the system in meeting the international requirements. Most of the obligations under the Recommendation are either absent or, where present, they fall short of meeting the criteria. The concern that therefore there could be abuse of the system assumes higher degrees which need to be immediately addressed.

### 3.10.2. Recommendations and comments

**Recommendation 11**

1337. A number of weaknesses have been identified in the analysis of Recommendation 11 which, together with the absence of guidance to the sector, need to be addressed in order to ensure the soundness of the system.

1338. Although a full reading of the analysis for the specific criteria should not be excluded, the shortcomings and weaknesses identified in the AML/CFT Law and the effective implementation of the elements of the essential criteria for Recommendation 11 could be summarised as follows:

- inadequate supervisory practices to ensure compliance (EC 11.1);
- no requirements to examine the background and purpose of the transaction (EC 11.2);
- no requirement for the retention of the findings of the examinations as opposed to the retention of information and identity of all parties involved (EC 11.2 and EC 11.3);

1339. To this effect, recommendations are made in the analysis for the specific EC to Recommendation 11 in order to harmonise the procedures with international standards and to provide legislative clarity and guidance. Whereas it is advisable that such recommendations are read within the context of the analysis of each specific EC, the main recommendations refer to:

- implement effective supervisory procedures to ensure compliance in particular with reference to the automated process of identifying transactions with the established characteristics;
- revise Article 20 of the AML/CFT Law to the extent that the provisions require the examination, to the extent possible, of the background and purpose of these transaction; the documentation of the findings; and the retention of the findings as part of the report required under paragraph (3) on the information surrounding the transaction and the parties involved.

**Recommendation 21**

1340. The analysis of Recommendation 21 finds that the provisions of the AML/CFT Law to meet the relevant criteria are limited and fall short from providing for the reporting subjects under the Law to adequately fulfil obligations.

1341. The shortcomings, weaknesses and gaps identified in the analysis of Recommendation 21, in addition to those for Recommendation 11, can be grouped as follows, although a full reading of the specific criteria is recommended:

- paragraph (2) of Article 20 falls short in applying the obligations to relationships with 'other financial institutions' (EC 21.1);
- no guidance to reporting subjects on how to determine whether a jurisdiction, if not included in the FATF list, could still present a high risk for the financial sector in Kosovo (EC 21.1.1);
- since the proposed CBK Regulation will only be applicable to the entire financial sector, there remains an uneven playing field for the rest of the reporting subjects who will remain without guidance from the authorities (EC 21.1.1);
- no requirements to examine the background and purpose of the transaction (EC 21.2);
- no requirement for the retention of the findings of the examinations as opposed to the information and identity of all parties involved (EC 21.2);
- there are no legal or other provisions for the authorities to apply counter-measures (EC 21.3).

1342. In the analysis of the Recommendation, and further to the recommendations for Recommendation 11, the assessment team makes certain recommendations for the purpose of enhancing compliance with FATF Recommendation 21 standards. While the recommendations can be grouped as below, it remains important that these recommendations are read within the context of the analysis of the FATF Recommendation 21:

- amend and clarify paragraph (2) of Article 20 of the AML/CFT Law to include reference to 'other financial institutions';
- provide guidance to banks and financial institutions and the entire reporting subjects on how to determine whether a jurisdiction, if not included in the FATF list, could still present a high risk for the financial sector in Kosovo;
- appropriate procedures be put in place to ensure that lists issued by the FATF or other bodies indicating an elevated risk in specific jurisdictions be made immediately available to all reporting subjects with guidance on the extent of implementation; and
- provide legislative provisions in the AML/CFT Law empowering the relevant competent authorities to take counter-measures.

### 3.10.3. Rating for Recommendation 11 and Recommendation 21

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.11** | **LC** | • no requirements to examine background and purpose of transactions;<br>• no clear requirement for the retention of the findings of the examination; and<br>• effectiveness concerns arising out of the limited legal provisions and implementation guidance. |
| **R.21** | **PC** | • obligations not applied to relationships with 'other financial institutions';<br>• lack of guidance on determination of high risk countries;<br>• no requirements to examine background and purpose of transactions;<br>• no clear requirement for the retention of the findings of the examination;<br>• no legal or other provisions for the authorities to apply counter-measures; and<br>• effectiveness concerns arising out of the limited legal provisions and implementation guidance. |

## 3.11. Suspicious Transaction Reporting (Recommendation 13* & Special Recommendation IV)

### 3.11.1. Description and Analysis

1343. Recommendation 13 requires that if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to TF, it should be required, directly by law or regulation, to report promptly its suspicions to the FIU.

1344. SR IV is more specific and requires that where financial institutions suspect or have reason to suspect that funds in a transaction are linked or related to, or are to be used for terrorism, terrorist acts or terrorist organisations they should promptly report their suspicions to the relevant competent authorities.

1345. Article 22 of the AML/CFT Law requires banks and financial institutions to file with the FIU two types of reports. Reports of all suspicious acts and transactions as defined in the Law and reports on all single or linked transactions in currency of €10,000 or more. The following paragraphs refer to the former reporting but some references may be made to the latter as and where necessary.[141]

1346. The AML/CFT Law defines a 'suspicious act or transaction' as *an act or transaction or an attempted act or transaction, that generates a reasonable suspicion that the property involved in the act or the attempted act or transaction, is proceeds of crime and shall be interpreted in line with any guidance issued by the FIU on suspicious acts or transactions.*

1347. Obligations to meet the criteria for Recommendation 13 at national level are required to be by law or regulation. In this regard concerns expressed earlier in this Report on the validity of the Advisory Letter 2007/1 and Rule X of the CBK as a 'regulation' for these purposes are applicable. Notwithstanding further guidance on the implementation of the AML/CFT Law is considered positively in contributing to the effective implementation of the reporting regime under the Law.

***Reporting of suspicious transaction to the FIU – Essential Criterion 13.1****

1348. EC 13.1 requires a legal obligation for financial institutions to report to the FIU when there is a suspicion or there are reasonable grounds to suspect that funds are the proceeds of a criminal activity, as a minimum being the proceeds of any of the predicate offences under Recommendation 1. The obligation under the law should be a direct mandatory one.

1349. Article 22 of the AML/CFT Law requires banks and financial institutions to report to the FIU, in the manner and in the format specified by the FIU, all suspicious acts or transactions within twenty four (24) hours of the time the act or transaction was identified as suspicious.

1350. In the definition of 'suspicious act or transaction' the AML/CFT Law makes reference to the property involved in the act or transaction being the proceeds of crime. In turn the AML/CFT Law defines 'proceeds of crime' as *any property derived directly or indirectly from a predicate criminal offence. Property derived indirectly from a predicate criminal offence includes property into which any property directly derived from the predicate criminal offence was later converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the commission of the predicate criminal offence.* 'Predicate criminal offence' is in turn defined as *any offence, which generates proceeds of crime*.

1351. Paragraph (2) of Article 22 of the AML/CFT Law further requires banks and financial institutions to continue to report to the FIU any additional material information regarding the transaction(s) concerned that becomes available to the bank or financial institution following the submission of the related STR.[142]

141. Currency reporting is addressed under FATF Recommendation 19. Refer to the analysis of Recommendation 19 in this Report.

142. The FIU informed that it uses the provisions under paragraph (2) of Article 22 to get information from banks and financial institutions that is not available to it but that is requested by foreign FIUs irrespective of whether an STR has been filed. The assessment team does not share this interpretation of paragraph (2) of Article 22 in providing such powers to the FIU since this paragraph is only invoked if an institution has already

1352. Paragraph (3) of Article 22 of the AML/CFT Law empowers the FIU to exempt certain transactions or categories of transactions from the reporting obligation where it determines that the transactions or category of transactions are routine and serve a legitimate purpose. In January 2014, the FIU issued the Administrative Instruction No. 02/2014 on Exemption of Certain Transactions from Reporting which specifies cases where multiple transactions should not be subjected to legal obligation of reporting from banks and financial institutions (payments of municipal obligations provided by companies in public ownership; payments of taxes to public authorities; payments of insurance policies which are legally mandatory as vehicle insurance policies; payments of registration in faculty and/or other payments for study purposes in public institutions of higher education).

1353. Moreover, Article 23 of the AML/CFT Law requires banks and financial institutions to have in place internal programmes and procedures for, among others, reporting to the FIU in accordance with the reporting requirements under the Law.

1354. Advisory Letter 2007/1 of the CBK, although still with reference to the UNMIK Regulations that have been repealed with the coming into force of the AML/CFT Law, provides important guidance for banks and financial institutions on the identification of suspicious acts or transactions, including an Annex with indicators, which should not be taken as being exhaustive. It also provides guidance on actions to be taken by compliance officers of banks and financial institutions upon being informed internally of a suspicious act or transaction, thus contributing for consistency within the sector in managing the reporting regime.

1355. While reflecting the reporting obligation under the AML/CFT Law, Rule X of the CBK likewise provides guidance on the reporting regime but with reference to the obligations promulgated by the UNMIK Regulations that have been repealed by the coming into force of the AML/CFT Law.

1356. The assessment team has been informed that such or similar provisions will be retained in the proposed CBK Regulation.

1357. In an Administrative Guidance Ref FICAD: 49/2011 issued by the Financial Intelligence Centre (FIC) on 31 May 2011 banks and financial institutions are reminded that all suspicious acts or transaction are to be reported without any filtering process; that all suspicious acts or transactions are to be reported within 24 hours of being identified; and that preferably these should be filed electronically using the goAML system. The FIU has issued various guidance on the reporting of suspicious acts and transactions using the goAML system.

1358. The FIU has informed that it has received 145 STRs in 2010 and 125 reports in 2011, 196 reports in 2012 and 165 reports in 2013 from banks. An additional 3 STRs in 2011 and 6 reports both in 2012 and 2013 came from non-bank MVT service providers. The assessment team expresses concern with the overall number of STRs filed and the fact that they were reported primarily by the banking sector.

1359. In addition to the reporting of suspicious transactions to the FIU Article 22 of the AML/CFT Law also requires the filing with the FIU of CTRs for currency transactions of €10,000 or more.[143]

1360. According the Performance and Resource Plan of the FIU, the FIU overall has received a total of 419,615 CTRs in 2010 while in 2011 it has received 423,443 CTRs, in 2012 it received 480,479 CTRs and in 2013 it received 604,331 CTRs. It is worth noting, as indicated above, that in the same period 2010 - 2013 the FIU received 145, 125, 196 and 165 STRs respectively from banks and none from exchange bureaux.

1361. The reporting obligation under paragraph (1) of Article 22 of the AML/CFT Law read within the definition of what constitutes a 'suspicious act or transaction', including the definitions of 'proceeds of crime' and 'predicate criminal offence' provide an adequate legal obligation for banks and financial institutions to report to the FIU.

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filed an STR and such information that is eventually available is linked to that STR – see comments under Recommendation 26 in this Report.

143. Currency reporting is addressed under FATF Recommendation 19. Refer to the analysis of Recommendation 19 in this Report.

1362. However, while the definition of suspicious transaction refers to 'an act or transaction', the obligation to report does not appear to cover situations where banks or financial institutions have 'information available' that a person may be involved in ML or the FT. Such situations may, subject to interpretation, be covered by the Annex to Advisory Letter 2007/1 of the CBK which provides guidance through suspicious indicators and which, the assessment team is informed, will be retained in the proposed CBK Regulation.

1363. It is recommended that a revision of the definition of 'suspicious acts or transactions' should include the following at the end;

> (*definition*) The definition shall include situations where information available indicates that a person or entity may be or may have been involved in criminal activities.

1364. Moreover the wide difference between the number of CTRs and STRs received by the FIU, in particular from banks and exchange bureaux, as indicated above raises concerns on the effectiveness of the system. It appears, although no evidence is available to the assessment team, that reporting subjects in filing a CTR which may also be a suspicious act or transaction in terms of the AML/CFT Law do not follow by filing a separate STR. Thus a transaction that may be suspicious may not be investigated by the FIU since the FIU retains CTRs for intelligence and reference purposes only.

1365. Although the FIU claims it tries to identify CTRs that might also be STRs in order to treat them accordingly, it is still recommended that the FIU takes appropriate measures first to ensure that this is not happening and further to raise more awareness to the reporting subjects on the differences and consequences of filing two separate reports (CTR and STR) where a CTR under the definition of the AML/CFT Law is also considered as a suspicious act or transactions as also defined in the Law.

***Reporting of suspicions of financing of terrorism – Essential Criterion 13.2* and Special Recommendation Essential Criterion IV.1***

1366. EC 13.2 and EC SR.IV.1 require financial institutions to file an STR where there are reasonable grounds to suspect or where there is suspicion that the funds in the transaction are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations or by those who finance terrorism.

1367. As detailed above, Article 22 of the AML/CFT Law requires banks and financial institutions to report to the FIU, within the stipulated time, all "suspicious acts or transactions" as defined in the Law. Otherwise the Law is silent on references to FT in its reporting obligations provisions.

1368. The obligation to report suspicious transactions is therefore linked to the definition of 'suspicious acts or transactions' in the AML/CFT Law where it transpires that the definition does not make references to the FT.

1369. In providing guidance and indicators on what constitutes a suspicious act or transactions, Advisory Letter 2007/1 of the CBK does not make references to reporting obligations for suspicions of FT, although some indicators in the Annex make reference to FT – e.g transfers of large amounts, or frequent transfers to or from countries producing illegal drugs or known for terrorist activities.

1370. Section 10 of Rule X of the CBK reflects the reporting obligation under Article 22 of the AML/CFT Law and provides guidance accordingly. Section 10 however includes a paragraph which states: *[Banks and financial institutions shall report to the FIC any customer or transaction that they have reasonable grounds to suspect may be linked to the financing of terrorism or to individuals who support terrorism. Attention should be devoted to monitoring and keeping up to date the list of organisations and individuals related to terrorists or terrorism based on information received from the FIC, or other available sources. Attention shall be paid to non-profit and humanitarian organisations, especially if the activities are not in accordance with the registered activity, if the source of funds is not clear, or if such organisations receive assets from suspicious sources.]*

1371. For some reason not clarified to the assessment team this paragraph in Rule X, maybe because it goes beyond the provisions of the AML/CFT Law, is in square brackets ([ ]).

1372. The FIU has informed that in 2010 it had 10 cases regarding FT, 5 cases in 2011, 3 cases in 2012 and 6 cases in 2013.

1373. The industry has informed that although there is no clear legal obligation, they would be cautious and file an STR if they had suspicion that a transaction may be linked to the FT. It should be mentioned that if, as held by the assessment team, there is no legal obligation to report transactions related to the FT, questions on the applicability of the "safe harbour" provisions for reporting under the Law may not apply.

1374. The AML/CFT Law links the reporting obligation to the definition of 'suspicious act or transaction' which definition does not include any reference to the FT. Indeed the definition refers to 'proceeds of crime' while the FT may not necessarily be done through proceeds of crime.

1375. Moreover, the square bracketed provision in Section 10 of Rule X of the CBK is beyond the provisions of the Law and, in any case, the validity of the Rule as a regulation for the purposes of the FATF Methodology is questionable.

1376. Through the above analysis of the framework for the obligation for banks and financial institutions to report suspicious acts and transactions or persons it follows therefore that there is no legal obligation under the AML/CFT Law for reporting transactions or persons suspected to be linked to the FT.

1377. It is therefore recommended that Article 22 of the AML/CFT Law be amended as follows, also covering attempted acts or transactions that may be related to the FT (*italics*):

> *Article 22 (paragraph (1.1))*: all suspicious acts or transactions, ***or suspicions that an act or transaction or an attempted act or transaction may be related to the financing of terrorism, or that a person or an entity may be involved in the financing of terrorism***, within twenty four (24) hours of the time the act or transaction was identified as suspicious ***or suspicion raised.***

1378. The proposed amendment to Article 22 may require additional amendments to other articles of the AML/CFT Law referring to the reporting obligation of other reporting subjects not within the financial sector.

***Reporting of attempted transactions – Essential Criterion 13.3* and Special Recommendation Essential Criterion IV.2***

1379. EC 13.3 and EC SR.IV.2 require that all suspicious transactions, included attempted ones, should be reported irrespective of the amount involved.

1380. According to paragraph (1) of Article 22 of the AML/CFT Law all suspicious acts or transactions are to be reported to the FIU without any threshold.

1381. Paragraph (1) of Article 22 of the AML/CFT Law make references to 'suspicious acts or transaction' which therefore follows the definition of the term in the Law and which definition refers to attempted acts or transactions.

1382. Under paragraph (5) of Article 22 of the AML/CFT Law banks and financial institutions are required to notify the FIU prior to taking any action in connection with any suspicious act or transaction, which would result in the release or transfer of the property subject to the transaction from the control of the bank or the financial institution.

1383. Advisory Letter 2007/1 of the CBK is silent on attempted transactions since it was published prior to the relevant recent amendments to the AML/CFT Law. The assessment team however is informed that such references to attempted transactions will be included in the proposed CBK Regulation.

1384. On the other hand, and without prejudice to the position taken by this Report on its validity as a regulation for the purposes of the FATF Methodology, Section 10 of Rule X of the CBK requires that where a bank or a financial institution decides not to enter into a business relationship because of suspicion of ML or TF, it shall report the matter to the FIC (now FIU) immediately.

1385. As already stated, the reporting obligation under paragraph (1) of Article 22 of the AML/CFT Law is linked to the definition of 'suspicious act or transaction'. Although the definition

does not indicate whether it is in the past i.e. the transaction has already been undertaken, or in the present i.e that the transaction is being undertaken or proposed to be undertaken, a faithful interpretation would be that the definition is referring to acts or transactions that have occurred and also to attempted ones.

1386. The reporting obligation under paragraph (5) of Article 22 may be interpreted as being mandatory before the transaction is undertaken – indeed the spirit of the provision is so as otherwise the transaction cannot be suspended by the FIU in time. However this is subject to interpretation. The words *which would result in the release or transfer of the property subject to the transaction from the control of the bank or the financial institution* may indicate that the transaction is in the past as in an attempted transaction the 'property subject to the transaction' would not have passed under the control of the bank or the financial institution, unless the transactions refers to a transfer of funds already held by the bank.[144]

1387. The provision of Section 10 of Rule X of the CBK is more related to the establishment of a business relationship as opposed to an attempted transaction – even if the provisions of Rule X are taken as applicable within the context of the FATF Methodology as a regulation.

1388. This Report concludes therefore that the current reporting framework of suspicious transactions as promulgated under the AML/CFT Law as amended in 2013 includes attempted transactions that may not be executed.

***Reporting of suspicious transactions that may involve tax matters – Essential Criterion 13.4 and Special Recommendation Essential Criterion IV.2***

1389. EC 13.4 and EC SR.IV.2 require that the reporting obligation for suspicious transactions applies even in circumstances where the transaction may involve tax matters.

1390. The AML/CFT Law is basically silent on referring directly to this matter since the reporting obligation is linked to the definition of 'suspicious act or transaction' and which in its definition includes references to 'proceeds of crime' and which in turn in its definition refers to any property derived directly or indirectly from a predicate criminal offence i.e. any offence, which generates proceeds of crime.

1391. Advisory Letter 2007/1 and Rule X of the CBK are silent on the matter.

1392. Paragraph (1) of Article 313 (Tax evasion) of the CC states that: *Whoever, with the intent that he or she or another person conceal or evade, partially or entirely, the payment of taxes, tariffs or contributions required by the law, provides false information or omits information regarding his or her income, property, economic wealth or other relevant facts for the assessment of such obligations shall be punished by a fine and by imprisonment of up to three (3) years.*

1393. Moreover, paragraph (1) of Article 314 (False Tax related Documents) of the CC states that: *Whoever makes a false statement or issues a false document when the submission of a truthful statement or document is required by law, or whoever does not issue a document whose issuance is required by law, shall be punished by a fine and by imprisonment of up to three (3) years.*

1394. It follows therefore that for the purposes of the CC tax evasion, including the submission of false tax related documents, is a criminal offence and would therefore be captured under the definition of 'suspicious acts or transactions' under the AML/CFT Law.

1395. Consequently the reporting obligation under Article 22 of the AML/CFT Law applies for the purposes of EC 13.4 and EC SR.IV.2.

1396. Notwithstanding, it appears that in practice different interpretations are given to this state of affairs regarding tax evasion and ML. Indeed, whereas the industry, and in particular the financial sector, indicated full awareness of the fact that tax evasion is a criminal offence and hence where there is a suspicious act or transaction that could involve tax matters they would report,

144. As the suspension of a transaction does not fall within the criteria for Recommendation 13, the Kosovo authorities may wish to take note within the context of reviewing the Law accordingly for the suspension of transactions.

unfortunately the situation is quite the opposite with the authorities. Indeed, some authorities, including investigative and prosecutorial authorities, are of the opinion that if there are indications that a reported transaction could involve tax matters this is not investigated for ML or FT but only for tax evasion by the TAK – in this respect please refer to the analysis of Recommendation 1 (EC 1.3 and EC 1.4) in this Report. Reporting of suspicious transactions believed to be related to tax matters becomes weak if such transactions are not prosecuted, thus negatively affecting the effectiveness of the preventive regime.

1397. It is strongly recommended that the FIU provides awareness to such authorities for the investigation and prosecution of suspicious acts or transaction that may involve tax matter also for the purposes of the prosecuting ML and FT. While holding that this is not the case with the FIU, the FIU claims is has strongly recommended training sessions organised jointly with other law enforcement institutions, because the tax evasion as a punishable crime in the CC has to be neccessarily linked to ML. According to the FIU such training was provided by the FIU where its officials participated as lecturers or participants – for example in the training sessions organised by the Institute against Economic Crimes where two FIU officials were invited to lecture in most of the sessions organised by this Institute. Both lecturers were very clear in inter-relating the criminal offences with ML/FT.

***Reporting where funds are suspected to be proceeds of all criminal acts constituting a predicate offence – Additional Element 13.5***

1398. AE 13.5 requires that the obligation for financial institutions to report is extended to suspicions or reasonable grounds of suspicion that funds in a transaction are the proceeds of all criminal acts that would constitute a predicate offence for ML domestically.

1399. As stated above the reporting obligation for banks and financial institutions under paragraph (1) of Article 22 of the AML/CFT Law is linked to the definition of 'suspicious act or transaction' with references to 'proceeds of crime' and which in turn in its definition refers to any property derived directly or indirectly from a predicate criminal offence i.e any offence, which generates proceeds of crime.

1400. The obligation to report under paragraph (1) of Article 22 of the AML/CFT Law covers all criminal acts constituting a predicate offence through the definition of 'suspicious acts or transactions'.

1401. The words 'that would constitute a predicate offence for ML domestically' renders the requirement under Additional Element 13.5 subject to interpretation. It could be referring to situations where the criminal act is committed domestically or to situations where the criminal act is committed outside the country but where the money is being laundered domestically.

1402. The AML/CFT Law in linking the reporting obligation to the definition of 'suspicious act or transaction' does not distinguish whether the proceeds are of a crime that has been committed domestically or internationally.

1403. Moreover, banks and financial institutions are not obliged to identify the predicate offence and whether such offence is domestic or foreign since the obligation to report is only subject to the reasonable suspicion that the funds in the transaction are proceeds of criminal activity.

***Effectiveness***

1404. The weaknesses identified above and as indicated below negatively impact the effectiveness of the reporting regime. This is the result of the quality and quantity of STRs received by the FIU which could be impacted through the CTR reporting system. Also as a result of the shortcomings in the reporting obligation itself with regards to the FT.

1405. The lack of feedback from the FIU to reporting entities with regard to the outcome of cases, as well as any general feedback on typologies negatively impact the quality of STRs, although the FIU claims there is noticeable improvement in the quality of STRs received.

1406. In addition the shortcomings identified regarding supervision do not allow to consider the reporting regime as effective.

### 3.11.2. Recommendations and Comments

1407. The analysis of Recommendation 13 on the reporting obligation and SR IV on the reporting obligation for FT identifies serious weaknesses in the framework for the preventive regime for banks and financial institutions in Kosovo.

1408. This Report has expressed overall concerns on the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context of the repealed UNMIK Regulations to which both documents refer and hence their status within the FATF Methodology. This Report finds that both documents cannot be considered as 'regulation' even because at times they go beyond the provisions of the Law itself.

1409. Within this context, the major weaknesses identified in the AML/CFT Law within the context of the EC for FATF Recommendation 13* and SR IV could be summarised as follows, although a reading of the Description and Analysis for the specific criteria is primarily recommended:

- the reporting obligation does not cover situations where information available indicates that a person may be or may have been involved in ML or the FT (EC 13.1);
- the low number of STRs filed and hence concerns over the wide difference in number of CTRs and STRs filed which could be negatively impacting the reporting regime (EC 3.1);
- the reporting obligation does not cover reporting of transactions or acts that may be related to the FT (EC 13.2 and SR IV.1); and
- concerns over the investigation and prosecution for STRs suspected to be related to tax matters.

1410. Recommendations to rectify the identified weaknesses are made in the analysis for the specific EC. While it is advisable that recommendations are read within the context of the analysis of the specific EC, the main recommendations refer to:

- amending the definition of 'suspicious acts and transactions' to include situations where information available indicates that a person or entity may be involved in criminal activities;
- amending Article 22 to introduce the reporting obligation for the FT;
- FIU to undertake measures to ensure that CTRs that raise suspicions are also reported as STRs and to create awareness accordingly; and
- FIU to ensure that relevant competent authorities are made aware on the obligation to investigate and prosecute for AML/CFT purposes STRs that could be related to tax matters.

### 3.11.3. Rating for Recommendation 13 and Special Recommendation IV

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.13** | **PC** | • no reporting obligation in situations where information available indicates possible ML or FT activities;<br>• absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on the FIU and industry;<br>• no reporting obligation for transactions suspected to be linked to the FT;<br>• low number of STRs;<br>• concern over non-filing of suspicious CTRs as STRs;<br>• concerns on the outcome of STRs that could involve tax matters; and<br>• effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs, investigation of STRs that could be related to tax matters, and lack of effective supervision. |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.IV** | **NC** | • no reporting obligation in situations where information available indicates possible ML or FT activities;<br>• absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on the FIU and industry;<br>• no reporting obligation for transactions suspected to be linked to the FT;<br>• low number of STRs;<br>• concern over non-filing of suspicious CTRs as STRs;<br>• concerns on the outcome of STRs that could involve tax matters; and<br>• effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs, investigation of STRs that could be related to tax matters and lack of effective supervision. |

## 3.12. Protection and no 'tipping off' (R.14)

### 3.12.1. Description and Analysis

1411. The requirements under Recommendation 14 are twofold. Recommendation 14 requires that financial institutions, their directors, officers and employees be protected by legal provisions from any criminal and civil liability for breach of confidentiality when they report and disclose information to the FIU in good faith and in accordance with the provisions of law. Recommendation 14 further requires that financial institutions, their directors, officers and employees be prohibited from disclosing that an STR or related information is being reported to the FIU.

***Protection for reporting to the FIU – Essential Criterion 14.1***

1412. EC 14.1 requires that financial institutions, their directors, officers and employees, whether permanent or temporary, be protected by law from any criminal or civil liability when they report in good faith to the FIU.

1413. Article 35 of the AML/CFT Law states that *Notwithstanding any contrary provisions of applicable law, no civil or criminal liability action may be brought nor any professional sanction taken against any person or entity based solely on the good faith transmission of information, submission of reports, or other action taken pursuant to this Law, or the voluntary good faith transmission of any information concerning a suspicious act or transaction, suspected money laundering or suspected financing of terrorist activities to the FIU.*

1414. Advisory Letter 2007/1 and Rule X of the CBK are silent on this matter.

1415. Under Article 35 the AML/CFT Law provides protection to 'any person or entity'. Within the context of the AML/CFT Law, the term 'any person or entity' could be interpreted to cover reporting subjects under Article 16 of the Law and any other person or entity required to report to the FIU under the Law. It is difficult to interpret this term to refer to directors, officers and employees of the reporting subject. The FIU however holds that the provisions of Article 35 of the AML/CFT Law should be read within the context of paragraph (4) of Article 22 which deals with the "tipping off" aspects and specifically requires all *Directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the present article* not to disclose such information; and paragraph (1) of Article 23 which provides for the appointment of the compliance officer who shall be *responsible for interaction and information exchange with the FIU and the CBK.* The assessment team does not concur with this over-stretched interpretation even if Article 35 is read within this context.

1416. The protection under the AML/CFT Law is provided *notwithstanding any contrary provisions of applicable law*, thus ensuring that, as the *lex specialis* (special law), the AML/CFT Law overrides

any other provisions in any other law that may impose criminal or civil liability for breach of confidentiality. However the protection is conditioned by the fact that any disclosure is done in good faith and within the provisions of the AML/CFT Law.

1417. Notwithstanding, Article 35 of the AML/CFT Law could be slightly amended to adequately cover EC 14.1 by the inclusion of the words *and their directors, officers and employees, whether temporary or permanent* immediately following the words "person or entity".

***Prohibition of disclosure of reporting to FIU (tipping off) – Essential Criterion 14.2***

1418. EC 14.2 requires that financial institutions, their directors, officers and employees, whether permanent or temporary be prohibited from disclosing to any person, including the person suspected, the fact that an STR or related information is being reported or provided to the FIU.

1419. It should be further noted that Article 28 of the EU Third AML Directive establishes the prohibition of disclosure of information not only where a report has been filed or information provided to the FIU, but also in situations where a ML or FT investigation is being or may be carried out.

1420. Paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, 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 or the CBK. Article 22 however provides for disclosures if so authorised in writing by the FIU, a Prosecutor, or a Court.

1421. Advisory Letter 2007/1 and Rule X of the CBK are silent on this matter.

1422. Paragraph (4) of Article 22 appears to adequately cover the requirements of EC 14.2. However, the analysis of the provisions in this Article against the requirements of EC 14.2 identifies some gaps.

1423. Paragraph (4) of Article 22 of the AML/CFT Law does not prohibit the bank or financial institution itself but only its directors, officers, employees and agents from making disclosures. Notwithstanding, paragraph (4) of Article 33 then imposes a penalty not only on directors, officers, employees and agents but also on banks and financial institutions if they breach the provisions of paragraph (4) of Article 22. The assessment team considers this as an inconsistency creating legal ambiguity as a bank or financial institution cannot be held to have breached a legal obligation which in fact is not provided for in the law. The FIU hold otherwise and claims that paragraph (4) of Article 33 should again be read within the context of Article 22 (tipping off) and Article 23 (appointment of compliance officer). The assessment team does not concur with this over-stretched interpretation.

1424. Article 22 does not specify employees as being permanent or temporary and the term 'agents' cannot be interpreted accordingly.

1425. The prohibition is not from disclosing the fact that the report has been filed or is being filed with the FIU but rather from providing the report or information therein to third parties including the subject person of the report itself. Therefore although going beyond the EC, it does not cover the EC.

1426. The prohibition does not cover the fact that an investigation is being or may be carried out.

1427. It is therefore recommended that paragraph (4) of Article 22 of the AML/CFT Law be amended as follows (in italics bold) for the purposes of the FATF Recommendation 14. However, it is further advisable to refer below in this Report for proposed further amendments for consideration within the context of Article 28 of the EU Third AML Directive and the analysis below re Article 7 of the Council of Europe Convention:

> ***"Banks and financial institutions, their d~~D~~***irectors, officers, employees ***(whether permanent or temporary)*** and agents who make or transmit reports pursuant to the present article, ***or who are aware of such fact including where a money laundering or financing of terrorism investigation is being or may be carried out***, shall not ~~*provide*~~ ***disclose the fact*** that the report ***has been filed or is in the***

***process of being filed,*** or communicate any information ***whether or not*** 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 ***or the investigation***, other than the FIU or CBK, unless authorised in writing by the FIU, a Prosecutor, or a Court."

***Confidentiality of names and personal details of employees making report – Additional Element 14.3***

1428. AE 14.3 seeks to establish the protection that is provided to the confidentiality of the identity of staff of financial institutions that make and file STRs to the FIU.

1429. Paragraph (1.17) of Article 14 of the AML/CFT Law imposes an obligation on the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit, and that such information may only be used for the purposes stipulated in the AML/CFT Law.

1430. Paragraph (1.3) of Article 15 of the AML/CFT Law however provides a gateway and establishes the data that may be disclosed by the FIU and the circumstances under which such data may be disclosed. One such data that the FIU may disclose, provided this is done in accordance with paragraph (2) of Article 15, constitutes *any data concerning a person or entity which has provided information or records to the FIU that would directly or indirectly identify the person or entity*.

1431. Paragraph (2) of Article 15 of the AML/CFT Law as reproduced below provides for the FIU to disclose the information above mentioned:

> 2.1. to the appropriate unit of the police, the Financial Investigation Unit, the Kosovo Intelligence Agency, the competent prosecutor, the Kosovo Customs, the Tax Administration Department of the Ministry of Economy and Finance or KFOR, if the information would be relevant to investigations within its competence, or to a body outside Kosovo with similar functions to the FIU ;
>
> 2.2. to a public or governmental body of Kosovo if such disclosure of information is necessary for the FIU.
>
> 2.3. to bodies responsible for law enforcement, or performing a similar role to the FIU, outside Kosovo, if such disclosure is necessary or of assistance to the FIU in performing its functions.

1432. Advisory Letter 2007/1 and Rule X of the CBK are silent on this issue.

1433. The AML/CFT Law seems to provide a gateway from the absolute confidentiality under the AML/CFT Law for disclosure of *any data concerning a person or entity which has provided information or records to the FIU that would directly or indirectly identify the person or entity*.

1434. Moreover, paragraph (2) of Article 15 of the AML/CFT Law provides for an array of domestic and foreign authorities (for some reason including the FIU itself) to whom the FIU can disclose this information – the reason being unclear.

1435. The term 'a person or entity which has provided information' is interpreted to cover reporting subjects under Article 16 of the Law and any other person or entity required to report to the FIU under the Law consistent with the interpretation given by this Report under the analysis of EC 14.1.

1436. It also appears that, although paragraph (3) of Article 15 limits such disclosures for intelligence purposes only, the FIU may disclose such information to the mentioned authorities for reasons other than investigations of ML or the FT.

1437. It therefore appears that, subject to the interpretation given by this Report to the term 'any person or entity' within the context of the AML/CFT Law, the Law indirectly protects the identity of employees making reports or providing information.

1438. It is therefore advisable to ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution or any other reporting subject or entity making the report or providing the information.

1439. Notwithstanding, it is advisable to review paragraph (2) of Article 15 of the Law, first to remove duplication (for example: reference to a body outside Kosovo with similar functions as the FIU in 2.1 and in 2.3) but more importantly to limit the entities or authorities to whom the information could be provided to those to whom the FIU would have forwarded its analysis report – although preferably such information should not be disclosed at all.

1440. Refer also to the section below concerning Article 27 of the EU Third AML Directive.

***Protection of employees from threats or hostile actions – EU Third AML Directive Article 27***

1441. Article 27 of the EU Third AML Directive imposes an obligation on Member States to take all appropriate measures to protect employees of reporting persons and entities under the Directive who report suspicions of ML or FT either internally or externally to the FIU from being exposed to threats and hostile action.

1442. The 'Description and Analysis' under the analysis of AE 14.3 above also applies to Article 27 of the EU Third AML Directive.

1443. The comments made under the analysis for AE 14.3 in general apply also to Article 27 of the EU Third AML Directive.

1444. Notwithstanding the conclusions of this Report under AE 14.3 above the AML/CFT Law does not provide for the type of protection of employees as promulgated by Article 27 of the EU Third AML/CFT Directive.

1445. In this regard, and further to the Recommendations under AE 14.3 above, it is recommended that a new paragraph (4) be added to Article 15 which obliges any authority that for any reason has personal information on employees of reporting subjects who have filed a report or provided information to protect such information and keep it confidential, as follows:

> *Article 15 (paragraph (4))* "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 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, shall protect and keep confidential such personal information."

***Lifting of prohibition of disclosure ('tipping off') – EU Third AML Directive Article 28***

1446. As indicated above in the analysis for EC 14.2, Article 28 of the EU Third AML Directive establishes the prohibition of disclosure of information not only where a report has been filed or information provided to the FIU, but also in situations where a ML or FT investigation is being or may be carried out.

1447. Article 28 of the EU Third AML Directive however provides categorised situations where the prohibition of disclosure (tipping off) can be lifted:

- disclosure to competent supervisory authorities or for law enforcement purposes;
- disclosure between banks and financial institutions falling within the same financial services group;
- disclosure between the accountancy and legal profession firms or their employees within the same legal person or 'network';[145]
- disclosure between banks, financial institutions, and the accountancy and legal profession where the disclosure involves the same customer and the same transactions and that the reporting persons or entities are from the same professional category.

145. The EU Directive defines a 'network' as 'a larger structure to which the person belongs and which shares common ownership, management or compliance control'.

1448. The lifting of the prohibition under Article 28 applies between Member States or with non-Member States that impose requirements for the prevention of ML or the FT that are equivalent to those imposed by the Directive.

1449. As detailed under the above analysis of EC 14.2 in this Report, paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, 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 or the CBK. Article 22 however provides for disclosures if so authorised in writing by the FIU, a Prosecutor, or a Court.

1450. Paragraph (4) of Article 22 of the AML/CFT Law in general can be interpreted to be covering Article 28 of the EU Third AML Directive in that it gives power to the FIU, a Prosecutor, or a Court to lift such prohibition. Moreover the prohibition does not include the CBK, as the current authority with delegated supervisory authority for the entire financial sector.

1451. It does not appear however that there is any guidance under what circumstances and for what purpose the FIU or a Prosecutor can lift the disclosure prohibition.

1452. Part of the industry, in particular those banks and financial institutions forming part of larger international groups have expressed concern that they are prohibited from sharing information within the group they form part of unless they are so authorised as provided for under the Law.

1453. It is worth noting that under the new Recommendation 18 of the 2012 FATF Standards (previously Recommendations 15 and 22) the requirement is partly that financial group programmes for the prevention of ML and the FT should include the sharing of information for CDD and risk management purposes – which is interpreted to include sharing of information where there is suspicion of ML or the FT which could be at group level and thus address the fight against ML and FT on a more holistic and global basis.

1454. It is therefore recommended that, notwithstanding EU membership, the Kosovo Authorities consider the provisions of Article 28 of the EU Third Directive, and the 2012 FATF Standards in this regard, with the aim of either amending the AML/CFT Law accordingly or amending the AML/CFT Law for the purposes of empowering the FIU to provide guidance under what circumstances it would be prepared to give approval for disclosure other than as provided by Law. It is further important for the Kosovo authorities to consider this within the context of international banks operating in Kosovo.

***Prohibition of disclosure – CETS 198 Article 7***

1455. Article 7 of CETS 198 requires signatories to the Convention to adopt legislative or other measure to enable them to:

a. determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;

b. obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;

c. monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts

1456. Paragraph (2d) of Article 7 of CETS 198 in turn requires signatories to the Convention to have legislative or other measures in place to ensure that banks do not disclose to the person concerned or to third parties that such information has been sought or that an investigation is being carried out.

1457. Paragraph (1.17) of Article 14 of the AML/CFT Law imposes an obligation on the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit, and that such information may only be used for the purposes stipulated in the AML/CFT Law.

1458. Paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, 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 or the CBK. Article 22 however provides for disclosures if so authorised in writing by the FIU, a Prosecutor, or a Court.

1459. The prohibition of disclosure (tipping off) within the context of the FATF Standards (Recommendation 14) has already been discussed in the above analysis of EC 14.2 in this Report. However, as can be seen from Article 7 of CETS 198, the disclosure prohibition under the Convention covers other issues not included in the FATF Standards or the EU Third AML Directive.

1460. In general paragraph (1.17) of Article 14 of the AML/CFT Law imposing confidentiality on staff of the FIU may be extendedly interpreted to cover situations under Article 7 of the Convention. However, even the present AML/CFT Law recognises that specific provisions prohibiting disclosure are necessary as may be found under paragraph (4) of Article 22 of the AML/CFT Law.

1461. However, the prohibition under paragraph (4) of Article 22 of the AML/CFT Law, even with the proposed amendment as in the above analysis of EC 14.2 would not meet the obligations under Article 7 of CETS 198.

1462. It is therefore proposed for consideration by the Kosovo Authorities, since Kosovo is not a signatory to the Council of Europe Convention, that should it become a signatory to the Convention, or should it irrespectively wish to adopt such measures as good practice to better co-operate internationally then a new paragraph (4A) should be included under Article 22 of the AML/CFT Law as follows:

> *Article 22 (paragraph (4A*)) Furthermore, banks and financial institutions, their directors, officers, employees (whether permanent or temporary) and agents who have information in this regard, shall not disclose to any person or entity, including any person or entity involved, the fact that the bank or financial institution has been requested to:
>
> - determine and provide information whether a natural or legal person is a holder or beneficial owner of one or more accounts,;
> - obtain the particulars of specified bank accounts and banking operations which have been carried out during a specified period; or
> - monitor specified bank accounts and banking operations which have been carried out during a specified period.

1463. A positive consideration of the above recommendation would further entail various other amendments to the AML/CFT Law empowering the FIU to undertake the measures specified in paragraphs (a), (b), and (c) of Article 7 of the Convention.

***Effectiveness***

1464. The divergences in the relevant legal provisions of the AML/CFT Law from the international standard as identified could negatively impact the implementation of the prohibition of disclosure (tipping off).

### 3.12.2. Recommendations and Comments

1465. The AML/CFT Law includes provisions which positively create the prohibition of disclosure (tipping off) to the person concerned and to third parties where a report has been filed with or related information provided to the FIU.

1466. The analysis however shows that there remain some gaps and weaknesses in the system which are not in compliance with the international standards and upon which some parts of the industry have expressed concern.

1467. Although a full reading of the Description and Analysis section for the specific criteria is advisable, the following are highlights of the main weaknesses or gaps identified:

- the safe harbour protection for good faith disclosure under the Law does not clearly apply to directors, officers and employees, temporary or permanent (EC 14.1)
- the prohibition from disclosure does not apply to banks and financial institutions themselves (EC 14.2);
- the prohibition from disclosure does not specify whether it applies to both permanent and temporary employees (EC 14.2);
- the prohibition from disclosure does not cover information that a report has been filed but the provision of the report itself to a third party (EC 14.2);
- the prohibition does not cover the fact that an investigation is being or may be carried out (EC 14.2);
- need to strengthen the protection and confidentiality of personal data of employees making reports (AC 14.3 and EUD Art 27);
- lifting of the prohibition of disclosure can only be done by the FIU, a Prosecutor or the Courts but there is no guidance or criteria under which circumstances (EUD Article 28);
- there are no provisions for prohibition of disclosure under the Council of Europe Convention – but Kosovo is not a signatory (CETS 198 Article 7).

1468. The Report makes recommendations to rectify the identified weakness under each specific section. The following are indications of proposed amendments which should not be read as a substitute for the full reading of the specific section and recommendations:

- amend Article 35 of the AML/CFT Law to extend protection to directors, officers and employees, temporary or permanent;
- amend paragraph (4) of Article 22 imposing the prohibition of disclosure in accordance with the international standards;
- ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution making the report or providing the information;
- review paragraph (2) of Article 15 of the Law to limit the entities or authorities to whom the information could be provided to those to whom the FIU forwards its reports;
- add a new paragraph (4) to Article 15 of the AML/CFT Law which obliges any authority that for any reason has possession of personal information on employees of reporting subjects who have filed a report or provided information, to protect such information and keep it confidential;
- consider the provisions of Article 28 of the EU Third Directive on the lifting of the disclosure prohibitions in specific circumstances; and
- consider inserting a new paragraph (4A) to Article 22 of the AML/CFT Law imposing a prohibition of disclosure in circumstances as provided under the Council of Europe Convention (CETS 198)

### 3.12.3. Rating for Recommendation 14

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.14** | **NC** | • not clear that safe harbour protection for disclosures applies to directors, officers and employees, temporary or permanent;<br>• prohibition of disclosure (tipping off) does not apply to banks and financial institution as entities;<br>• legal inconsistency on prohibition and penalties for banks and financial institutions;<br>• prohibition of disclosure (tipping off) does not specify whether it applies to both permanent and temporary employees;<br>• prohibition of disclosure (tipping off) covers situations where the report itself is provided to the third party;<br>• prohibition of disclosure (tipping off) does not cover situations where an investigation is being or may be |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| | | carried out;<br>• legal uncertainty on the protection of personal data of employees making the report or providing information;<br>• limitations on lifting of prohibition of disclosure in specific circumstances; and<br>• effectiveness issues due to divergences from the international standard. |

## 3.13. Other Reporting – Currency Transaction Reporting (R.19)

### 3.13.1. Description and Analysis

1469. Recommendation 19 urges countries to consider the feasibility of a system where banks and other financial institutions and intermediaries report to a central agency all domestic and international currency transactions above a fixed threshold.

***Reporting of all transactions in currency above a fixed threshold – Essential Criterion 19.1***

1470. EC 19.1 requires countries to conduct a feasibility and utility assessment of implementing a system for reporting of all transactions in currency above a fixed threshold.

1471. Kosovo has implemented a system for reporting all transactions in currency above a fixed threshold through paragraph (1.2) of Article 22 of the AML/CFT Law which states that banks and financial institutions shall report to the FIU, in the manner and in the format specified by the FIU, all single transactions in currency of €10,000 or more. Multiple transactions shall be treated as a single transaction if the bank or financial institution has knowledge that the transactions are by or on behalf of one person or entity and total more than €10,000 in a single day. There is no time limit set by the AML/CFT Law within which banks and financial institutions are required to report to the FIU. A time limit could be interpreted as requiring reporting on a daily basis since the accretion of multiple transactions is based on a daily basis or a time limit could be interpreted as indefinite since no time is set.

1472. In addition, paragraph (3) of Article 26 of the AML/CFT Law adds that, if in the course of performing services for a client, they receive €10,000 or more in currency in a transaction or related transactions from a client, lawyers, notaries, certified accountants, licensed auditors and tax advisors (collectively referred to as "covered professionals" in the AML/CFT Law) shall file a report with the FIU within 15 working days of the reportable transaction. Those transactions include sales of goods or services, sales of real property, sales of intangible property, rentals of real or personal property, exchanges of currency for other monetary instruments, including other currency, payments of a pre-existing debt, reimbursement of expenses paid, makings or repayments of a loan, or payments of fees in currency to the professional for his services.

1473. Furthermore, paragraph (3.1) of Article 28 of the AML/CFT Law states that casinos and licensed objects of games of chance shall report to the FIU all single transactions in currency of €10,000 or more. Multiple or linked transaction shall be treated as a single transaction if the casino, gaming house and licensed object of games of chance knows, or reasonably should have known, that the transactions are by or on behalf of one person or entity and total more than €10,000 in a single gaming day. There is no time limit set by the AML/CFT Law within which a casino, gaming house or licensed object of games of chance is required to report to the FIU. A time limit could be interpreted as requiring reporting on a daily basis since the accretion of multiple or linked transactions is based on a daily basis or a time limit could be interpreted as indefinite since no time is set.

***Maintenance and availability of reports – Additional Element 19.2***

1474. AE 19.2 seeks to establish whether reports are maintained in a computerised data base and made available to relevant competent authorities for AML/CFT purposes.

1475. Paragraph (1.6) of Article 14 of the AML/CFT Law states that the FIU is required to create and maintain a database of all information collected or received relating to suspected ML or FT activities and such other materials as are relevant to the work of the FIU.

1476. All the CTRs received by the FIU are maintained and managed within goAML, the same computerised database which is at the disposal of the competent authority in Kosovo for combating ML and TF purposes.

***Safeguards to ensure proper use of information – Additional Element 19.3***

1477. AE 19.3 enquires whether systems for reporting of large currency transactions are subject to strict safeguards to ensure proper use of the information or data that is reported or recorded.

1478. Paragraph (1.17) of Article 14 of the AML/CFT Law states that the staff of the FIU shall be required to keep confidential any information obtained within the scope of their duties, even after the cessation of those duties within the FIU. Such information may only be used for the purposes provided for in accordance with the law.

1479. In addition, paragraph (6) of Article 33 of the AML/CFT Law makes it a criminal offence for any official of the FIU to disclose information and to remove or destroy records without lawful authority.

***Effectiveness***

1480. In 2011 a total of 423,443 CTRs from banks, micro-finance institutions and exchange bureaux with a total of above €4,873,354,867 were received by the FIU.

1481. In 2012 a total of 480,479 CTRs from banks, micro-finance institutions and exchange bureaux with a total of above €5,242,591,346 were received by the FIU.

1482. In 2013 a total of 604,331 CTRs from banks, micro-finance institutions and exchange bureaux with a total of above €4,180,929,271 were received by the FIU.

1483. The assessment team did not receive any statistics on CTRs, if any, submitted by lawyers, notaries, certified accountants, licensed auditors and tax advisors and by casinos and gambling houses.

### 3.13.2. Recommendations and Comments

1484. In a further review of the AML/CFT Law the authorities may wish to consider setting a time limit for banks and financial institutions, and for casinos, gaming houses and licensed objects of games of chance for the reporting of currency transactions as established for "covered professionals".

1485. The authorities should consider to take measures to ensure that lawyers, notaries, certified accountants, licensed auditors and tax advisors and casinos and gambling houses correctly fulfil their obligation of declaration of cash transactions as provided by the AML/CFT Law.

### 3.13.3. Rating for Recommendation 19

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.19** | **C** | |

## 3.14. Guidance and feedback to financial institution and DNFBPs (R.25)

### 3.14.1. Description and Analysis

1486. Recommendation 25 requires competent authorities to provide guidance and feedback to financial institutions and DNFBPs to assist them in effectively implementing the national measures for the prevention of ML and FT, particularly in the detection and reporting of suspicious transactions.

1487. According to the FATF Methodology guidance provided, at a minimum, should give assistance on issues covered under the relevant FATF Recommendations, including a description of ML and FT techniques and methods and any additional measures that financial institutions and DNFBPs could take to ensure that their AML/CFT measures are effective.

1488. In June 1998 the FATF published Best Practice Guidelines in providing feedback to financial institutions and other reporting subjects. The Document is still valid with the Methodology drawing on it in providing details of appropriate feedback mechanisms. The mechanisms include two main procedures (i) the provision of general feedback through statistics, information on current techniques and trends (typologies) and sanitised cases; and (ii) specific or case by case feedback including acknowledgment of receipt of the STR.

1489. The AML/CFT Law provides for the issue of guidance by the FIU but is silent on the provision of feedback.

1490. In practice, although the industry is satisfied to a certain degree with the guidance provided or in the process of being provided, it appears that feedback is either not adequate or lacking.

***Guidance to implement and comply with AML/CFT requirements – Essential Criterion 25.1***

1491. EC 25.1 requires competent authorities to establish guidelines for assisting financial institutions and DNFBPs to implement and comply with their respective AML/CFT obligations under the law.

1492. The empowerment to establish and issue guidelines is expected to be provided for in the main legislation. Thus under the duties and competencies of the FIU, Article 14 of the AML/CFT Law empowers the FIU to issue administrative directives, instructions and guidance on issues related to ensuring or promoting compliance with this Law, including but not limited to:

- the use of standardised reporting forms;
- about suspicious acts or transactions, including the nature of suspicious acts or transactions for the purposes of this Law, and the development of lists of indicators of such acts and transactions; and
- the exemption of persons or entities or categories of persons or entities from reporting obligations under this Law and the methods of reporting such exemptions;

1493. The financial sector and most of the DNFBPs met informed that both the FIU and the CBK consults with them through their associations before issuing new guidance.

1494. Within this context, and within the powers vested upon it through the Law, the FIU has issued various documents in the form of Administrative Directives and Administrative Instructions which do not however all provide specific guidance:

- Administrative Instruction 04/2014 on politically exposed persons;
- Administrative Instruction 03/2014 on procedures for applying sanctions;
- Administrative Instruction 02/2014 on exemption of certain transactions from reporting;
- Administrative Instruction 01/2013 on compiling statistics, reports and records on ML/FT;
- Administrative Directive 01/2013 on training for the prevention and combating of ML/TF;

- Administrative Directive 14/2011 on mandatory completion of reporting fields;
- Administrative Guidance 49/2011 on reporting of STRs; and
- Guidance of July 2010 on web-reporting in submitting STRs online.

1495. Moreover, prior to the coming into force of the AML/CFT Law, the FIC (forerunner of the FIU) had issued various other Administrative Directives in terms of Section 2.1(1) and Section 3.11 of the UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. However, as already established under this Report, the UNMIK Regulation was repealed by the coming into force of the AML/CFT Law in September 2010 with no provisions to keep such Directives in force.

1496. Notwithstanding the above Administrative Instructions and Directives, which positively contribute to assist reporting subjects in meeting their obligations under specific elements of the AML/CFT Law the FIU has not issued general guidance within the context of the Methodology assisting reporting subjects, other than the financial sector which is provided by guidance through the CBK, in fulfilling their obligations – such as the application of CDD and record keeping.

1497. Within this context the absence of guidance about suspicious acts or transactions, including the nature of suspicious acts or transactions for the purposes of the AML/CFT Law, and the development of lists of indicators of such acts and transactions stands out.

1498. In this regard it should be noted that the AML/CFT Law does not place an obligation on reporting subjects to develop lists of indicators of suspicious transactions except on "covered professionals" and this to be done by the FIU in consultation with the relevant professional bodies.[146,147] This appears to be an inconsistency within the AML/CFT Law.

1499. Indeed paragraph (12) of Article 26 of the AML/CFT Law requires the FIU, in consultation with the Kosovo Bar Association, the Kosovo Board on Standards for Financial Reporting and any other relevant professional association of "covered professionals" to establish minimum standards, written procedures and controls for the prevention and detection of ML by covered professionals and supervise them.

1500. When enquired with the KCN whether the FIU had issued any guidance within the context of Article 26 of the AML/CFT Law, KCN representatives present informed that no guidance had been issued although there may have been discussions in this regard. Following the on-site visit the KCN informed that during the regular meetings, through the members of the KCN Committee (Board of the KCN) the FIU has disseminated the writtem procedures and controls on prevention and detection of ML. Although requested a copy or a link to an electronic version of such document which was only mentioned by the KCN was never produced.

1501. In reply to a similar enquiry the representative of SCAAK informed that no such guidance had ever been issued and that indeed SCAAK has very rare communications with the FIU.

1502. Moreover, paragraph (8) of Article 28 of the AML/CFT Law dealing with additional obligations of casinos and other gaming houses requires the FIU from time to time, to adopt, amend, or repeal sub-legal acts consistent with the policy, objects and purposes of Article 28 of the Law as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of the AML/CFT Law.

1503. Notwithstanding these specific legal mandates, it appears that the FIU has not established any such procedures or issued any sub-legal acts.

1504. It should however be mentioned that in August 2013, pursuant to Article 81, paragraph (4) of the Law No. 04/L-080 on Games of Chance, the MoF had issued Administrative Instruction MF No. 3/2013 on the Implementation of the Law No. 04/L-080 on Games of Chance. The Administrative Instruction is of a prudential nature dealing with the licensing and operational

146. According to the AML/CFT Law "covered professionals" includes lawyers, notaries, certified accountants, licensed auditors, and tax advisors – refer to Article 26 of the AML/CFT Law.

147. Notwithstanding, the AML/CFT Law provides for pecuniary penalties for failure to produce a list of indicators for the detection of customers and transactions for which there shall exist reasons for suspicion of ML or TF, or failure to produce such a list in the prescribed manner and within the timeframe.

procedures of games of chance under Law No. 04/L-080 and therefore does not address issues related to the AML/CFT Law which fall within the remit of the FIU.

1505. During the meeting with selected banks and financial institutions in the course of the Cycle 2 on-site visit banks informed that they never received any guidance on the identification of STRs from the FIU. It is only the CBK Advisory Letter 2007/1 that provides some indicators upon which each bank has developed its own list. However representatives of banks present expressed concerns on the harmonisation of such lists.

1506. There are no provisions in the AML/CFT Law providing for any other competent authority to issue directives, instructions, guidance or any other information that would assist reporting subjects to fulfil their obligations under the AML/CFT Law.[148]

1507. Notwithstanding, and prior to the signing of the MoU between the FIU and the CBK through which the CBK was delegated supervisory powers for the entire financial sector in 2013, the CBK had issued two documents guiding the financial sector in meeting its obligations for the prevention of ML and the FT – Advisory Letter 2007/1, which includes a list of indicators of suspicious activities, and Rule X.

1508. Advisory Letter 2007/1 was issued in terms of UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences which has been repealed in 2010 with the coming into force of the AML/CFT Law while Rule X was issued in terms of UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation which has also been repealed with the coming into force of the Law on Banks in 2012. However the Law on Banks provides that any rules promulgated under such regulations shall continue in effect, to the extent that they are not in conflict with this Law on Banks itself or until modified or repealed by the CBK. Notwithstanding, this Report holds that none of the Sections of the UNMIK Regulation 1999/21 referred to in Rule X specifically provided for the issue of regulations for AML/CFT purposes as the provisions under Article 46 relate only to supervisory and prudential purposes under the Regulation.

1509. As already detailed in this Report the CBK intends to issue a detailed Regulation incorporating both the Advisory Letter and Rule X which, according to the CBK and the banks met by the assessment team, will provide comprehensive guidance to the financial sector.

1510. As a short term measure, through the delegation of supervision MoU signed by the FIU and the CBK, the FIU acknowledges the issue of guidance or regulations for the financial sector issued by the CBK. However, the FIU does not entirely delegate this power to the CBK as the AML/CFT Law does not provide for such delegation. Consequently the MoU provides for practical arrangements where such guidance or regulations issued for the financial sector for the purposes of the AML/CFT Law are issued within the spirit of the supervisory delegated remit to the CBK in terms of Article 36A of the Law, they are only issued following a process of discussions and consultation between the FIU and the CBK and they are only issued with joint responsibility of the FIU and the CBK. The Kosovo authorities have informed that eventual amendments to the AML/CFT Law will provide a clearer legal permanent basis for such delegation.

1511. While positively acknowledging that these arrangements and the eventual issue of the CBK proposed Regulations are a step in the right direction for the financial sector, the assessment team are of the view that unless the FIU issues similar general guidance for the other reporting subjects, there will be created an inconsistency in the level playing field for reporting subjects.

1512. It is therefore recommended that while the FIU issues overarching guidance to reporting subjects, other than the financial sector, on the implementation of obligations under the AML/CFT Law, the CBK issues its proposed Regulation but the CBK should ensure appropriate legal basis.

148. With the exception of paragraph (3) of Article 19 (Wire Transfers) which provides that the competent authority may issue regulations regarding cross - border transfers executed as batch transfers and domestic transfers.

***Adequate and appropriate feedback to reporting financial institutions and DNFBPs – Essential Criterion 25.2***

1513. EC 25.2 requires competent authorities, and in particular the FIU, to provide adequate and appropriate feedback to financial institutions and DNFBPs who are required to file STRs taking regard of the FATF Best Practice Guidance.

1514. The AML/CFT Law is silent on the provision of feedback to reporting subjects by the FIU or other competent authorities. Thus there is no reference to the provision of feedback under Article 14 of the AML/CFT Law which provides for the duties and competences of the FIU.

1515. In reply to a question as to how many times has the FIU provided feedback in 2011 and 2012 to reporting entities on progress on financial investigations/criminal investigations that originated from STRs filed by these reporting entities, during the Cycle 1 on-site visit the FIU had simply replied "No Report" which is interpreted as meaning that either no statistics are available or that no feedback on any report had been provided.

1516. Notwithstanding, during the Cycle 2 on-site visit the FIU informed that it does provide feedback. According to the FIU the goAML system in its new version supports more information for feedback. The FIU is now providing feedback on each case and has consequently seen a strong improvement in the quality of the reports. Thus feedback is being provided on an ongoing basis even when the STR is received. However, according to the FIU, its Annual Report will provide more meaningful feedback although of a generic nature, including typologies. The FIU intends to provide feedback through its supervisory work and training sessions.

1517. The banks and financial institutions met by the assessment team informed that there is general feedback like typologies in the FIU Annual Report and that they receive acknowledgements when they file reports with the FIU. However, specific feedback is only received at times if requested.

1518. While it appears there is some conflict on the provision to and receipt of feedback by reporting subjects, the absence of mandatory obligations in this respect under the AML/CFT Law may be required to be reviewed to ensure that feedback is provided.

1519. Thus it is recommended that new provisions are made in the AML/CFT Law for the provision of general and specific feedback to the reporting subjects based on the FATF Best Practice Guidance on Providing Feedback to Reporting Financial Institutions and Other Persons.

1520. While not necessarily covered through EC 25.2, it is important that the FIU itself receives feedback. During the on-site visit the FIU informed that the FIU receives feedback also from the SPRK Preventive Unit. Indeed, since January 2013 the FIU claims to have received feedback on 93 reports. The FIU is now relying on the office of the NCCEC who is responsible to co-ordinate all cases and to send feedback on a monthly basis. On the other hand the FIU claims it is hard to get feedback from the Courts.

***Effectiveness***

1521. Guidance on the harmonisation of the implementation and fulfilling of the obligations under the AML/CFT Law by all reporting subjects is an important element in ensuring that the system is functioning effectively. This does not appear to be the case because, although guidance is being provided, it appears that more comprehensive guidance is needed complemented by stronger liaison between the relevant competent authorities in order to ensure an even playing field between all the reporting subjects.

1522. This, together with the inconsistencies and legal ambiguities on the establishment of guidance by the FIU, impact negatively on the efficiency of the system.

1523. Moreover, the apparent lack of feedback would also impact on the effectiveness of the system as without feedback it is difficult to ensure first that reporting subjects understand better their reporting obligation and second that consequently this improves the quality of the reports which in turn would impact on the better preparation of cases for prosecution.

### 3.14.2. Recommendations and Comments

1524. Although most of the elements of Recommendation 25 are present in the Kosovo AML/CFT system either through practice or through legislative provisions, the analysis of Recommendation 25 in this Report identifies some gaps and weaknesses that need to be addressed as they would negatively impact on the harmonisation of the system and consequently on the effectiveness of the system.

1525. Although a full reading of the analysis for Recommendation 25 is essential in order to put into context the identified gaps and weaknesses, these could be mainly covered as follows:

- absence of general guidance within the context of the Methodology assisting reporting subjects other than the financial sector in fulfilling their obligations – such as the application of CDD and record keeping (EC 25.1);
- absence of guidance to reporting subjects other than the financial sector about suspicious acts or transactions, including the nature of suspicious acts or transactions for the purposes of the AML/CFT Law, and the development of lists of indicators of such acts and transactions (EC 25.1);
- inconsistency in the AML/CFT Law requiring all reporting subjects to develop lists of indicators of suspicious transactions (EC 25.1);
- inconsistency in the AML/CFT Law requiring the FIU to issue guidance only to "covered professionals" and casinos and other gaming houses (EC 25.1);
- absence of legal mandate for competent authorities under the AML/CFT Law other than the FIU to issue regulations for the purposes of compliance with the Law (EC 25.1);
- absence of a legal mandate for the competent authorities, and in particular the FIU, to provide feedback to reporting subjects (EC 25.2); and
- conflicting views on the actual provision and receipt of feedback (EC 25.2).

1526. To this effect the analysis of Recommendation 25 provides recommendations for upgrading the abovementioned shortcomings as detailed below. A full reading of the analysis is however recommended to put into context these recommendations:

- the FIU issues overarching guidance to reporting subjects, other than the financial sector, on the implementation of obligations under the AML/CFT Law, and including guidance on indicators of suspicious transactions thus removing uneven playing field due to the proposed CBK Regulation to the entire financial sector;
- the CBK issues its proposed Regulation;
- remove legal inconsistencies and ambiguities in the AML/CFT Law for the establishment of guidance by the competent authorities other than the FIU; and
- new provisions be made in the AML/CFT Law for the provision of generic and specific feedback to the reporting subjects based on the FATF Best Practice Guidance on Providing Feedback to Reporting Financial Institutions and Other Persons.

1527. Furthermore, it is recommended that closer co-operation and effective liaison be established between the FIU and other competent authorities which under the AML/CFT Law are delegated supervisory powers to ensure harmonisation in the issue of guidance to those under their respective supervisory remit.

### 3.14.3. Rating for Recommendation 25

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.25** | **PC** | • absence of comprehensive general guidance to reporting subjects in fulfilling their obligations under the AML/CFT Law;<br>• inconsistency in the AML/CFT Law requiring all reporting subjects to develop lists of indicators of suspicious transactions;<br>• inconsistency in the AML/CFT Law requiring the FIU to issue guidance to "covered professionals" and casinos only; |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • absence of legal mandate or other arrangement for competent authorities other than the FIU to issue guidance and regulations; and<br>• absence of legal mandate for the FIU to provide feedback. |

## 3.15. Internal controls, compliance, audit and foreign branches (R.15 and R.22)

### 3.15.1. Description and Analysis

**Recommendation 15**

1528. Recommendation 15 requires financial institutions to develop programmes for the prevention of ML and TF which should include the establishment of internal policies, procedures and controls; compliance management arrangements including the appointment of a compliance officer; screening of integrity of employees; employee training; and an audit function.

1529. According to the FATF Methodology the type and extent of measures to be taken for each of the requirements of Recommendation 15 should be appropriate having regard to the risk of ML and TF and the size of the business.

1530. It is an internationally accepted standard that the size of an institution is not measured solely on the number of employees but also on its turnover, its assets, and its balance sheet value.

1531. While the AML/CFT Law addresses some elements of Recommendation 15, others may be addressed through regulations or applied as best practice or are not applied at all. The following paragraphs shall expand on the foregoing including findings during the Cycle 2 on-site visit by the assessment team.

***Internal procedures, policies and controls to prevent money laundering and financing of terrorism – Essential Criterion 15.1***

1532. EC 15.1 requires financial institutions to have procedures, policies and controls in place to prevent ML and TF that at least cover CDD, record retention, detection of unusual and suspicious transactions and the reporting obligations.

1533. Article 23 of the AML/CFT Law requires banks and financial institutions to develop internal programmes for the prevention of ML and TF which should include procedures for CDD, record retention, identification of suspicious transactions and reporting, and training programmes. It is further required by law that such internal programmes are submitted to the FIU and the CBK but the AML/CFT Law does not require that any of the two authorities approves or otherwise the internal procedures.

1534. There are no provisions in the AML/CFT Law imposing similar obligations on other reporting subjects except for casinos. Consequently there are no such obligations imposed by rules or regulations of the competent authorities and hence this creates a legal inconsistency.

1535. While Advisory Letter 2007/1 is silent on internal rules and procedures, Rule X, in reflecting the obligations under the Law in this respect, requires that the internal AML/CFT policies and procedures be adopted by resolution of the Governing Board and implemented on a day-to-day basis by management and staff.

1536. The assessment team is informed that the proposed CBK Regulation shall include the present guidance and will provide additional guidance on the establishment of internal policies and procedures, including the general responsibilities of officials of the institution for the purposes of implementing the procedures in compliance with the obligations under the AML/CFT Law and regulations.

1537. During the Cycle 2 on-site visit the CBK confirmed that since it is a requirement under Article 23 of the AML/CFT Law all banks and financial institutions have developed internal programmes consisting of internal policies and procedures to be followed for the prevention of ML and TF. Most banks and financial institutions have invested well in ensuring compliance with their obligations under the AML/CFT Law. Others may need to invest more. But this is what the new AML/CFT supervisory Division within the CBK will be monitoring to ensure that such policies and procedures are in place according to the Law and are being implemented effectively.

1538. The banks that are subsidiaries of foreign banks and who met with the assessment team confirmed that they do have internal procedures which often reflect the provisions of the policies and procedures of the group to which they individually belong. Banks expressed concern however on the harmonisation of procedures in Kosovo because while they all do the same thing because the obligations are the same, yet the way that these compliance procedures are implemented differ since they often rely on their parent's procedures. Banks however expressed satisfaction that the proposed CBK Regulation will assist them in the harmonisation of the approach, in particular in the risk based approach.

1539. It follows therefore that compliance with the obligations under the EC 15.1 for the financial sector is adequately applied although there is a need to ensure harmonisation in implementation of procedures and the removal of legal inconsistencies on obligations for the all reporting subjects.

***Appointment of AML/CFT compliance officer– Essential Criterion 15.1.1***

1540. EC 15.1.1 requires financial institutions to develop appropriate compliance management arrangement which, as a minimum, should include the appointment of an AML/CFT compliance officer at management level.

1541. Paragraph (1) of Article 23 of the AML/CFT Law imposes a mandatory obligation for banks and financial institutions to appoint a "compliance officer" who shall be responsible for interaction and information exchange with the FIU and the CBK. The compliance officer shall be responsible for the reporting and record keeping obligations under the AML/CFT Law. Banks and financial institutions are further bound to inform the CBK and the FIU of the identity or changes in the appointment of the compliance officer. There are no similar obligations for other reporting subjects.

1542. The AML/CFT Law however falls short in providing criteria for the appointment of the compliance officer, such as the need for the officer to be at management level to command authority. Likewise is the Advisory Letter 2007/1.

1543. Rule X attempts to provide some guidance in dealing with the requirement of a compliance function within banks and financial institutions. In this regard it addresses the requirements or criteria for the appointment of the Head of the compliance function while defining the responsibilities of the function. However, as indicated earlier in this Report, the assessment team expresses doubt on the validity of Rule X which, in this regard, refers to the role of the Head of the compliance function (compliance officer) as *who will act as contact person for the purposes of section 3.16 of Regulation 2004/2* – which Regulation, as stated earlier in this Report has been repealed with the coming into force of the AML/CFT Law.

1544. The assessment team is informed that the proposed CBK Regulation, in retaining most of the guidance provided in Rule X, will provide extended guidance to banks and financial institutions by establishing criteria for the appointment and removal of the compliance officer; establishing the criteria for who should not be appointed as compliance officer; and by establishing the roles and responsibilities of the compliance function and those of the compliance officer as the Head of the Compliance Function.

1545. In the course of the Cycle 2 on-site visit the CBK informed that all banks and financial institutions had appointed the compliance officer as mandatorily required under the AML/CFT Law and that the CBK and the FIU had been informed accordingly and are being further informed upon changes. This was confirmed by the banks and financial institutions met by the assessment team who also confirmed the independence of the compliance officer who normally reports directly to the Board of Directors. Moreover the CBK informed that while it has no reason to doubt the independence of the compliance officer, it will be examining this in the course of its on-site visits.

1546. In the light of the absence of adequate criteria for the appointment of and in the absence of adequate definition of the roles and responsibilities of the compliance officer, it is recommended

that the CBK issues its proposed Regulation and eventually ensure through its supervisory visits that the appointment and roles and responsibilities of the compliance officer in banks and financial institutions are harmonised accordingly.

***Timely access to information - Essential Criterion 15.1.2***

1547. EC 15.1.2 requires that the AML/CFT compliance officer and other appropriate staff have timely access to information on customer identification and other CDD data, transaction records and all other relevant information.

1548. The AML/CFT Law is essentially silent on this matter. Paragraph (1) of Article 23 of the Law defines the roles and responsibilities of the compliance officer as *who shall be subject of the reporting and record keeping obligations under this Law* which the assessment team interprets as being the two responsibilities of the compliance officer i.e the reporting obligation and the record keeping obligation.

1549. While Rule X does not specifically define the responsibilities of the compliance officer except through the definition of the responsibilities of the compliance function which is headed by the compliance officer, it falls short in providing for the right of and timely access to information by the compliance officer.

1550. It follows therefore that with the absence of a requirement for the compliance officer to be appointed at a senior management level and the absent of appropriate legal provisions for the powers of the compliance officer for timely access to information, there are concerns on the effectiveness of the functions of the compliance officer.

1551. Although it is understood that the proposed CBK Regulation will provide further guidance including that the compliance officer should have rights of timely access to relevant information, it is still recommended that such powers be provided under the Law through Article 23 of the AML/CFT Law being amended to include provisions providing for the right of timely access to relevant information for the purposes of the AML/CFT Law by the compliance officer in order to fulfil obligations under the Law and regulations.

***Adequately resourced and independent audit function – Essential Criterion 15.2***

1552. EC 15.2 provides that financial institutions should be required to maintain an adequately resourced and independent audit function to test compliance with internal procedures, policies and controls. Such audit function shall be commensurate with and proportionate to the size and activities of the financial institution. There is nothing in the criteria that prohibits the outsourcing of the audit function.

1553. Although limited, paragraph (2.6) of Article 23 of the AML/CFT Law requires that banks and financial institutions establish an audit function to test the reporting and identification system. The Law however does not provide for the resources, independence and operations of the audit function.

1554. The Law on Banks is also mandatory in that it requires all banks and branches of foreign banks to appoint an internal auditor who must operate independently of management (Article 55). The Law further provides for the responsibilities of the audit function.

1555. The Law on Banks however is not mandatory in requiring MFIs and NBFIs to appoint an internal auditor (Article 103). The Law provides that the CBK may, because of special circumstances, require by Order or Regulation, specific MFIs or NBFIs to have an internal auditor who must be approved in advance by CBK. The duties of the internal auditors may be specified by CBK Regulations or Order.

1556. In 2012 the CBK issued Regulation 8 on Internal Controls governing MFIs and requiring MFI's to have an effective system of internal controls that is consistent with the nature, complexity, and risk inherent in their on and off balance-sheet activities and that responds to changes in their environment and conditions. The Regulation further requires that adequate internal controls within MFIs shall be supplemented by an effective internal audit function that independently evaluates the control systems within the institution.

1557. There are no such specific requirement through regulations for NBFIs except for the provisions in the CBK Rule XVI on the Registration, Supervision and Operations of NBFIs which, through Section 8 requires that NBFIs shall establish a system of internal controls and audit that is acceptable to the CBK. However the Rule is silent on the independence, resourcing and responsibilities of the audit function.

1558. UNMIK Regulation 2001/25 governing the insurance sector, while not being specific on the establishment of an internal audit function, yet makes references to internal audit work such as in Section 26 in referring to record keeping by insurance companies and insurance intermediaries where a reference is made to *internal audit work papers*; or in Section 49 dealing with external auditors who are required to review the adequacy of *internal audit* and internal control practices and procedures.

1559. During the on-site visit the CBK informed that while all banks have established an internal audit function, it is only the larger MFIs that have also done so. According to the CBK, depending on the size of the institution, the internal audit function can be outsourced, normally to the external auditor.

1560. While acknowledging that the provisions of EC 15.2 are broadly in place, the assessment team recommends a review of paragraph (2.6) of Article 23 of the AML/CFT Law to remove the limited function of internal audit from being to test the reporting and identification system to a broader remit to ensure full compliance of the preventive system with the legal and regulatory provisions and to ensure its effectiveness.

***Ongoing employee training – Essential Criterion 15.3***

1561. EC 15.3 requires financial institutions to provide ongoing employee training to ensure that employees are kept informed of developments in ML and FT techniques, methods and trends; and that they are provided with clear explanations and awareness of all aspects of AML/CFT laws, regulations and obligations, with particular reference to CDD and reporting of suspicious transactions.

1562. Article 23 of the AML/CFT Law requires that as part of their internal programmes required under the Law on AML/CFT, banks and financial institutions shall provide for employee awareness and training programmes on the prevention of ML and the FT and the responsibilities set upon them by the AML/CFT Law.

1563. While Advisory Letter 2007/1 is silent on the issue of training, Rule X places the responsibility for planning and overseeing an AML/CFT training programme upon the compliance function within the financial institution. It therefore requires that the obligations for the establishment of a training programme be part of the internal policies and procedures. The Rule specifically requires banks and financial institutions to give sufficient guidance and training to staff to enable them to recognise suspicious acts and transactions and that new staff undergo AML/CFT training before they may engage in opening business relationships with customers or executing financial transactions. Finally Rule X requires that although directors and senior managers may not be involved in the day-to-day procedures, it is important that they understand the statutory duties placed on them, their staff and the business itself. Therefore, they shall participate in training appropriate to their function. This training shall also cover possible sanctions arising from laws and regulations.

1564. It is envisaged that the provisions of Rule X shall be generally retained in the proposed CBK Regulation with additional guidance on training to be provided by a proposed Administrative Directive on training to be issued by the CBK.

1565. In October 2013 the FIU issued Administrative Directive No. 001/2013 on Training for Preventing and Combating ML and TF. The main objective of the Directive is primarily to define the responsibilities and powers of the FIU in providing training and in obliging the participation of reporting subjects in such training sessions. The first part of the Directive deals with training for reporting subjects by the FIU and requires reporting subjects to respond positively when invited to attend. Training for reporting subjects shall cover:

- reporting obligations of the reporting subjects set by the AML/CFT Law and other sub legal acts;
- the consequences of not respecting the AML/CFT Law;

- methods of ML and FT as well as the risks that reporting subjects might face and the possible consequences of such risks; and
- other important and relevant issues of this field – AML/CFT.

1566. The assessment team is informed that within this context, the CBK intends to issue an Administrative Directive addressed to banks and financial institutions on training requirements for the prevention of ML and the FT. The proposed Administrative Directive does not provide a training programme for banks and financial institutions to adopt and implement. The responsibility to develop training programmes for the prevention of ML and the FT remains the responsibility of banks and financial institutions in accordance with the AML/CFT Law. It is understood that the proposed Administrative Directive will provide principles upon which banks and financial institutions shall develop their training programmes. The Directive is applicable to all banks and subsidiaries and branches of foreign banks, NBFIs and MFIs and subsidiaries and branches of similar foreign institutions licensed by the CBK to operate in Kosovo in terms of the Law on Banks. The proposed Administrative Directive establishes the responsibilities of banks and financial institutions in providing training at all levels of officers and employees on a continuous basis; it establishes the nature of training and awareness that banks and financial institutions are expected to provide; and it provides detailed but non-exhaustive principles on the type of training that banks and financial institutions should consider. Moreover, the CBK further informed that its Directive will require banks and financial institutions to maintain comprehensive and meaningful statistics on training that is provided both internally and externally. It is important that the proposed CBK training Directive be harmonised with the Administrative Instruction on training issued recently by the FIU.

1567. The CBK informed that it intends to follow up on the training programmes of banks and financial institutions as part of its on-site and off-site examinations. However the CBK confirmed that banks and financial institutions already provide ongoing training programmes for their employees.

1568. This was confirmed by the banks and financial institutions met by the assessment team who confirmed that they try to develop their own standards of training. Every new employee is generally given training on the prevention of ML and the FT as part of the induction training upon recruitment. Training consists of defining ML and FT; defining the obligations of the bank under the Law; and other related issues. Training is provided for different sections and to different categories or designations of officials within the banks and financial institutions. Awareness sessions are normally included whenever there are amendments either to the legislation, the rules and regulations or the internal procedures.

1569. While it appears that ongoing training is being addressed and the authorities have issued or plan to issue guidance on training, unfortunately little statistics have been provided.

1570. The FIU has informed that together with other partners it has organised various training sessions for the financial sector and DNFBPs. Those for the financial sectors concerned:

***Table 18: Training provided by the FIU to the financial sector during 2014****

| 2014/Month | Reporting Subject | Type | Subject | Support |
|---|---|---|---|---|
| **January** | Micro-finance | Training | AML/CFT - Legal obligations and way of reporting | None |
| **March** | Insurance Companies | Training | AML/CFT - Legal obligations and way of reporting | CBK |
| **May** | Other financial institutions | Training | AML/CFT - Legal obligations and way of reporting | CBK<br>B&S Project |
| | Banks | Training | AML/CFT - Legal obligations and way of reporting | CBK<br>B&S Project |

* *Up to the time of drafting this Report*

1571. The assessment team therefore urges the CBK, without prejudice to the position of this Report on the legal basis for the CBK to issue regulations for the purposes of the AML/CFT Law, to issue its Administrative Directive on Training and to ensure its full implementation and the maintenance of appropriate statistics accordingly, ensuring harmonisation with any similar guidance issued by the FIU.

### *Screening procedures when hiring employees – Essential Criterion 15.4*

1572. EC 15.4 requires financial institutions to put in place screening procedures to ensure high standards when hiring employees.

1573. There are no such provisions in the AML/CFT Law except in the recent amendments with reference to casinos.[149] Likewise, Advisory Letter 2007/1 is also silent on the screening procedures for new employees.

1574. Rule X on the other hand requires that a policy on staff vetting, screening and training for AML/CFT purposes should form part of the internal AML/CFT policies and procedures. The Rule also requires that banks and financial institutions introduce comprehensive measures to ensure that their employees, especially staff having contact with customers or executing transactions and staff within the AML/CFT compliance function, do not have a criminal record or are not the subject of an ongoing criminal prosecution for financial crime, terrorism, or other serious crime which could call into question their trustworthiness. The assessment team is informed that these provisions of Rule X will be retained in the proposed CBK Regulation.

1575. With reference to senior management of banks and financial institutions the Law on Banks requires that each Director and Senior Manager of a bank must be fit and proper and of good repute and must meet the criteria established by the CBK regarding qualifications, experience and integrity.

1576. At its meeting with the CBK during the second on-site visit the assessment team was informed that screening mainly consists of education levels, experience for the job and criminal records to ensure the integrity of the new employees. Moreover, there are legal obligations on screening for senior management positions and the CBK has to approve the recruitment at such positions. The CBK checks that screening has been done through its on-site examinations where there are checks to ensure that employees have an appropriate background for the job.

1577. The banks and financial institutions met by the assessment team confirmed that sound screening procedures are applied at recruitment stage and no persons who fail the screening are employed.

1578. While it appears that screening requirements under EC 15.4 are generally adequate, yet there are some gaps and weaknesses that need to be addressed. First is the inconsistency in the AML/CFT Law where only casinos are required to have recruitment screening procedures in place; second is the validity of Rule X as already expressed in this Report; and third the uneven playing field as there do not appear to be any regulatory requirement for other elements of the financial sector to apply screening procedures.

1579. These gaps or weaknesses should be addressed through the necessary amendments to the AML/CFT Law requiring all reporting subjects to have recruitment screening procedures in place; by the issue of the CBK proposed Regulation replacing Rule X; and through the provision of guidance as may be necessary by the relevant competent authorities.

### *Independence and reporting hierarchy of compliance officer – Additional Element 15.5*

1580. AE 15.5 requires that the compliance officer be able to act independently and to report to senior management above the compliance officer's next reporting level or to the Board of Directors.

1581. The AML/CFT Law is silent on the independence and the reporting structure of the compliance officer. Likewise is the Advisory Letter 2007/1.

149. Refer to the analysis for Recommendation 16 on DNFBPs in the application of Recommendation 15 to DNFBPs.

1582. The provisions on the compliance function in Rule X indicate that the Head of the compliance function (being the compliance officer) reports to the Board of Directors and can only be removed on specific grounds by the Board of Directors who is also responsible to appoint that person.

1583. The assessment team has been informed that the proposed CBK Regulation shall retain the provisions of Rule X (the validity of which is questioned by this Report) but shall enhance guidance. Thus, it is understood that in providing for the appointment and functions of the compliance officers, the proposed CBK Regulation requires that the compliance officer must occupy a senior position of sufficient seniority and command within the institution where effective influence can be exercised on the AML/CFT policy of the bank or the financial institution. Moreover, the person occupying this position must have a direct reporting line to the Board of Directors and should not be precluded from posing effective challenge where necessary. In this regard this officer must also have the authority to act independently in carrying out his responsibilities and should have full and unlimited access to all records, data, documentation and information of the bank or the financial institution for the purposes of fulfilling responsibilities.

1584. During the on-site visit the CBK informed that although it has not yet examined the independence of the compliance officers within each institution, yet it has no reason to be concerned that such independence does not exist.

1585. The banks and financial institutions met by the assessment team confirmed that their compliance officers enjoy an independent role with the reporting line being directly to the Board of Directors although they do not exclude that some banks may have a reporting line through the Audit Committee.

1586. The lack of legal provisions on the independence and reporting lines of the compliance officer need to be addressed to reflect practice. The assessment team therefore urges the CBK, without prejudice to the position of this Report on the legal basis, to issue the proposed Regulation in order to provide further guidance to the banks and financial institutions.

***Effectiveness***

1587. Most of the requirements for Recommendation 15 seem to be adequately covered in practice for the financial sector. However, some gaps identified in the analysis of the EC need to be addressed immediately because if left unattended these could develop into risks to the effectiveness of the system. These mostly refer to inconsistencies in the AML/CFT Law; inadequate guidance and lack of statistics on training.

**Recommendation 22**

1588. Recommendation 22 requires that banks and financial institutions apply their internal policies, procedures and controls to their branches and subsidiaries in foreign countries particularly where the foreign country does not apply or insufficiently applies the FATF Recommendations. The Recommendation further requires that where banks and financial institutions are prohibited from doing so because of the laws of that foreign country, then banks and financial institutions should inform their relevant domestic competent authorities.

1589. There are no provisions in the AML/CFT Law in this regard. Consequently both the Advisory Letter 2007/1 and Rule X of the CBK are silent on this matter. The assessment team understands that likewise the proposed CBK Regulation will remain silent on the application of internal procedures to branches and subsidiaries outside of Kosovo.

1590. Article 11 of the Law on Banks requires that:

- A bank other than a foreign bank shall obtain prior written approval of the CBK before establishing or acquiring a branch or a subsidiary in another jurisdiction.
- The CBK shall prescribe by regulation the procedure for obtaining prior written approval and the form and content of the application.

1591. The reference to 'other than a foreign bank' is not clear and may leave a loophole in the Law on Banks and in practice. If the reference is to a subsidiary in Kosovo of a foreign bank, which should in practice be a Kosovo entity, then this means that such subsidiaries can establish or acquire branches and subsidiaries in other jurisdiction without CBK approval.

1592. However, according to Article 39 of Law on Banks no bank shall merge or consolidate with any other bank or acquire, either directly or indirectly, all or the majority of all of the assets of, or assume the liabilities of, any other bank, except with the prior approval of the CBK.

1593. Moreover, according to Article 40 of the Law on Banks no bank may acquire equity interest in a financial institution without the authorisation of the CBK.

1594. The Law on Banks is however silent on the application of policies and procedures and internal control to overseas branches or subsidiaries of Kosovo banks – presumably because this obligation emerges from the AML/CFT Law and is therefore not a prudential obligation in terms of the Law on Banks.

1595. Although the Law on Banks makes references to activities of MFIs and NBFIs that require prior CBK approval such as for the opening of new locations or any change of location; and any merger or acquisition of the MFI or NBFI, these are interpreted to be referring to the domestic market and hence the Law on Banks is silent on whether an MFI or a NBFI can establish or acquire a branch or subsidiary in a foreign market. Otherwise, as the Law is specific for banks, it would have been specific for MFIs and NBFIs.

1596. Notwithstanding that there is no obligation on banks and financial institutions to apply their internal policies, procedures and controls to their branches and subsidiaries in foreign countries, yet the AML/CFT Law through Article 31B foresees a pecuniary penalty for *failure to ensure detection and prevention measures for money laundering and terrorist financing defined in this law in its business units, subsidiaries and companies wherein he owns majority of shares and the majority of decision making rights, located in a third country.* This shows another inconsistency in the AML/CFT Law as regards sanctions – refer to analysis of FATF Recommendation 17.

1597. Apart from the fact that there is no definition of 'a third country' in the Law, the AML/CFT Law is imposing a penalty for failure to observe an obligation that legally does not exist except through the breach itself.[150]

1598. It was confirmed both by the CBK and the banks met by the assessment team that banks in Kosovo do not have branches or subsidiaries in foreign countries.

1599. Notwithstanding, while the Law on Banks allows for such an eventuality for banks even though with the authorisation of the CBK, there are no legal or regulatory provisions that meet the requirements of FATF Recommendation 22.

1600. It is therefore recommended that a new Article 23A on branches and majority owned subsidiaries in foreign countries be introduced which should provide for the obligations for the implementation of Recommendation 22 – see below under Recommendations and Comments.

1601. The analysis of the EC for Recommendation 22 in the following paragraphs should therefore be read within this context.

***Foreign branches and subsidiaries to observe AML/CFT measure consistent with home country – Essential Criterion 22.1***

1602. EC 22.1 requires financial institutions to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with their domestic requirements and the FATF Recommendations to the extent that the host country laws and regulations permit.

1603. Notwithstanding that the Law on Banks provides for banks to establish or acquire a branch or subsidiary in a foreign country, as already indicated above, there are no legal or regulatory provisions on any obligations on banks seeking to establish themselves overseas except the obligation to acquire the authorisation of the CBK.

150. For recommendations in this regard please refer to the analysis of FATF Recommendation 17.

***Countries which do not or insufficiently apply the FATF Recommendations – Essential Criterion 22.1.1***

1604. EC 22.1.1 requires financial institutions to pay particular attention in observing the principles in EC 22.1 in countries which do not or insufficiently apply the FATF Recommendations.

1605. In the course of the on-site visit the CBK and the banks informed that banks in Kosovo do not have branches or subsidiaries in foreign countries and therefore such provisions are not necessary. In fact there are no legal or regulatory obligations in this respect.

***Application of higher standard – Essential Criterion 22.1.2***

1606. EC 22.1.2 requires that where the AML/CFT requirements of the home and host countries differ the financial institutions should ensure that their branches and subsidiaries in foreign countries apply the higher standard to the extent that the host country laws and regulations permit.

1607. For the same reasons mentioned above and the absence of any legal or regulatory obligations in this respect, banks that may seek authorisation under the Law on Banks to establish or acquire a branch or subsidiary in a foreign country do not have any guidance in this respect.

***Obligation to inform home country supervisor – Essential Criterion 22.2***

1608. EC 22.2 requires that when a branch or subsidiary in a foreign country is unable to observe appropriate AML/CFT measures because of prohibitions in this respect by the host country local laws, regulations or other measures, then the bank should be required to inform its home supervisor.

1609. Since any obligations falling within the requirements under FATF Recommendation 22 are absent in Kosovo, there are no legal or regulatory obligation in this respect also. Inconsistencies would arise therefore should a bank seek CBK authorisation to establish or acquire an overseas branch or subsidiary.

***Financial institutions subject to Core Principles are required to apply consistent CDD measures at the group level – Additional Element 22.3***

1610. AE 22.3 seeks to establish whether financial institutions subject to the Core Principles are required to apply consistent CDD measures at group level, taking into account the activity of the customer with the various branches and majority owned subsidiaries worldwide.

1611. As already established under this analysis of Recommendation 22 there are no obligations meeting the criteria of the Recommendation notwithstanding that banks in Kosovo are allowed under the Law on Banks but subject to CBK approval to establish or acquire branches and subsidiaries in foreign countries.

1612. Looking at this additional criterion from the other perspective, banks in Kosovo that are subsidiaries of foreign banks informed the assessment team that, notwithstanding that the Law is silent in this respect, at times they adopt group policies to fulfil their domestic obligations where there is no domestic guidance but they always apply the higher standard.

***Procedures in place to take additional measures - EU Third AML Directive Article 31(3)***

1613. Paragraph (3) of Article 31 of the EU AML/CFT Third Directive[151] requires that where the laws of the *third country*[152] do not permit the application of equivalent AML/CFT measures, the procedures in place in the Member State should require institutions to take additional measures to

151. 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.

152. The term *third country* for the purposes of the EU refers to a country that is not a member state of the EU. For the purposes of a country that is not an EU Member State the interpretation should refer to any foreign jurisdiction.

handle the risk of ML and FT. The Directive does not specify what type of additional measures should be imposed but leaves this at the discretion of the Member States.

1614. In reply to the Cycle 2 Questionnaire the Kosovo authorities make references to Article 20 of the AML/CFT Law which governs the obligation for the special monitoring of certain transactions (as established by this Report this provision covers FATF Regulation 11 and Regulation 21) and to eventual articles in the CBK proposed Regulation covering CDD.

1615. The assessment team does not share the above opinion. This Report has already established that there are no legislative or regulatory provisions in Kosovo meeting the obligations for Recommendation 22.

***Communication to branches and major owned subsidiaries in third countries – EU Third AML Directive Article 34 (2))***

1616. Paragraph (2) of Article 34 of the EU Third AML Directive requires that banks and financial institutions in Member States communicate their AML/CFT policies and procedures, where applicable, to branches and majority owned subsidiaries in third (foreign) countries.

1617. Notwithstanding that in their replies to the Cycle 2 Questionnaire the Kosovo authorities have stated that there is such an obligation there is no reference to any legislative or regulatory provisions in this regard as this Report has established earlier.

***Effectiveness***

1618. Notwithstanding that banks in Kosovo do not have any branches or subsidiaries outside of Kosovo, the absence of any legal or regulatory provisions on the criteria and conditions for banks to establish or acquire a branch or subsidiary in a foreign country raises concerns on the effectiveness of the system, particularly when the Law on Banks allows banks to enter into such activities albeit with the authorisation of the CBK.

### 3.15.2. Recommendations and Comments

**Recommendation 15**

1619. Although most criteria of Recommendation 15 are adequately addressed for the financial sector, there remain certain concerns on implementation and consistency which impact on the effectiveness of the system due to identified gaps and weaknesses.

1620. Although a full reading of the analysis for Recommendation 15 is essential in order to put into context the identified gaps and weaknesses, the identified shortcomings could be mainly covered as follows:

- inconsistencies in the AML/CFT Law on the establishment of internal procedures including the appointment of a compliance officer (EC 15.1 and EC 15.1.1);
- absence of adequate criteria for the appointment and absence of adequately defining of the roles and responsibilities of the compliance officer (EC 15.1.1);
- absent of appropriate legal provisions for the powers of the compliance officer for timely access to information (EC 15.1.2);
- limited function of internal audit to test the reporting and identification system under the AML/CFT Law (EC 15.2);
- lack of statistics on training (EC 15.3); and
- inconsistency in the AML/CFT Law where only casinos are required to have recruitment screening procedures in place (EC 15.4).

1621. Within this context, and subject to a full reading of the analysis of the relevant EC, this Report provides recommendations to rectify the weaknesses identified for better harmonisation with the FATF Standards and hence a more effective implementation of the preventive system:

- revise the relevant Articles in the AML/CFT Law to remove legal inconsistencies mainly relating to the establishment of internal policies and procedures, the appointment of a compliance officer and the screening of new recruits;

- ensure harmonisation in implementation of procedures;
- without prejudice to the position of this Report on a permanent legal basis, CBK issues its proposed Regulation to clarify the appointment, roles and responsibilities of the compliance officer and ensure its effective implementation through on-site visits;
- review Article 23 of the AML/CFT Law to include provisions for the right of timely access to relevant information for the purposes of the AML/CFT Law by the compliance officer in order to fulfil obligations under the Law and regulations;
- review paragraph (2.6) of Article 23 of the AML/CFT Law to remove the limited function of internal audit to test the reporting and identification system to a broader remit to ensure full compliance of the system with the legal and regulatory provisions and to ensure its effectiveness; and
- without prejudice to the position of this Report on a permanent legal basis, CBK to issue its Administrative Directive on Training and to ensure its full implementation and the maintenance of appropriate training statistics.

**Recommendation 22**

1622. The analysis of the application of obligations meeting the criteria for Recommendation 22 show that there are no legal or regulatory provisions to this effect. Consequently the assessment team expresses serious concerns because while the Law on Bank allows banks to establish or acquire branches or subsidiaries overseas, yet there are no AML/CFT criteria or conditions under which this could be effected.

1623. The argument that since banks require the authorisation of the CBK for such activities and hence the CBK can impose conditions is no argument as such procedures could lead to inconsistencies – although this could be applied in the short term should the need arise until effective mandatory legislative provisions are enacted.

1624. Consequently, while a full reading of the analysis for Recommendation 22 is recommended, the weakness in the implementation of the provisions of Recommendation 22 can be grouped as follows:

- the reference to 'other than a foreign bank' in Article 11 is not clear and may leave a loophole in the Law on Banks and in practice for subsidiaries of foreign banks in Kosovo; and
- absence of legal or regulatory provisions on conditions that should be applied for AML/CFT purposes to branches and subsidiaries in foreign countries.

1625. Notwithstanding that currently banks in Kosovo do not have branches or subsidiaries overseas, the Report recommends the introduction of a new Article 23A on branches and majority owned subsidiaries in other countries which should provide for the obligations for the implementation of Recommendation 22:[153]

> **Article 23A**
> **Branches and subsidiaries in other countries**
>
> (1) Banks [and financial institutions] shall ensure that their written internal procedures and controls for the prevention and detection of money laundering and the financing of terrorism are communicated to their branches and subsidiaries in other countries, in particular where such countries do not or insufficiently apply equivalent obligations.
>
> (2) Banks [and financial institutions] shall ensure that their branches and subsidiaries in foreign countries apply measures for the prevention and detection of money laundering and the financing of terrorism that, as a minimum, are consistent with their internal procedures and where these differ, their branches and subsidiaries should apply the higher standard.
>
> (3) Where the laws, regulations or other measures in the foreign country do not permit the application of equivalent measures for the prevention of money laundering and the financing of terrorism then banks [and financial institutions] shall inform the FIU and the

153. Notwithstanding the legal uncertainties as explained in this analysis whether the Law on Banks provides for other financial institutions (MFIs and NBFIs) to acquire a branch or subsidiary overseas, the proposed Article 23A assumes that this is allowed. Otherwise the proposed paragraph should refer to banks only.

CBK accordingly and shall take additional measures to address the higher risk of money laundering or the financing of terrorism.

(4) Where banks [and financial institutions] are further unable to take additional measures in accordance with paragraph (3) of this Article, they shall further inform the FIU and the CBK who shall take measures to rectify the situation including requiring the bank or financial institution to close its branch or subsidiary in accordance with applicable laws.

1626. It is further recommended to amend paragraph (2) of Article 23 to also make reference to the FT: *written internal procedures and controls for the prevention and detection of money laundering* and the financing of terrorism.

### 3.15.3. Rating for Recommendation 15 and Recommendation 22

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.15** | **PC** | • absence of adequate criteria for the appointment of the compliance officer;<br>• absence of adequately defined roles and responsibilities of the compliance officer;<br>• absence of appropriate legal provisions for the powers of the compliance officer for timely access to information;<br>• function of internal audit limited to testing the reporting and identification system under the AML/CFT Law;<br>• lack of statistics on training;<br>• legal inconsistency in screening obligations for new recruits; and<br>• effectiveness issues arising out of inconsistencies in the AML/CFT Law; inadequate guidance and lack of statistics on training. |
| **R.22** | **NC** | • legal ambiguity on reference to 'other than a foreign bank' in Article 11 of the Law on Banks; and<br>• no legal or regulatory provisions on the application of AML/CFT measures for branches and subsidiaries outside Kosovo. |

## 3.16. Shell Banks (R.18)

### 3.16.1. Description and Analysis

1627. Recommendation 18 imposes three main obligations related to shell banks:

- Countries should not approve the establishment of shell banks or the continued operations of shell banks;
- Financial institutions should not establish or continue correspondent banking relationships with shell banks; and
- Financial institutions should not establish any business relationships with respondent foreign institutions that allow their accounts to be used by shell banks.

1628. In its Glossary to the Methodology the FATF defines a 'shell bank' as *a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial services group that is subject to effective consolidated supervision.* It further defines 'physical presence' as constituting meaningful mind and management located within the country and therefore the existence simply of a local agent or low level staff does not constitute physical presence.

1629. The AML/CFT Law defines a 'shell bank' as *a bank, or an institution engaged in equivalent activities, established in a country where it has no physical presence, which makes possible to*

*exercise an actual direction and management without being affiliated with any regulated financial group.*

1630. The definition of 'shell bank' in the AML/CFT Law closely reflects the definition in the FATF Methodology. Hence the following paragraphs assessing compliance of the relevant provisions of the AML/CFT Law with the Essential Criteria for Recommendation 18 have a similar basis for the term 'shell bank'.

1631. Established practices have shown that in assessing compliance with Recommendation 18 it is important to analyse the licensing provisions for banks and financial institutions in the relevant banking laws and regulations on licensing that may have been issued by the relevant supervisory and regulatory authorities.

***Prohibition on establishment or continued operations of shell banks – Essential Criterion 18.1***

1632. EC 18.1 requires countries to have in place licensing procedures for the establishment of banks and that also require such licensed banks to operate in the country that has issued the licence.

1633. Since the AML/CFT Law is not the law that provides for the licensing requirements of banks or financial institutions, the Law is silent on this matter.

1634. According to Article 4 of the Law on Banks the CBK has sole responsibility for issuing licences to banks and financial institutions. The CBK is further charged by the Law on Banks to maintain a central register of all banks and financial institutions that have been licensed by it which, among others, shall include the name and the head office and branch office addresses.

1635. Indeed paragraph (1) of Article 5 of the Law on Banks further imposes that no person shall engage in the business of banking or conduct any financial activity without an effective licence issued by the CBK in accordance with the provisions of the Law on Banks.

1636. Moreover, paragraph (4) of Article 5 of the Law on Banks further requires that foreign banks shall be permitted to engage in the business of banking in Kosovo only if the foreign bank has obtained a licence issued by the CBK to conduct such activity through a branch office in Kosovo or has established a subsidiary bank in Kosovo for which a licence has been issued by the CBK in accordance with the provisions of the Law on Banks.

1637. Part II of the Law on Banks provides for the procedures to be followed for the licensing of banks. Among the prudential, operational, governance and administrative requirements, the Law on Banks requires that the organisational structure of the proposed bank and its affiliates will permit the CBK to effectively exercise supervision on a consolidated basis, and that the ownership structure of the bank will not hinder effective supervision (Article 8). Moreover, a licence may be issued subject to various conditions such as information on the hiring and training of the staff of the bank and information on the lease, purchase or occupancy of bank premises from which the business will be undertaken.

1638. Part IV of the Law on Banks further provides for the governance and ownership of banks, including the procedures for the general meetings of shareholders, the structure and procedures for the Board of Directors and the structure of senior management.

1639. According to Article 92 of the Law on Banks, the licensing provisions for banks under Part II of the Law likewise apply to the licensing and registration of MFIs and other NBFIs as defined in the Law.

1640. Part XVII of the Law on Banks provides for the organisation, management and administration of MFIs and NBFIs. In this regard the Law provides for the governance of these institutions including the structure and operations of the Board of Directors, the internal committees and senior management structure.

1641. Within its licensing remit the CBK has issued various rules and regulations governing the licensing procedures of banks, MFIs and NBFIs including insurance companies and intermediaries.

1642. The legal provisions, supplemented by rules and regulations of the CBK for the licensing framework for banks, MFIs and other NBFIs is robust and clearly prohibits the establishment of shell banks since the licensing regime requires that the mind and management of the bank or financial institution is located in Kosovo with operational premises and required staff levels.

1643. The Law on Banks does not address the issue of the prohibition of continued operation of shell banks. But this is understandable since, as indicated above, in the first instance the licensing legal regime does not allow for the licensing of shell banks.

1644. It appears therefore, that the requirements under EC 18.1 are fulfilled through the licensing regime under the Law on Banks and the rules and regulations of the CBK.

***Correspondent banking relationships with shell banks – Essential Criterion 18.2***

1645. EC 18.2 requires that financial institutions are not permitted to enter into or continue correspondent banking business relationships with shell banks.

1646. The Glossary to the FATF Methodology defines 'correspondent banking' as *the provision of banking services by one bank (the "correspondent bank") to another bank (the "respondent bank"). Large international banks typically act as correspondents for thousands of other banks around the world. Respondent banks may be provided with a wide range of services, including cash management (e.g. interest bearing accounts in a variety of currencies), international wire transfers of funds, cheque clearing, payable through accounts and foreign exchange services.*

1647. The AML/CFT Law does not provide a definition of correspondent banking.

1648. Paragraph (6) of Article 21 of the AML/CFT Law requires that financial intermediaries do not open or maintain correspondent accounts with a shell bank or a bank which is known *to allow the use of shell accounts*.

1649. Without prejudice to the concerns expressed in this Report regarding Advisory Letter 2007/1 of the CBK, in reflecting the provisions of the AML/CFT Law the Advisory Letter requires that a bank should not establish or continue a correspondent banking relationship with a non-resident respondent bank incorporated in a jurisdiction in which the bank has no presence and which is unaffiliated with a regulated financial group (i.e. a shell bank). The assessment team is informed that these provisions will still feature in the proposed CBK Regulation.

1650. On the other hand, Rule X of the CBK is silent on this issue.

1651. The terminology 'financial intermediaries' in paragraph (6) of Article 21 of the AML/CFT Law is not defined in the Law but for the purposes of this analysis it is interpreted to be referring to 'banks and financial institutions' in accordance with the general use of this term in the Law.

1652. The words *to allow the use of shell accounts* in paragraph (6) of Article 21 is not understood. The proper terminology used in the international standards is *to allow its accounts to be used by shell banks.*

1653. Notwithstanding, the provisions of paragraph (6) of Article 21 of the AML/CFT Law addresses only one side of the correspondent banking relationship and that is the prohibition for banks to open or maintain correspondent accounts with a shell bank. Article 21 does not address the issue where a bank in Kosovo provides correspondent banking relationships to a respondent bank from another country. Indeed whereas the EC speaks of correspondent banking relationships with shell banks, paragraph (6) of Article 21 addresses the opening and maintenance of accounts with a shell bank.

1654. The Advisory Letter on the other hand appears to addresses the issue from the view of correspondent banking relationships with 'respondent' institutions and that is where the bank in Kosovo is providing banking services as opposed to receiving such services as is indicated in paragraph (6) of Article 21 of the AML/CFT Law – see the analysis for FATF Recommendation 7.

1655. In the light of the definition of 'correspondent banking' provided by the Glossary to the FATF Methodology as reproduced above, banks should be prohibited from acting both as a 'respondent' and as a 'correspondent' institution with or for shell banks.

1656. It follows therefore that, in the absence of a definition of 'correspondent banking' which would incorporate also when the bank in Kosovo provides banking services to a foreign 'respondent' institution, the provisions of the Advisory Letter are going beyond what the AML/CFT Law intended, even though they provide for a better transposition of the requirements under EC 18.2.

1657. In the circumstances it is advisable to review the provisions of paragraph (6) of Article 21 of the AML/CFT Law to read as follows:

> *Article 21 (paragraph* (6)): Banks and financial institutions shall not enter into or continue correspondent banking relationships with a shell bank or a bank that allows its accounts to be used by shell banks.

1658. For the sake of legal clarity it is further recommended that the term 'correspondent banking relationships' is defined in the AML/CFT Law on the basis of the definition of the FATF Glossary, for the purposes of compliance with both FATF Recommendation 18 and FATF Recommendation 7:

> *Correspondent banking relationships* – the provision of banking services by one bank (the correspondent bank) to another bank (the respondent bank). Banks in Kosovo will be acting as 'respondent banks' when they establish relationships for the receipt of banking services by another bank (the correspondent bank) or as 'correspondent banks' when they establish relationships for the provision of banking services to another bank (the respondent bank).

***Accounts used by shell banks – Essential Criterion 18.3***

1659. EC 18.3 requires that financial institutions be obliged to satisfy themselves that respondent financial institutions in foreign countries to which they provide banking services do not allow their accounts to be used by shell banks.

1660. In providing for correspondent banking relationships with banks from foreign countries, paragraph (4) of Article 21 establishes enhanced measures for such relationships but it does not provide for banks and financial institutions to confirm that the respondent institution does not allow its accounts to be used by shell banks.[154]

1661. As detailed within the context of the above analysis of EC 18.2 in this Report, AML/CFT Law together with the provisions of Advisory Letter 2007/1 aim to cover the requirements of the EC 18.3 by prohibiting banks and financial institutions from opening or maintaining such relationships.

1662. It is paragraph (6) of Recommendation 21 that to an extent tries to address this issue. However, in the absence of a definition of the term "correspondent banking relationships" paragraph (6) is interpreted to be referring to "correspondent banks" where banks in Kosovo receive banking services (see the words "open or maintain correspondent accounts with a shell bank" and not "for a shell bank") rather than to "respondent banks" where the bank in Kosovo is providing banking services. There is therefore no specific requirement for banks and financial institutions to satisfy themselves that respondent banks in a foreign jurisdiction do not permit their accounts to be used by shell banks.

1663. The proposed amendment under the analysis of EC 18.2 above prohibiting the establishment or the maintenance of correspondent banking relationships with shell banks or banks that allow their accounts to be used by shell banks shall contribute for better harmonisation with the FATF Standards.

1664. Within this context, therefore, the proposed amendment to paragraph (6) of Article 21 under EC 18.2 would provide legal clarity.

***Effectiveness***

1665. The lack of legal clarity between correspondent and respondent institutions complemented by the lack of the definition of 'correspondent banking relationships' could contribute negatively to

154. Paragraph (4) of Article 21 of the AML/CFT Law attempts to transpose the obligations under FATF Recommendation 7. References to paragraph (4) are not meant to assess whether or not it meets the requirements of Recommendation 7 but only as a reference within the context of Recommendation 18.

the effectiveness of the system as the industry could provide for different interpretations of the obligations under the AML/CFT Law.

### 3.16.2. Recommendations and Comments

1666. The provisions of the Law on Banks covering licensing requirements and procedures for banks and financial institutions are comprehensive and ensure that any bank or financial institution so licensed has its mind and management in Kosovo and operates in and out of Kosovo from business premises located in Kosovo. Hence EC 18.1 is adequately covered.

1667. The analysis of the legal and other provisions covering other requirements under Essential Criteria 18.2 and 18.3 for Recommendation 18 identifies weakness and gaps that need to be addressed.

1668. Although a full reading of the Description and Analysis for the specific criteria is advisable, the following are indications of the main weaknesses or gaps identified:

- there is lack of legal clarity in distinguishing between 'correspondent' and 'respondent' banks (EC 18.2);
- there is no definition of correspondent banking relationship incorporating both 'correspondent' and 'respondent' institutions (EC 18.2);
- there is no obligation for banks to ensure that 'respondent' institutions do not allow their accounts to be used by shell banks (EC18.3).

1669. In this regard the Report makes recommendations for legal amendments for better harmonisation of the AML/CFT Law with the EC for Recommendation 18:

- redraft paragraph (6) of Article 21 to remove legal uncertainties;
- insert a definition of 'correspondent banking relationship' incorporating both 'correspondent' and 'respondent' institutions in accordance with the definition in the FATF Glossary to the Methodology;

### 3.16.3. Rating for Recommendation 18

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.18** | **PC** | • lack of legal clarity in distinguishing between 'correspondent' and 'respondent' banks;<br>• no definition of correspondent banking relationship;<br>• no obligation for banks to ensure that 'respondent' institutions do not allow their accounts to be used by shell banks; and<br>• effectiveness concerns due to lack of legal clarity. |

## 3.17. Ongoing Supervision and Monitoring and Market Entry (R.23)

### 3.17.1. Description and Analysis

1670. Recommendation 23 requires that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. It further requires that the relevant competent authorities implement measures to prevent criminals from owning, being the beneficial owner or holding senior management positions in financial institutions.

1671. The provisions of the Law on the CBK, the Law on Banks, UNMIK Regulation No. 2001/25 for the insurance sector, and the Law on Pension Funds all provide for the powers for prudential regulation and supervision of the relevant competent authorities (CBK and its forerunner the Banking and Payments Authority of Kosovo (BPK)) in accordance with the respective laws. Indeed Article 8 of the Law on the CBK states in paragraph (1) that the tasks of the CBK in pursuit of the objectives set forth in Article 7 and in other provisions of the Law on the CBK shall include *to*

*regulate, license, register and supervise financial institutions as further specified in this Law or any other Law*. Moreover Article 23 of the Law on the CBK further states that the CBK shall be exclusively responsible for the regulation, licensing, registration and supervision of banks and other financial institutions as further specified in the relevant Laws.

1672. The AML/CFT Law does not directly give regulatory or supervisory powers to the CBK to supervise the financial sector for the purposes of the prevention of ML and the FT. Instead the Law designates the FIU as the supervisory authority. In Article 36A however the AML/CFT Law recognises that the CBK and other sectorial supervisors in accordance with their competencies stipulated herein and in other relevant laws, remain responsible to supervise the implementation of the provisions of the AML/CFT Law by the entities under their supervision if the FIU delegates the right for a supervisory remit based on written agreement.

1673. To this effect in June 2013 the FIU and the CBK entered into an agreement in the form of a MoU for the purposes of Article 36A of the AML/CFT Law. In brief the MoU provides for the efficient and effective ways of exchange of information between the two authorities and the delegation of a supervisory mandate from the FIU to the CBK for banks and financial institutions (entire financial sector) for the purposes of the AML/CFT Law.

1674. Paragraph (2) of Article 83 of the Law on Banks requires banks and financial institutions to comply with the AML/CFT obligations while obliging the CBK and the FIU to cooperate in accordance with the laws in force.

1675. Similar provisions for MFIs and NBFIs are found in paragraph (2) of Article 113 of the Law on Banks with paragraph (3) of the same Article requiring these institutions to comply with all laws, regulations, rules, instructions, procedures and orders relating to the prevention of ML and TF.

1676. On the basis of these provisions, and therefore prior to the 2013 amendments to the AML/CFT Law, the CBK had assumed supervisory power for the entire financial sector for the purposes of the AML/CFT Law which at the time did not designate any authority for this purpose.

1677. Indeed, prior to these recent amendments to the AML/CFT Law and the signing of the MoU an assessment of the compliance of the CBK as the supervisory authority with the Basel Core Banking Principles[155] undertaken by the International Monetary Fund had identified the lack of a supervisory mandate for the CBK for the purposes of the AML/CFT Law and had consequently assessed Basel Core Principle 18 on the abuse of financial services for criminal activities as 'non-compliant'.

1678. At the time the report on the assessment of Kosovo's compliance with the Basel Core Banking Principles had expressed concern on the legal basis of the supervisory powers of the CBK for the purposes of the AML/CFT Law and hence on the soundness of the AML/CFT compliance regime. The assessment stated that *Reportedly, the previous law (still an UNMIK Regulation) granted authority to the Financial Information Center (i.e. the predecessor of the FIU) to conduct on-site compliance inspections of banks in coordination with the predecessor of the CBK, the Central Banking Authority of Kosovo*. It appears that the assessment is referring to UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related Criminal Offences which has been repealed with the coming into force of the AML/CFT Law and hence its provisions are no longer valid.

1679. Notwithstanding this situation in this Report the assessment team positively acknowledges the work that had been done by the CBK in monitoring banks and financial institutions on their compliance with the obligations under the AML/CFT Laws and regulations issued by the CBK itself even if the CBK had no direct legal mandate.

1680. Following the signing of the MoU between the FIU and the CBK delegating a supervisory remit to the latter for the entire financial sector, in October 2013 the CBK established an independent division, reporting directly to the Deputy Governor, with responsibilities for

155. The *Core Principles for Effective Banking Supervision* were first issued by the Basel Committee on Banking Supervision in September 1997 and complemented by the assessment Methodology in 1999. The Core Principles have been revised in 2006 with a Consultative Document for a further revision having been issued in 2011. The objective of the Core Principles is to assess a country's standard of banking supervision. Principle 18 deals with the prevention of the abuse of the financial system being used for ML and FT activities.

supervising the entire financial sector for the purposes of the AML/CFT Law. Prior to the MoU the CBK undertook supervisory responsibilities for the purposes of the AML/CFT Law as part of its prudential supervisory structure. Therefore, since the setting up of the independent division is rather recent, this analysis will take into consideration previous work in this regard by the CBK, notwithstanding that an adequate supervisory remit legal basis was absent at the time.[156]

1681. However, notwithstanding the change in the circumstances through which the CBK now has delegated legal supervisory remit over the entire financial sector for the purposes of the AML/CFT Law, for the purposes of this assessment, while the paragraphs that follow will, where appropriate, analyse the prudential supervisory powers and procedures of the CBK, the Report cannot take such measures and powers as automatically applicable for the purposes of the AML/CFT Law. In such instances, the Report will indicate the views of the assessment team and will make recommendations for rectifying this situation.

1682. Moreover, it is important to mention that the NRA (page 25), in dealing with factors related to the effectiveness of the prevention and detection of ML, FT, economic crimes and financial crimes further concludes that "*Inefficient compliance supervision functions are increasing informal economy and financial crime."* It appears that the NRA is referring to supervision in general for the purposes of the AML/CFT Law and hence apparently it refers to both the CBK and the FIU. The NRA considers this inefficiency as a high risk that should be addressed immediately. The assessment team understands that both the CBK and the FIU are currently addressing this issue.

***Financial Institutions subject to adequate AML/CFT regulation and supervision – Essential Criterion 23.1***

1683. EC 23.1 requires countries to ensure that financial institutions are subject to adequate regulation and supervision and that they are effectively implementing the FATF Recommendations.

1684. The AML/CFT Law empowers the FIU to supervise all reporting subjects under the Law, including the financial sector. However, as already explained above, the Law provides for the FIU to delegate sectorial parts of its supervisory responsibilities to other specific supervisory authorities. Within this context the FIU has delegated the supervisory responsibilities for the financial sector to the CBK.

1685. The Law on the CBK, the Law on Banks and the Law on Pensions all provide for the prudential supervisory responsibilities of the CBK for banks, financial institutions and pension funds.

1686. In practice the CBK has been supervising the financial sector on compliance with the provisions of the AML/CFT Law and has issued regulations for this purpose even before the 2013 amendments to the AML/CFT Law and the signing of the MoU between the FIU and the CBK.

***Supervision of financial institutions on compliance with AML/CFT obligations – Essential Criterion 23.2***

1687. In the light of the recent amendments to the AML/CFT Law, and without prejudice to the lack of legal empowerment for the CBK to supervise banks and financial institutions for the purposes of the AML/CFT Law prior to these amendments, the following paragraphs shall describe and analyse the prudential supervisory remit of the CBK in accordance with the Law on the CBK, the Law on Banks and the Law on Pension Funds.

1688. In establishing the tasks of the CBK in pursuit of the Bank's objectives as determined under Article 7 of the Law on the CBK, it is established that these shall include the responsibility of the CBK to regulate, license, register and supervise financial institutions. Article 23 of the Law gives exclusive responsibility to the CBK in this regard, including the imposition of administrative penalties as provided for under the same Law.

1689. Paragraph (1) of Article 65 of the Law on the CBK further empowers the CBK to issue such prudential mandatory regulations, instructions, and orders as may be necessary for carrying out the tasks entrusted to the CBK under this Law or any other Law.

156. For a detailed analysis of the structure of the new Divisions and its action plan and strategy, please refer below for the analysis of Recommendation 30 on resources.

1690. Various provisions in the Law on Banks empower the CBK to issue prudential mandatory regulations for banks and financial institutions dealing with prudential matters such as capital requirements; liquidity requirements; exposure limits; dividend payouts; related persons; asset classification; foreign currency exposure; external auditors; etc.

1691. According to Article 57 of the Law on Banks each bank and each of its affiliates shall be subject to prudential compliance examinations by the CBK through examiners appointed by the CBK. The examiners may visit banks at such reasonable times as CBK deems appropriate and may take such action as deemed necessary and advisable.

1692. Similar provisions for the supervision of MFIs and NBFIs are provided under Article 104 of the Law on Banks.

1693. The CBK has explained that, prior to the recent arrangements for its supervisory remit for the purposes of the AML/CFT Law, in undertaking its prudential supervisory functions the Bank applied a risk based approach which enabled the timely identification of risks and thus more effective distribution of supervisory resources. As a result, prudential supervision strategies are adapted to the risk profile of financial institutions by determining the frequency and continuous focus to on-site examinations.

1694. The CBK has informed that it intends to continue to conduct its supervisory remit for the purposes of the AML/CFT Law through off-site examinations and on-site visits. According to the table below provided by the CBK in its replies to the Cycle 1 Questionnaire on-site inspections prior to the 2013 supervisory arrangements seem to have reduced and have focussed more on Foreign Exchange Bureaux while it appears that, with the exception of 2013, there have been no off-site examinations unless this is a continuous process through reporting done by banks and financial institutions. The CBK has further confirmed that the examinations in the table below are not AML/CFT focussed ones but are of a prudential nature with an AML/CFT component.

***Table 19: Inspections carried out by the CBK including the AML/CFT area***

| Year | Banks (Full scope) | | Banks (Partial) | | NBFIs & MFIs | | Saving & Loan | | Exchange Bureaux | | Postal Services | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site |
| **2008** | 6 | | | | | | | | | | | |
| **2009** | 7 | | | | | | | | 3 | | | |
| **2010** | 5 | | | | 5 | | | | 2 | | | |
| **2011** | 4 | | 1 | | 2 | | | | 30 | | | |
| **2012** | 3 | | | | 1 | | | | | | | |
| **2013[1]** | 2 | | | 1 | 1 | | | | | | | |

[1] *Prior to October 2013*

1695. Since the new supervisory arrangements came in place and since the setting up of the independent supervision division for the purposes of monitoring the compliance with the AML/CFT Law in October 2013 the CBK has undertaken the following AML/CFT focussed examinations:

***Table 20: Inspections carried out by the CBK since October 2013***

| Year | Banks (Full scope) | | Banks (Partial) | | NBFIs & MFIs | | Saving & Loan | | Exchange bureaux | | Postal services | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site |
| **2013** | | | | 2 | 1 | | | | | | | |
| **2014[1]** | 1 | | | 1 | 1 | | | | 1 | | | |

[1] *number of inspections from October 2013 until March 2014*

1696. The provisions in the Law on the CBK, the Law on Banks and the Law on Pension Funds empowering the CBK to issue rules and regulations refer to the *prudential* regulation and supervision of the financial sector.

1697. There are no provisions in any law, including the AML/CFT Law empowering the CBK to issue rules or regulations for the purposes of the prevention of ML and the FT. It appears that such power was provided for through UNMIK Regulations which have now been repealed with the coming into force of the relevant laws such as the AML/CFT Law.

1698. The assessment team has queried whether the MoU between the FIU and the CBK delegating supervisory powers to the CBK also covers a delegation for the CBK to issue regulations as this is not even contemplated by the AML/CFT Law. Indeed, the AML/CFT Law only empowers the FIU to issue such regulations.

1699. The CBK informed that as amended the AML/CFT Law does not give the power to the CBK to issue regulations and there seems to be a legal ambiguity for the CBK to issue such regulations. Consequently, and as a temporary measure, the MoU has recently been amended to the extent that the FIU empowers the CBK, in liaison with the FIU and on behalf of the FIU, to issue regulations to the financial sector for the purposes of implementing the AML/CFT Law. The intention is later to amend the AML/CFT Law directly for legal clarity in providing direct or delegated powers for the CBK to issue regulations.

1700. Moreover, as already explained in Section 3.1 of this Report, the risk based approach applied by the CBK for supervisory purposes, the CAMEL approach, only takes into consideration prudential issues (Capital, Assets, Management, Earnings and Liquidity).

1701. During the on-site visit the assessment team was informed that the new Division for the Prevention of Money Laundering intends to develop a risk-based methodology for the way it intends to implement its supervision strategy. At this stage, being a new Division with direct responsibilities for the prevention of ML and the FT the focus is for the Division to familiarise itself with the financial structure and its supervisory remit procedures.[157]

1702. The assessment team has been informed about and provided with a copy of the 'Strategy of the Division for the Prevention of Money Laundering 2013 – 2016' and of the 'Action Plan of the Division for the Prevention of Money Laundering 2013 – 2016' both of which address the development of the new Division to achieve its goals.[158]

1703. According to the CBK, depending on the objective of the visit and the size of the institution, an on-site visit usually lasts about 2 weeks with a team of 2 – 3 people. Then there is also the time needed to draft the report, discuss it and forward it to the examined institution. The current annual plan for 2014 covers about 15 institutions and also covers follow up visits and reports.

1704. The CBK intends to visit each bank at least two times a year, one visit for examination purposes and one for a follow up. According to the CBK banks could be covered by present resources. But for other financial institutions visits will probably be once a year. The current annual plan for 2014 covers about 15 institutions and also covers follow up visits and the drawing up and submission of reports.

1705. Considering the resources and the number of banks and financial institutions, including the time taken of two weeks for an on-site examination, the assessment team has reservations as to what extent such a plan is feasible and achievable unless done at the cost of the quality of the supervision. The CBK, in acknowledging the lack of supervisory experience since the Division has been active only since October 2013, believes it can achieve this plan – the more so since there has been an increase in human resources within the Division.

1706. Notwithstanding this Report positively acknowledges the supervisory work done by the CBK prior to the amendments to the AML/CFT Law and the signing of the MoU with the FIU in ensuring compliance with the AML/CFT Law and regulations for the financial sector.

157. The CBK eventually claimed that it has introduced an AML/CFT Supervisory Manual which addresses the supervisory risk based approach.

158. For an analysis of these two documents, please refer to the analysis of Recommendation 30 in this Section.

1707. While acknowledging these developments within the CBK, the assessment team urges the CBK to ensure that the new Division on the Prevention of Money Laundering be given all the necessary tools, both legal (for example the issue of rules and regulations) and operational (for example human and technological resources, including training), to build up the necessary experience and expertise to meet the strong challenges ahead to properly, adequately and effectively supervise the financial sector on the prevention of ML and the FT.

***Prevention of criminals owning or managing financial institutions – Essential Criterion 23.3***[159]

1708. EC 23.3 requires that countries have in place legal provisions or regulatory measures through which supervisory or other competent authorities can prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a senior management function, including supervisory and executive boards, of a financial institution.

1709. According to Article 37 of the Law on Banks the CBK has absolute powers in determining the shareholders of a bank. The Law prohibits any person, acting directly or indirectly, alone or in concert with another person, from becoming a principal shareholder in a bank without obtaining prior written authorisation from the CBK.

1710. Moreover, the Law on Banks further requires that the prior authorisation is obtained from the CBK where a principal shareholder, acting directly or indirectly, alone or in concert with another person, intends to increase ownership interest in a bank above 10, 20, 33, 50 or 75% of the total equity.

1711. Article 37 of the Law on Banks further requires that banks notify the CBK of any acquisition of shares within five (5) days after the acquisition if the amount of shares acquired equals or exceeds five percent (5%) of the equity but does not exceed ten percent (10%) in accordance with such form and containing such information as the CBK may require.

1712. Paragraph (3) of Article 37 establishes the information that shall accompany applications for increases in shareholding in accordance with Article 37. One of the requirements for each individual natural person is *an official statement from the Court disclosing any convictions for offences by a criminal court, personal bankruptcy filings, disqualifications from practicing a profession, or past or present involvement in a managerial function of a body corporate or other undertaking subject to insolvency proceedings, if any.*

1713. According to Article 38 of the Law on Banks the CBK shall determine whether to approve such application on the basis of the licensing criteria but shall consider the suitability of the proposed shareholders and their standing in the financial markets.

1714. The Law on Banks defines a 'principal shareholder' as any person who owns, directly or indirectly, alone or in concert with another person, ten percent (10%) or more of any class of voting shares of a bank or company or ten percent (10%) of the equity interest in a bank or company.

1715. There are no direct similar provisions on the acquisition of shareholding in MFIs and NBFIs. However Article 95 of the Law on Banks provides that certain transactions require the prior approval of the CBK. These include situations for the sale or transfer of the institution's business to a different entity; any merger or acquisition of the MFI or the NBFI; and situations where the MFI or NBFI is a legal entity and there are transactions changing the list of the shareholders owning ten percent (10%) and more of the share capital and/or of the voting rights of the company.

1716. Article 38 of UNMIK Regulation 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries requires the approval of the CBK for any changes in shareholding of the insurance company or insurance intermediary where a person intends to acquire a significant holding or where a person intends to change the size of a significant holding. Mergers and amalgamations likewise require the prior authorisation of the CBK.[160]

159. Refer also to the analysis on 'fit and proper criteria' for senior management in the Report.

160. A new law for the insurance sector is in progress. In the meantime UNMIK Regulation 2001/25 remains valid and applicable.

1717. Moreover, in terms of Article 39 of the UNMIK Regulation changes in the board of directors or officers of insurance companies or insurance intermediaries shall be reported to and explained to the BPK – forerunner of the CBK.

1718. Acquisition of shareholding in a bank appears to be adequately covered through the provisions of Article 37 of the Law on Banks. However, there is no obligation to inform the CBK when divesting of shareholding through the same stages as applied by Article 37.

1719. Also there is no reference in the Law on Banks to obligations in the acquisition of voting rights that would indirectly increase the shareholding unless the term 'directly or indirectly' is intended to be interpreted accordingly.

1720. The requirement for a statement from the Courts under paragraph (3.3) of Article 37 of the Law on Banks is a positive element in measuring compliance with the requirements for EC 23.3 for Recommendation 23.

1721. Moreover, the criteria to be applied by the CBK in determining an application for changes in shareholding, in particular in acquisitions, does not take account of ML or FT implications.

1722. The EU Directive on Mergers and Acquisitions[161] establishes five (5) criteria upon which a supervisory authority is to determine whether an acquisition of shareholding in a bank can be approved. The fifth (5th) criterion requires : *whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC (*) is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.*

1723. It is therefore recommended that a new paragraph (6) is added to Article 37 of the Law on Banks as follows:

> *Article 37 (paragraph (6)):* A person who, directly or indirectly, alone or in concert with another person, decides to:
>
> (i) dispose of a principal shareholding in a bank;
>
> (ii) reduce a principal shareholding so as to cause it to cease to be a principal shareholding;
>
> (iii) reduce the shareholding so that the proportion of shareholding would fall below 20, 33, 50 or 75% of the equity
>
> shall notify the CBK indicating the size of the shareholding and providing any relevant information on the proposed disposal or reduction in holding.

1724. It is further recommended that the paragraph under Article 38 of the Law on Banks be renumbered as paragraph (1) and a new paragraph (2) be added as follows reflecting the criterion under the EU Directive on Mergers and Acquisitions:

> *Article 38 (paragraph (2)):* The CBK shall further assess whether, in connection with the proposed acquisition, money laundering or the financing of terrorism within the meaning of the Law on the Prevention of Money Laundering and the Financing of Terrorism is being or has been committed or attempted, or that as a result of the proposed acquisition there could be an increased risk of money laundering or the financing of terrorism.

1725. Consequent to the above recommendation, it is also recommended to amend paragraph (3) of Article 39 on mergers, consolidations and acquisitions of the Law on Banks as follows (amendments in italics):

> *Article 39 (paragraph (3)):* For the purposes of making a determination on an application filed under this Article, the criteria for preliminary approval of an application for a banking licence, as set forth in Article 7 *and the criteria for acquisition of shareholding as set forth in Article 38* of this Chapter shall apply *mutatis mutandis*.

161. Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector – *OJ L247, 5 September 2007, pp 1-16.*

1726. The CBK may wish to consider including the above recommendations also for MFIs and NBFIs where these are in the form of a legal entity.

***'Fit and Proper' criteria for directors and senior management – Essential Criterion 23.3.1***

1727. EC 23.3.1 requires that directors and senior management of financial institutions subject to the Basel Core Principles are evaluated on the basis of 'fit and proper' criteria including those relating to expertise and integrity.

1728. Article 26 of the Law on Banks requires that each bank is administered by a Board of Directors elected by the bank's shareholders at a general meeting.

1729. Paragraph (5) of Article 26 establishes criteria where a person cannot become a Chairman of a Board of Directors or a member:

- person convicted of crime or found to be liable for an economic offence within the Penal Code;
- person who, pursuant to the court decision was denied ability to conduct activities within competence of Board of Directors; and
- person older than seventy (70) years of age on the day of appointment.

1730. Article 28 of the Law on Banks on the other hand establishes the competences of the Board of Directors which includes the appointment of senior management.

1731. According to Article 30 of the Law on Banks the senior management (Chief Executive Officer and his Deputy) shall be appointed by the Board of Directors with the approval of the CBK. Moreover, according to Article 34 no person shall become a Director or Senior Manager of a bank without obtaining the prior approval of the CBK.

1732. Similar provisions for the appointment of individuals as members of the Board of Directors and the appointment of senior management and senior managers for MFIs and NBFIs where appropriate are provided for under Article 97 of the Law on Banks.

1733. Although in accordance with the Law on Pension Funds the CBK is assigned the responsibility of licensing, regulating and supervising pension funds, the Law does not appear to give the power to the CBK to approve the appointment of the Board directors or the appointment of senior management and senior managers. However, the appointment of the Governing Board of the Kosovo Pensions Savings Trust is governed by Article 4 of the Law on Pensions. According to the Law, persons who are appointed to be Governing Board members must be persons of recognised integrity and must have professional expertise and experience in pension, financial, investment and insurance matters. One (1) of the eight (8) members is appointed by the Government as a non-voting member while a Selection Committee chaired by the Governor of the CBK and including the Auditor General and the Minister of Finance makes proposals to the Assembly for the appointment of the other members.

1734. In terms of Article 52 of UNMIK Regulation 2001/25 the directors and officers of an insurance company or insurance intermediary, and the representative officers of a branch, must be "fit and proper" persons to exercise their role. They shall not allow their relationships with an insurance company's or insurance intermediary's shareholders, other directors, other officers or employees to affect their fiduciary duty to policyholders in any way.

1735. Article 35 of the Law on Banks requires that Board Directors and Senior Management be persons who are 'fit and proper' for such positions and meet criteria established by the CBK on qualifications, experience and integrity. In practice the CBK undertakes a thorough 'fit and proper' test on the expertise and integrity of individual persons nominated to be appointed as directors of the Boards of banks and financial institutions, senior management and senior managers. The CBK has informed that to this effect it has drawn up a Regulation treating the 'fit and proper' criteria to be applied and the procedures thereto. The Regulation has not been made available to the assessment team.

1736. Similar fit and proper test are undertaken for the insurance sector in terms of the UNMIK Regulation 2001/25.

1737. CBK has informed that its Regulation 24 on Corporate Governance of Insurance Companies and Insurance Intermediaries treats the issue of "fit and proper" criteria for directors, senior officers and other officers of the institutions. Moreover, the CBK has further informed that the Licensing Manual (internal) treats specific "fit and proper" criteria for persons who pursuant to the UNMIK Regulation and Regulation 24 are required to meet the "fit and proper" criteria.

1738. The analysis however identifies that the Law on Pension Funds provides for the appointment of the Governing Board of the Kosovo Pension Savings Trust, but appears to be silent on the appointment of senior management of a pension fund. The CBK has informed that the determination of the senior management remains the responsibility of the Governing Board of the Trust according to the Law on Pension Funds (04/L-101). The Board then informs the CBK regarding its decision.

***Application of prudential regulatory and supervisory measures – Essential Criterion 23.4***

1739. EC 23.4 provides for the application of prudential regulatory and supervisory measures which are also relevant to ML in a similar manner for anti-ML and TF for financial institutions that are subject to the Core Principles – banking, insurance, and securities.

1740. Prudential measures that would include references to the prevention of ML and the FT and which are normally applicable would include licensing procedures, governance of the appointment of Board Directors and senior management, internal controls and preventive procedures.

1741. The Law on Banks, the Law on Pension Funds and the UNMIK Regulation 2001/25 do not specifically refer to such application as there is no link between the relevant provisions in these laws or regulations and the AML/CFT Law.

1742. In practice, the CBK, notwithstanding the absence of a legal basis prior to the 2013 amendments to the AML/CFT Law and the signing of the relevant MoU with the FIU in accordance with Article 36A of the AML/CFT Law, supervised the financial sector on its compliance with the provisions of the AML/CFT Law and has issued, and intends to issue further, rules and regulations regulating the way banks and financial institutions should operate in compliance with their anti-ML and FT obligations.

1743. It should however be noted that, as indicated and analysed above, licensing rules and regulations and governance issues applied for prudential purposes by the CBK are also relevant for the purpose of the prevention of ML and the FT. Recommendations made above in this regard should ensure the link between prudential regulations and prevention of ML and the FT as appropriate in such provisions which can only be found in the specific financial legislation. It is for this purpose that, within the context of the AML/CFT Law, this Report is making recommendations referring, for example, to the criteria for shareholding acquisition.

1744. It is however recommended that any further revisions of the legal provisions on the supervisory responsibilities for the purposes of the AML/CFT Law be accompanied by powers to the relevant competent authorities to issue rules and regulations and to apply appropriate prudential supervisory powers accordingly – in this regard please refer to recommendations under Section 3.18 of this Report in the analysis of FATF Recommendation 29.

***Licensing or registration of money value transfer and currency exchange services – Essential Criterion 23.5***

1745. EC 23.5 requires that persons or entities providing a MVT service or currency exchange services to be subjected to a licensing or registration process by a nominated competent authority.

1746. According to Article 8 of the Law on the CBK establishing the Bank's tasks, paragraph (1.2) thereof establishes one of the tasks of the Bank as being to regulate, license, register and supervise financial institutions as further specified in this Law or any other Law. In terms of the Law on the CBK, a 'financial institution' is defined as: *entities such as banks, foreign exchange offices, insurance companies, pension funds, and other entities conducting financial activities, as defined in any Law relevant for the purposes of this Law, for which the Central Bank is given supervisory authority by Law.* The Law on the CBK however falls short from defining a 'financial activity'.

1747. Article 4 of the Law on Banks likewise provides that: *The CBK shall have sole responsibility for the issuance of licenses to all banks and registration of all Microfinance Institutions and NBFIs.*

1748. In turn the Law on Banks defines a 'financial institution' as incorporating all banks, NBFIs and MFIs regulated under the Law itself. The Law further defines a 'non-bank financial institution' as: *a legal entity that is not a bank and not a microfinance institution that is licensed by the CBK under this Law to be engaged in one or more of the following activities: to extend credit, enter into loans and leases contracts financial-leasing, underwrite, trade in or distribute securities; act as an investment company, or as an investment advisor; or provide other financial services such as foreign exchange and money changing; credit cards; factoring; or guarantees; or provide other financial advisory, training or transactional services as determined by CBK.*

1749. Complementary to the Law on the CBK in the definition of a 'financial institution', the Law on Banks provides a definition of a 'financial activity' under Article 44 which, although providing for payment transfer services and currency exchange services, is however limited to banks.

1750. The definition of services that may be provided by NBFIs under Article 94 of the Law on Banks includes *transfers and remittances of money, or payment services, on payments originating within or outside the country* but does not include currency exchange services.

1751. In its definition of a 'financial institution' the AML/CFT Law includes[162] the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system; and money and currency changing.

1752. UNMIK Regulation 1999/21 on the Bank Licensing, Supervision and Regulation, which has been repealed by the coming into force of the Law on Banks, defined a 'financial institution' as: *a juridical person that is not a bank that is licensed by the BPK to engage in one or more of the following activities: extending credit; underwriting, dealing in, brokering, or distributing securities; acting as investment company manager or investment advisor or providing other financial services such as equipment leasing finance services, micro-finance services or foreign exchange or other financial informational, advisory or transactional services.* The definition is very similar to that adopted by the Law on Banks which has repealed the UNMIK Regulation.

1753. Moreover Section 25 of the UNMIK Regulation 1999/21 defines a 'financial activity' in the same manner as now defined in the Law on Banks but likewise provides only for activities that can be undertaken by banks.

1754. Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions defines and states that a 'Foreign Exchange Office' is considered to be a 'financial institution' as defined in Section 2 of Regulation 1999/21, and means a legal or natural entity that is not a bank and engages in the buying and selling of foreign currencies. Likewise a 'Money Transfer Office' is considered to be a 'financial Institution' as defined in Section 2 of Regulation 1999/21, and means a legal or natural entity that is not a bank and performs electronic or wire transfer services through an international authorised electronic transfer system. Regulation 1999/21 is now repealed and any references to it become void and hence not applicable.

1755. As already established under Section 3 'Scope of coverage of the AML/CFT Law' there are major and serious divergences in the various definitions of what constitutes a financial institution in the different laws. The paragraphs that follow assess this situation only with regards to those entities providing a MVT service or a currency exchange service.

1756. The definition of a 'financial institution' under the Law on the CBK includes a direct reference to foreign exchange offices. Hence the provision of MVT services has to be identified through the definition of financial activities in other related laws.

1757. Likewise the definition of "non-bank financial institution" in the Law on Banks only makes direct reference to foreign exchange or money changing services and leaves MVT services to the definition of financial activity

162. For a full definition of the activities of a financial institution for the purposes of the AML/CFT Law, please refer to Section 3 of this Report on 'Scope of coverage of the AML/CFT Law'.

1758. The definition of financial activity under Article 44 of the Law on Banks refers only to the activities that can be undertaken by banks. But the activities of a NBFI as detailed in Article 94 of the Law on Banks includes references to MVT services (not included in the definition directly) but excludes foreign exchange services (included directly on the definition).

1759. It is Rule XVI of the CBK that tries to link both MVT services and foreign exchange services to the definition of a financial institution in UNMIK Regulation 1999/21 – which however has now been repealed by the Law on Banks and therefore any references in Rule XVI become irrelevant.

1760. It transpires therefore that the various definitions of financial institution which differ in substance create a legal uncertainty on the licensing or registration requirements or obligations for MVT services and currency exchange services.

1761. Thus foreign or currency exchange services would legally fall within the licensing or registration regime of the CBK because of the direct reference in the Law on the CBK and the Law on Banks although such activity is not included under Article 94 of the Law on Banks as an activity of a NBFI.

1762. On the other hand, MVT services are not included in the definition of a financial institution in the Law on the CBK and in the Law on Banks but are included as an activity under Article 94 of the Law on Banks for NBFIs.

1763. The reference in Rule XVI of the CBK to MVT services and currency exchange to the definition of financial institution in UNMIK Regulation 1999/21 become irrelevant as the UNMIK Regulation has been repealed by the Law on Banks and creates conflicts with the new definitions.

1764. It is consequently strongly recommended that the various definitions of a financial institution in the above mentioned laws are harmonised between themselves and in relation to the activities of NBFIs for legal certainty in the licensing powers of the CBK.

1765. It therefore appears that there may be legal uncertainty on the powers of the CBK to license or register MVT services through the Law on Banks or the Law on the CBK, even though in practice this was being done even prior to the Cycle 1 assessment.

1766. Notwithstanding, promulgated by Decree No. DL-016-2013, dated 24 April 2013, a new Law No. 04/L-155 of 4 April 2013 on Payment System was brought in force (Official Gazette 12/2013 of 3 May 2013). The scope of the Law is to provide for the CBK, in conformity with the Law on the CBK, to be the sole authority in charge of regulation and oversight of the Kosovo payment system, with the aim of ensuring its safety, soundness and efficiency. In order to regulate payment system the new Law provides for the conditions under which payment institutions providing payment services are authorised and operators of payment, clearing and securities settlement systems are licensed by the CBK; for the terms and standards under which such services may be provided and payment, clearing and securities settlement systems operated; and for the means and procedures under which the CBK shall exercise its oversight powers.

***Monitoring and supervision of money or value transfer services and money or currency changing services – Essential Criterion 23.6***

1767. EC 23.6 requires that natural or legal persons providing a MVT service or a money or currency exchange service be subject to effective systems for monitoring and ensuring compliance with domestic requirements to combat ML and TF.

1768. In its definition of a 'financial institution' the AML/CFT Law includes[163] the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system; and money and currency changing.

1769. According to Article 16 of the AML/CFT Law financial institutions as defined in the Law are considered as reporting subjects and hence required to comply with all the applicable obligations for the prevention of ML and the FT in terms of the Law.

163. For a full definition of the activities of a financial institution for the purposes of the AML/CFT Law, please refer to Section 3 of this Report on 'Scope of coverage of the AML/CFT Law'.

1770. Indeed Article 19 of the AML/CFT Law provides for specific obligations for banks and financial institutions providing wire transfer services and establishes procedures to be followed for the prevention of ML and the FT in effecting wire transfer.[164]

1771. As already established in this Report the AML/CFT Law appoints the FIU as the supervisory authority for all reporting subjects with Article 36A empowering the CBK to assume responsibility for the supervision of the entire financial sector only under a written delegation from the FIU, and which delegation has been given in accordance with the 2013 MoU between the FIU and the CBK.

1772. Notwithstanding the absence of a legal supervisory mandate prior to the 2013 amendments to the AML/CFT Law, the CBK has informed that a number of on-site examinations had been undertaken. Two on-site examinations have been undertaken for MVT service providers since the setting up of the new Division for the Prevention of Money Laundering in October 2013:

***Table 21: On-site visits with an AML component to MVT (MVT) operators***

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014[1] |
|---|---|---|---|---|---|---|---|
| MVT operators | | 1 | | 2 | | | 2 |
| Currency Exchange operators | | 3 | 2 | 30 | | | 1 |
| **Total** | | **4** | **2** | **32** | | | **2** |

[1] *Up to October 2014*

1773. Notwithstanding the divergences in the definitions of a financial institution with respect to MVT services and money or currency exchange services, yet the AML/CFT Law puts both types of entities as reporting subjects for the purposes of the prevention of ML and the FT obligations under the Law.

1774. Both types of financial institutions therefore would fall under the supervisory remit of the CBK in accordance with the delegated supervisory powers to the CBK in terms of Article 36A of the AML/CFT Law, notwithstanding that the CBK had assumed such responsibility and in practice monitored such institutions on their compliance with the AML/CFT Law even prior to such supervisory delegation as part of its prudential supervisory remit.

***Licensing, regulation and supervision of all financial institutions not subject to the Core Principles – Essential Criterion 23.7***

1775. EC 23.7 requires that all types of financial institutions that do not fall within the Core Principles for banks, insurance companies or investment companies are licensed or registered and appropriately regulated and are subject to supervision or oversight for the prevention of ML and the FT.

1776. For the sake of completion this analysis will refer to the powers of the CBK in this regard to the entire financial sector but will focus on those entities outside the Core Principles.

1777. As already described under the analysis for EC 23.5 of this Report the Law on the CBK and the Law on Banks provide that the CBK has the sole responsibility to licence and to prudentially regulate financial institutions as defined in these or other laws.

1778. The Law on Pension Funds likewise provides for the licensing and prudential regulatory responsibilities of the CBK for Pension Funds while UNMIK Regulation 2001/25 provides for the licensing and prudential regulatory powers and responsibilities of the CBK for insurance companies and insurance intermediaries.

1779. In accordance with the new provisions of Article 36A of the AML/CFT Law and pursuant to the MoU between the FIU and the CBK, the CBK now has a legal supervisory mandate to monitor and supervise the entire financial sector for the purposes of compliance with the AML/CFT Law.

164. To an extent these reflect the requirements under FATF SR VII.

1780. It appears that all financial institutions providing any financial activity as defined under the respective laws are subject to a licensing or registration regime and are subject to prudential regulation and supervision by the CBK. Indeed the Law on the CBK and the Law on Banks charge the CBK with the prudential supervision of all financial institutions. This remit is further extended through the prudential supervisory remit for payment services to the CBK by the Law on Payment System.

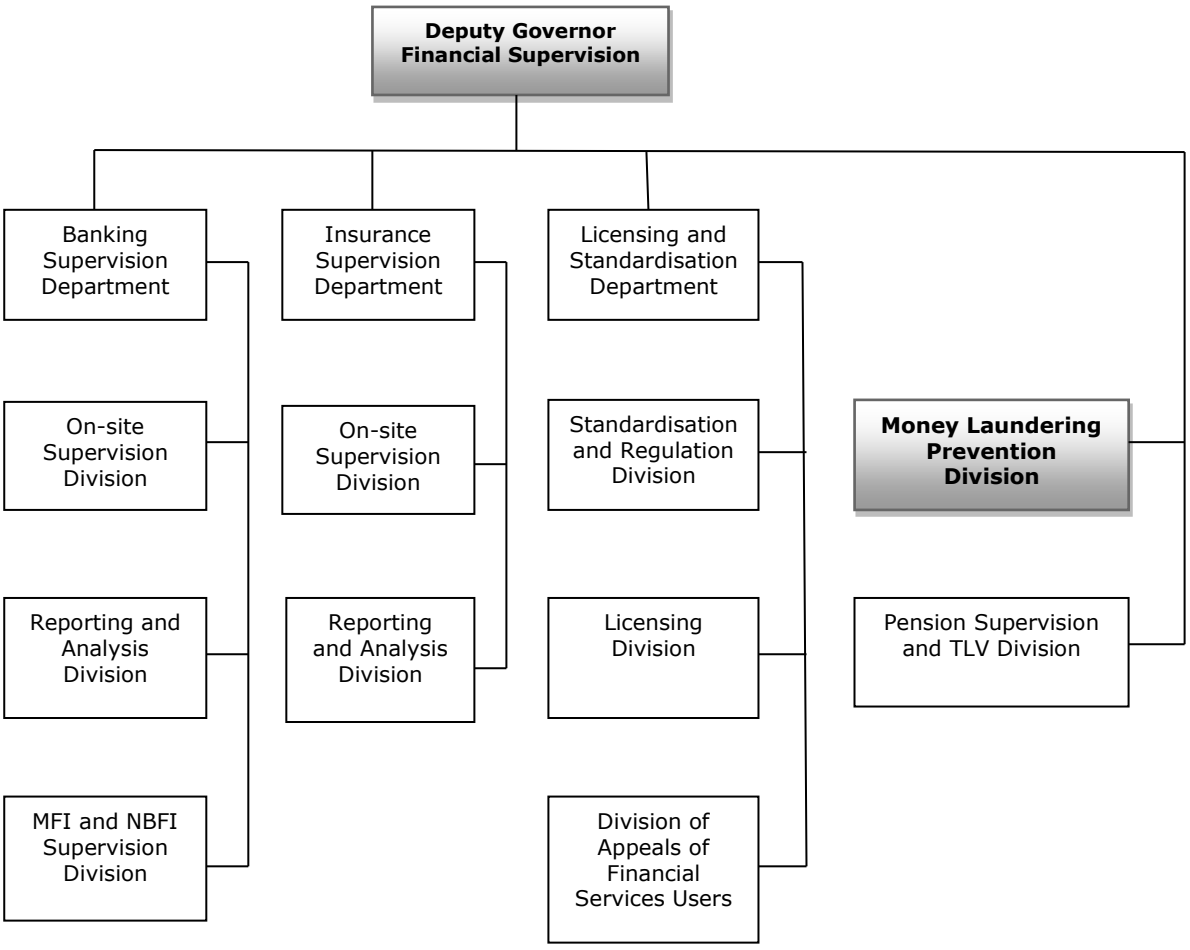
1781. As already stated in this Report this Report positively acknowledges the supervisory work that had been done by the CBK in ensuring that the entire financial sector complies with obligations under the AML/CFT Law for the prevention of ML and the FT notwithstanding the absence of a legal mandate prior to the 2013 amendments to the AML/CFT Law.

**Recommendation 30**

1782. Recommendation 30 requires that the relevant competent authorities involved in combating ML and FT should be provided with adequate financial, human and technical resources and that their staff are of high integrity.

***Structure, funding, staffing and other resources of supervisory authorities – Essential Criterion 30.1***

1783. EC 30.1 requires supervisory authorities responsible to ensure compliance by financial institutions with the prevention of ML and the FT obligations under the relevant laws be adequately structured, funded, staffed, and provided with sufficient technical and other resources to fully and effectively perform their functions.




1784. Following the 2013 amendments to the AML/CFT Law and the signing of the MoU between the FIU and the CBK delegating a supervisory remit for the entire financial sector to the CBK, in October 2013 the CBK established an independent Division for the Prevention of Money Laundering which reports directly to the Deputy Governor responsible for financial supervision. Prior to October 2013, notwithstanding that the CBK did not have a legal supervisory mandate for the purposes of

the AML/CFT Law, the CBK exercised this function through its Banking Supervision Directorate which, at the time, included an Anti-Money Laundering Division.

1785. The above chart extracted from the web-site of the CBK provides the structure and reporting lines of the three Departments forming the Banking Supervision Directorate and the Money Laundering Prevention Division which likewise directly reports to the Deputy Governor Financial Supervision.

1786. There are currently five persons within the Money Laundering Prevention Division including the Head of the Division. According to the Head the current structure and resources are adequate to meet the objectives of the Division.

1787. The Money Laundering Prevention Division of the CBK is funded through the Budget of the CBK as established under Article 64 of the Law on the CBK and as applicable for all other areas of the Bank, while it has access to the Bank's IT systems and other resources.

1788. According to the Strategy of the Money Laundering Prevention Division for 2013 -2016 the basic strategic objectives are:

- Strengthening capacities of the Division for Prevention of Money Laundering within CBK;
- Continuous development of the legal infrastructure;
- Continuous strengthening of the supervision and control and increase of cooperation and awareness;
- Develop and strengthen of the cooperation in the internal and external aspect.

1789. For this purpose the Division has developed an Action Plan for 2013 – 2014. Of particular interest for the analysis of Recommendation 30 EC 30.1 is the first objective i.e. the strengthening of the capacities of the Division. According to the Action Plan the main two specific objectives for strengthening the capacities of the Division are (i) the recruitment of new officials to fill the vacancies in the Divisions, including the development of Job Description and rensponsibilities for the existing and new staff and (ii) the assessment and provision of technical needs, both through technical equipment and expertise and office space. The Action Plan further addresses the updating of legislation and regulations and the development of supervisory expertise.

1790. While the development of the Strategy and the Action Plan 2013 – 2016 are positive steps forward, the assessment team urges the CBK to ensure the effective and timely implementation of the Action Plan and to ensure that during the implementation period measures are put in place to ensure the continuous monitoring of the financial sector for the prevention of ML and the FT. In particular focus at this stage should be on recruiting the appropriate staff and the development of efficient technology to support the work of the Division.

1791. The AML/CFT Law establishes the FIU as the supervisory authority for the supervision of all reporting subjects. Therefore, unless the FIU intends to enter into MoUs with other competent authorities similar to that for the CBK and who would take supervisory responsibilities for specific sectors, the FIU needs to enhance its capacity through both technical and human resources.

1792. The FIU has developed a Performance and Resource Plan for 2014 – 2016. Objective 6 – Enhancing the Capacity of the FIU – is of particular reference to the analysis of EC 30.1. The Plan looks objectively at enhancing the capacity of the FIU through appropriate funding, technical resources (equipment and human), recruitment of compliance and other staff and training programmes and the development of key performance indicators for monthly monitoring.

1793. According to the 2011 Annual Report of the FIU, the structure of the Unit, excluding EULEX officials and seconded staff,[165] comprises 14 officers as follows: Director of FIU (1), IT Manager (1), Legal Officer (1), Officer for Budget and Finance (1), Procurement Officer (1), Administrative Assistant (1) and Intelligence Analysts (8).

1794. Notwithstanding the supervisory remit for the FIU as promulgated by the AML/CFT Law, and notwithstanding that the Annual Report 2011 states that a number of compliance visits were undertaken during the period, the structure of the Unit as defined in the Annual Report does not show any officers responsible for compliance unless this function is done by the Intelligence

165. EULEX staff 9 (7 internationals and two locals); seconded staff from KC officer (1), TAK officer (1).

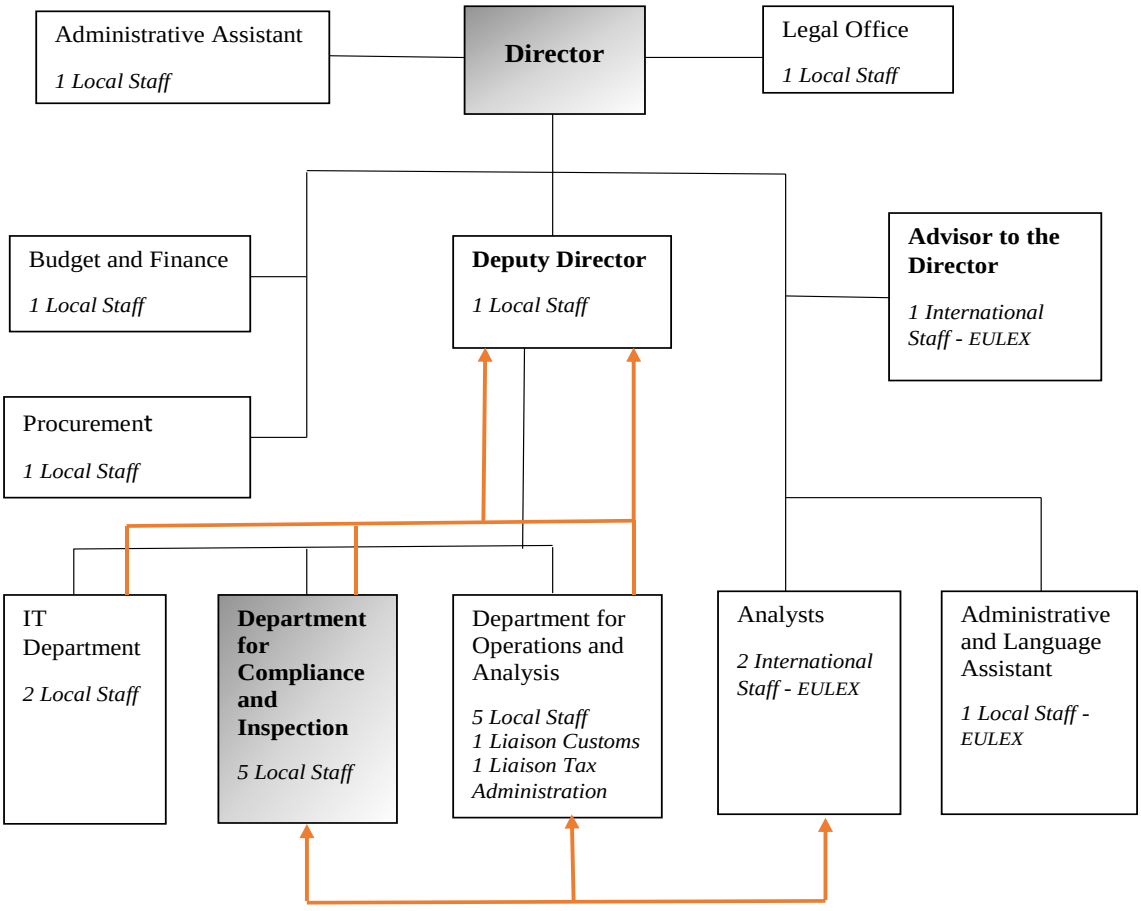
Analysis. Indeed the FIU has confirmed that it has a department for analysis and operations and a department for compliance and inspection. However it appears that a number of intelligence analysts are also assigned to conduct compliance inspections. In acknowledging the issue of resources, the assessment team question the ability for intelligence analysts to also undertake compliance visits.

1795. According to the 2012 Annual Report during 2012, the recruitment process of new staff and the filling of professional positions at the FIU has continued as part of the transition of the institution from the EULEX Mission to local authorities. In 2012 the FIU registered an increase of 4 staff members and has thus reached a complement of 18 from the previous 14. The Performance and Resource Plan 2014 – 2016 sees a continuation of the recruitment process which will continue until the completion of the total of 20 approved positions.

1796. According to the FIU Performance and Resource Plan 2014 – 2016, under Objective 6 – Enhance Capacity of the FIU, it is planned that the FIU increases its staff with three (3) new recruits in 2014 (Compliance Supervision (2) and Operations and Analysis (1)) and with one (1) new recruit in 2016 (Internal Audit) to complement the envisaged new section in the FIU on internal audit.

1797. During the Cycle 2 on-site visit, and as indicated in the Resource Plan, the FIU has provided the below organisational chart. It should be mentioned that while the organisational chart shows 5 local staff in the Department for Compliance and Inspection, the FIU informed that these are not permanent staff of this Department but of the Department for Operations and Analysis.

1798. The FIU has its own budget through the MoF and which is approved by the National Assembly, while it has its own internal IT systems separate from the database.[166] According to the FIU Performance and Resource Plan 2014 – 2016 *The current budget is not at a satisfactory level. This creates difficulties for the FIU to execute its mandate.*[167]




166. For more details on the FIU, please refer to Section 2.6 of this Report.

167. See page 28 of the Plan.

1799. This Report has not assessed in detail the overall prudential supervisory structure for the financial sector at the CBK which, however, appears to be adequate.

1800. With the focus of this assessment being the availability of resources for the supervision of the financial sector for compliance with the AML/CFT Law and related rules and regulations, this Report only takes into consideration the newly established Money Laundering Prevention Division at the CBK.

1801. With the number of banks and financial institutions that are subject to AML/CFT supervision it appears that the human resources (5 officers including the Head) at the Money Laundering Prevention Division are inadequate and inappropriate for future supervisory work and consequently the assessment team welcomes the Action Plan 2014 – 2016 which foresees the recruitment of addition staff for the Division.

1802. Although according to statistics provided by the CBK a number of on-site visits have been undertaken, these have mostly been undertaken prior to the establishment of the new Division and only represent components of a prudential visit. In the light of the Action Plan and the forecasts of the Head of the Division to visit banks and financial institutions more often on focussed AML/CFT on-site visits, the CBK therefore appears to lack adequate resources to fulfil this goal of undertaking full and focussed AML/CFT examinations at banks and financial institutions in a timely and adequate manner and to follow up and ensure that corrective measures are being or have been taken where these are recommended on findings of the examinations.

1803. The structure of the FIU and its resources for fulfilling supervisory functions – which currently also includes the financial sector jointly with the CBK – including its inadequate budget, may be of a major concern for the FIU to eventually fulfil its remit for the supervision of the entire reporting subjects to an effective and efficient degree. The FIU should consider having specialised trained resources dedicated to the supervisory function.

1804. The NRA (page 25), in dealing with factors related to the effectiveness of the prevention and detection of ML, FT, economic crimes and financial crimes further concludes that "*The quantity of human, technical and other resources of the FIU are insufficient and the agency does not have the capacity to respond to the increasing demand of its services*". The Action Plan considers this as a high risk which should be immediately addressed.

1805. It therefore appears that both the CBK and the FIU need to address their capacities for the supervision of the financial sector for the purposes of the AML/CFT Law in order to effectively undertake such responsibility.

***High professional standards – Essential Criterion 30.2***

1806. EC 30.2 requires that supervisory authorities with a remit to supervise entities on compliance with obligations for the prevention of ML and the FT maintain high professional standards, including standards concerning confidentiality, integrity and appropriate skills.

1807. As the AML/CFT Law through the MoU between the FIU and the CBK now nominates the CBK as the competent authority for the responsibility of supervising the financial sector on compliance with the Law, this analysis will assess the professional standards applied by the CBK as the authority that in practice is currently exercising supervisory oversight of the financial sector both for prudential and AML/CFT purposes, and the FIU as the nominated competent authority to supervise all reporting subjects with the exception of the building construction companies under the AML/CFT Law.

1808. Article 6 of the Law on the CBK establishes the independence and autonomy of the institution and its members. The Law requires that the CBK, the members of its decision-making bodies or staff, do not take instructions from any other person or entity, including government entities and that the independence and autonomy of the CBK shall be respected at all times.

1809. Furthermore, Article 40 of the Law on the CBK establishes that to be eligible to serve on the decision-making bodies of the CBK a person must be of integrity and hold a university degree. Such person must have a minimum of ten (10) years professional or academic experience in the fields of economics, finance, banking, accounting, or legal matters.

1810. Moreover, Article 52 of the Law on the CBK further establishes that the appointment and termination of the employment of all members of the staff lies with the Governor of the Bank in accordance with the general terms of employment and conditions adopted by the Executive Board. In this regard the CBK has procedures for recruitment which ensure the integrity and required skills of its employees.

1811. In accordance with Article 69 of the Law on the CBK members of the CBK decision-making bodies and its staff have a fiduciary duty to the CBK and to its customers to place the CBK and its customers' interests before their own interest and shall avoid any situation likely to give rise to a conflict of interest.

1812. In establishing an ethical culture within the Bank Article 69 of the Law on the CBK further requires that members of the decision-making bodies of the Bank and its staff members do not receive or accept from any source any benefits, rewards, remuneration or gifts in excess of a customary or negligible amount, whether financial or non-financial, which benefits, rewards, remuneration or gifts are connected in any way whatsoever to their activities within the CBK. Towards this end, the CBK can establish internal rules and procedures.

1813. Finally, Article 74 of the Law on the CBK imposes the duty of confidentiality, except when necessary to fulfil any task or duty imposed by this Law or any other Law, on all persons who have served or currently serve as members of the Board, the Executive Committee or as a staff member from permitting access to, disclose or publicise non-public information which is obtained in the performance of duties at the Bank or using such information, or allow such information to be used, for personal gain. Article 74 further provides gateways when such confidentiality may be lifted in accordance with the Law.

1814. Article 4 of the AML/CFT Law establishes the FIU as a central independent national institution responsible for requesting, receiving, analysing and disseminating to the competent authorities, disclosures of information which concern potential ML and TF. In terms of Article 7 of the Law the Management Board of the Unit has no right to interfere in any way in the ongoing cases of the FIU.

1815. Article 5 of the AML/CFT Law establishes the members of the Management Board of the FIU through *ex officio* positions held and therefore are not named on appointment. Among its competences as established by Law, the Management Board appoints and dismisses the Director of the FIU upon the proposal of the MoF, on the basis of demonstrated knowledge, professionalism and experience. The AML/CFT Law provides for the whole process for the nomination, selection, appointment and dismissal of the Director.

1816. Otherwise the AML/CFT Law is silent on the recruitment of staff of the FIU. The FIU has however informed during the visits that such recruitment is subject to the normal recruitment conditions for civil servants in terms of Regulation 02/2010 of the Ministry of Public Administration on the Recruitment Procedures in Civil Service and Regulation 07/2010 of the Ministry of Public Administration on Appointment of Civil Servants. The FIU is normally represented by the Director in the selection process for the Unit's staff.

1817. Paragraph (1.17) of Article 14 of the AML/CFT Law requires the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit and use such information only within the purposes provided for in accordance with the AML/CFT Law.[168]

1818. The analysis of the legal provisions for the recruitment and functions of staff and the confidentiality obligations indicate that both the CBK and the FIU, as current supervisory authorities for the purposes of the AML/CFT Law maintain high professional standards concerning confidentiality, integrity and skills in accordance with the requirements under FATF EC 30.2.

1819. No further recommendations in this regard are necessary.

168. For more details on the FIU, please refer to Section 2.6 of this Report.

***Adequate and relevant AML/CFT Training – Essential Criterion 30.3***

1820. EC 30.3 requires that relevant staff of supervisory authorities be provided with adequate and relevant training in the prevention of ML and the FT.

1821. There are no provisions in any law to this effect although paragraph (1.10) of Article 14 of the AML/CFT Law requires the FIU to organise and/or conduct training regarding ML, the FT activities and the obligations of reporting subjects. This should including training of the FIU own staff. In general, one expects that such training forms part of general training programmes of the relevant supervisory authority.

1822. According to information provided by the FIU various past and present members of staff attended a number of training sessions. Some training provided is not directly related to AML/CFT issues but also covers training in relation to the IT systems (goAML); study visits and operational aspects.

1823. In the course of the Cycle 2 on-site visit the Deputy Director of the FIU informed that he had just collected statistics on training for 2013 – 2014 which show that FIU officers have attended 18 training sessions for that period.

1824. Moreover, according to the FIU Performance and Resource Plan 2014 – 2016 it is envisaged that the FIU continues to provide the necessary training to its officers in preparing them to fulfil their roles within the FIU.

1825. In its replies to the Cycle 1 Questionnaire, the CBK has informed that based on the training policy of the CBK, relevant staff (both from the AML Division and other supervisory Divisions of the Bank) have benefited from training organised by the 'JVI – Joint Vienna Institute'; 'Banque de France'; US Treasury and KP'; 'International Criminal Investigation Training Assistance Program – ICITAP' and others.

1826. In the course of the Cycle 2 on-site visit the assessment team was informed that while training remained one of the main goals of the new Money Laundering Prevention Division within the overall training programme of the CBK (Item 1.3.3 of the Division Action Plan 2013 – 2016) since the setting up of the Division in October 2013, the Head of the Division has already participated in intensive training sessions at the Joint Vienna Institute. Statistics provided by the CBK indicate that overall 4 staff members were provided with AML/CFT training in 2013 and another 4 in 2014.

1827. Information provided indicates that training for relevant staff of supervisory competent authorities, in this case considering the FIU and the CBK, is being undertaken forming part of the training programmes and policies of both institutions.

1828. No specific recommendations are necessary but both institutions may wish to harmonise their training programme in this regard in the light of the joint responsibilities for the supervision of the entire financial sector for AML/CFT compliance purposes.

**Recommendation 32**

1829. Recommendation 32 requires countries to ensure that the relevant competent authorities can review the effectiveness of their systems to combat ML and FT by maintaining comprehensive statistics on matters relevant to the effectiveness and efficiency of their systems.

***Maintenance of comprehensive statistics – Essential Criterion 32.2***

1830. EC 32.2 requires competent authorities to maintain comprehensive statistics on on-site examinations conducted by supervisors relating to or including AML/CFT and sanctions applied. These and other related statistics should be relevant to measure the effectiveness and efficiency of the implementation of FATF Recommendation 23.

1831. There are no obligations under the AML/CFT Law for competent authorities to maintain statistics of any kind although it appears that in practice some statistics are maintained.

1832. Although Article 25 of the Law on the CBK deals with the collection of statistics by the Bank, such statistics do not refer to those required under FATF Recommendation 32. Indeed there

is no obligation under the Law on the CBK or the Law on Banks requiring the maintenance of statistics by the CBK itself whether or not related to the prevention of ML and the FT.

1833. In its replies to the Cycle 1 Questionnaire the CBK has provided statistics on the number of on-site visits (mainly prudential with an AML/CFT component) undertaken since 2008. In the Cycle 2 Questionnaire the CBK provided additional statistics on on-site visits since the setting up of the Money Laundering Prevention Division.

1834. The FIU has not provided similar statistics although indicative statistics are provided in the Annual Reports.

1835. In October 2013 the FIU issued Administrative Instruction No. 001/2013 on Compiling Statistics, Reports and Recommendations on ML and TF. The objective of the Administrative Instruction issued by the FIU is primarily to define the obligations under paragraph (1.8) of Article 14 of the AML/CFT Law which requires the FIU to compile statistics and records and based thereon make recommendations to the competent authorities and Ministries and/or other relevant persons or bodies regarding measures which may be taken and legislation which may be adopted to combat ML and the FT activities.

1836. Within this context the Instruction delineates the type of statistics that the FIU intends to maintain. The Instruction next defines the source of information for the compilation of statistical data that will be maintained by the FIU:

- data that is received at the FIU as initial information;
- based on the data and intelligence reports compiled by the FIU itself; and
- based on data which is received as feedback at FIU.

1837. The CBK has informed that, having been delegated supervisory powers for the entire financial sector for the purposes of the AML/CFT Law in terms of the new Article 36A through the MoU entered into with the FIU, it intends to issue an Administrative Directive on the maintenance and provision of statistics applicable to banks and financial institutions

1838. The proposed CBK Administrative Directive establishes sets of statistics that are comprehensive and meaningful for banks and financial institutions, and the CBK itself, for the CBK to be able to understand and measure the effectiveness of the system for the prevention of ML and the FT with regard to the financial sector. The statistics detailed in the Directive are not exhaustive and banks and financial institutions may collect and maintain additional information which they may consider necessary to fulfil their obligations in this regard. The Directive however does lay down the principles for the minimum sets of statistics that should be maintained and provided to the CBK in this regard. To this effect the Directive is complemented with a template for the collection and maintenance of comprehensive and meaningful statistics which banks and financial institutions shall be required to complete and submit to the CBK on a periodical basis as the CBK may establish.

1839. The assessment team is informed that the proposed CBK Administrative Directive on statistics is constructed as follows:

- it establishes the responsibilities of banks and financial institutions in the collection and maintenance of comprehensive and meaningful statistics by giving direction and guidance also to use statistics in measuring the effectiveness of their internal procedures and to report periodically to the CBK;
- it establishes the main pillars of statistical information that banks and financial institutions shall maintain as a minimum, related to: CDD; Relationships and Accounts; Suspicious Transaction reporting; Currency Transaction reporting; Compliance assessments; Resources; Training and Awareness; and Court Orders. The Directive allows the CBK to request additional statistics as circumstances may warrant;
- it requires the CBK to consolidate the statistical information received; to undertake an effectiveness assessment of the whole financial sector on the basis of the individual assessments reported by the banks and financial institutions and the consolidated statistics; and to make such information available to the FIU. The Directive requires the CBK itself to maintain its own statistics in this regard;
- it provides for measures for its implementation while referring to administrative measures for non-compliance.

1840. Although some statistics have been provided it does not appear that the maintenance of statistics is sufficient to determine the effectiveness of the supervisory regime for the purposes of the AML/CFT Law.

1841. The NRA (page 25), in dealing with factors related to the effectiveness of the prevention and detection of ML, FT, economic crimes and financial crimes further concludes that "*Lack of national, regular, analytical and accurate situational reporting mechanisms on money laundering, financing of terrorism, economic crime, financial crime and informal economy weakens authorities' strategic and operational performance and credibility*." The NRA considers this as a high risk to be addressed in due course.

1842. Notwithstanding that the assessment team acknowledges the positive progress on the part of the FIU and the CBK to issues relevant directives or instructions to the reporting subjects, it appears that the general maintenance of statistics for measuring the effectiveness of the whole AML/CFT regime may need to be put on a stronger legal footing through the AML/CFT Law. Indeed one of the competences of the FIU is to *compile statistics and records and based thereon make recommendations.*

1843. It is therefore recommended that a new Article 30A under the title "Statistical Data" is introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects and relevant competent authorities as follows:

> **Article 30A**
> **Statistical Data**
>
> (1) The FIU, supervisory and other competent authorities with a responsibility for combating money laundering and the financing of terrorism, reporting subjects and other persons or entities with obligations under this Law shall maintain comprehensive statistical data relevant to their area of responsibility.
>
> (2) In maintaining statistical data, persons, entities and authorities referred to in paragraph (1) of this Article shall liaise with the FIU who, in cooperation with other relevant supervisory authorities with a supervisory remit under this Law in terms of Article 36A, may determine the type of statistical data that may be required.
>
> (3) To this effect the FIU or a relevant supervisory authority as referred to in paragraph (2) of this Article may issue administrative directives, instructions or guidance on the maintenance of statistics to those sectors under their supervisory remit.
>
> (4) Statistical data maintained under this Article shall be made available to the FIU within time periods as the FIU may determine to enable it to review the effectiveness of the national system and to make recommendations accordingly as required under Article 14 of this Law.

***Effectiveness***

**Recommendation 23**

1844. Various shortcomings and weaknesses identified in the supervisory structure for the purposes of monitoring banks and financial institutions on their compliance with the legal AML/CFT obligations raise concern on the effectiveness of the AML/CFT supervisory regime.

1845. First is the recent designation of the CBK as the authority responsible to supervise the financial sector on compliance with the AML/CFT Law complemented by the consequent lack of power to such an authority to issue rules and regulations for implementing the AML/CFT Law with the current Rules issued by the CBK still referring to repealed UNMIK Regulations.

1846. Finally the effectiveness of the system is further negatively impacted through the low number of on-site visits, staffing shortages and lack of adequate and meaningful statistics.

### 3.17.2. Recommendations and Comments

**Recommendation 23**

1847. The analysis on compliance with Recommendation 23 is mainly overshadowed by the recent designation of the CBK as the supervisory authority for the entire financial sector for the purposes of the AML/CFT Law, and hence the time required for the new Money Laundering Prevention Division in the CBK to establish itself although the assessment team acknowledges the work already done so far by the CBK, with the exception of those criteria under Recommendation 23 which are exclusively under the remit of the CBK concerning licensing, shareholding and governance of banks and financial institutions governed by other specific financial legislation.

1848. Notwithstanding, since in practice the CBK has been undertaking supervision of the financial sector for AML/CFT purposes even prior to its recent legal mandate, the analysis of the supervisory process of the CBK finds some shortcomings or weaknesses for Recommendation 23 that need to be addressed:

- no mandate for the CBK to issue rules and regulations for the purposes of the AML/CFT Law (EC 23.2 and EC 23.4);
- no obligation under the Law on Banks for a person or entity divesting of a significant interest in a bank to inform the CBK (EC 23.3);
- criteria in determining an application for changes in shareholding does not take account of ML or FT implications (EC 23.3); and
- divergences in the definition of 'financial institution' could lead to legal uncertainty on licensing requirements (EC 23.5).

1849. In the light of the above identified weaknesses or shortcomings for Recommendation 23 various recommendations are made in this Section to strengthen the legislative framework for a more effective system to prevent ML and the FT. It is important that recommendations made are read within the context of the comments made earlier in this Report for the respective essential criteria for Recommendations 23:

- the supervisory legal mandate for the CBK should be accompanied with a mandate to issue binding and mandatory rules and regulations for AML/CFT purposes (beyond the powers of the CBK in this regard under Article 85 of the Law on Banks for prudential purposes) (EC 23.2 and EC 23.4);
- insert a new paragraph (6) to Article 37 of the Law on Banks requiring a person or entity, alone or in concert with another, divesting of a significant interest or to reduce current shareholding to inform the CBK accordingly (EC 23.3);
- insert a new paragraph (2) to Article 38 of the Law on Banks requiring application of AML/CFT criteria as established under the EU Directive on Mergers and Acquisitions for approval of changes in shareholding (EC 23.3);
- amend paragraph (3) of Article 39 of the Law on Banks on mergers, consolidations and acquisitions consequent to the proposed paragraph (2) to Article 38; and
- harmonise the definitions of 'financial institution' in the various laws (EC 23.5).

**Recommendation 30**

1850. Some elements of Recommendation 30 dealing with resources have also been assessed and some weaknesses identified:

- inadequate resources at both the CBK and the FIU for AML/CFT supervisory purposes (EC 30.1).
- inadequate budget for the FIU which, according to the FIU Performance and Resource Plan 2014 – 2016 is not at a satisfactory level and creates difficulties for the FIU to execute its mandate (EC 30.1)

1851. In the light of the shortcomings for Recommendation 30 this Report makes some recommendations which however should be read within the context of the analysis of the current situation;

- both the CBK and the FIU need to address their respective capacities for the supervision of the financial sector for the purposes of the AML/CFT Law in order to effectively undertake such responsibility. (EC 30.1).

**Recommendation 32**

1852. In the analysis of the availability of statistics for the purposes of EC 32.2 under Recommendation 32 the Report finds that there is a need to strengthen this requirement through a legal obligation for maintaining statistics.

1853. The Report recommends that a new Article 30A under the title "Statistical Data" as indicated above is introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects, relevant competent authorities and other stakeholders.

### 3.17.3. Rating for Recommendation 23[169]

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.23** | **PC** | • absence of mandate for a supervisory competent authority designated in terms of Article 36A to issue AML/CFT rules and regulations;<br>• no obligation to inform CBK on divestment of shareholding;<br>• need to strengthen criteria for approval of changes in shareholding in relation to AML/CFT issues;<br>• divergences in definition of 'financial institution;<br>• low number of on-site visits; and<br>• consequent effectiveness issues including:<br>– human resources for supervisory authorities are insufficient thus impacting effectiveness;<br>– lack of relevant training programmes for supervisory staff impacts effectiveness; and<br>– need for authorities to maintain more meaningful statistics, otherwise supervisory effectiveness cannot be adequately judged. |

## 3.18. Supervisors (R.29)

### 3.18.1. Description and Analysis

1854. Recommendation 29 deals with the powers of supervisors to monitor and to ensure compliance with requirements to combat ML and the FT, including the authority to conduct on-site inspections.

1855. As already established under this Report while the FIU has a supervisory remit over all reporting subjects (with the exception of construction companies), in undertaking its supervisory function over the financial sector for the purposes of the AML/CFT Law the CBK has been delegated such powers under an MoU with the FIU in accordance with the provisions of Article 36A of the AML/CFT Law.

1856. Notwithstanding, the MoU and, more particularly the AML/CFT Law do not provide for the CBK to use its supervisory powers under the Law on the CBK and the Law on Banks, which powers are established for prudential purposes for those institutions within the remit of the prudential supervisory function of the CBK under these laws, also for the purposes of the AML/CFT Law.

169. Please refer to Section 7 for the overall rating of Recommendation 30 and Recommendation 32.

1857. Consequently, although the paragraphs that follow will analyse and assess the prudential supervisory powers of the CBK this will only be done for assessment purposes without prejudice to the position taken by this Report in the absence of a legal mandate to apply such supervisory powers to the supervisory mandate for the purposes of the AML/CFT Law.

1858. The paragraphs that follow will also take account of the supervisory powers under the AML/CFT Law provided to the FIU as the designated supervisory authority for all reporting subjects with the exception of the construction companies.

***Adequate powers to monitor and ensure compliance – Essential Criterion 29.1***

1859. EC 29.1 requires that supervisory authorities have adequate powers to monitor and ensure compliance by financial institutions, with requirements to combat ML and TF.

1860. Article 30 of the AML/CFT Law appoints the FIU as the supervisory authority for the purposes of the Law to supervise all reporting subjects under the Law with the exception of construction companies. In doing so Article 30 provides for the powers of the FIU to effectively undertake its supervisory tasks. In establishing the parameters within which the authorised officials of the FIU may conduct their on-site inspections including the right of entry, and the right to demand copies of documents, Article 30 further obliges the owner or person in charge of the premises being inspected and every person present in the premises to give the authorised officials all reasonable assistance to enable them to carry out their responsibilities.

1861. Article 23 of the Law on the CBK establishes the prudential supervisory tasks of the CBK with the exclusive responsibility for the Bank for the regulation, licensing, registration and supervision of banks and other financial institutions. Within this context, Article 30 further provides for the powers of authorised officials of the CBK to visit offices of financial institutions. Finally, Article 30 requires financial institutions to furnish the CBK with such information and records concerning their operations and financial condition as the CBK may require.

1862. Article 57 of the Law on Banks further provides for the supervisory powers of the CBK in fulfilling its prudential supervisory remit under the Law on the CBK for the prudential supervision of banks. Article 57 compels all officers of banks to co-operate with the CBK in carrying out inspections which can be on-site or off-site in nature and thus the CBK may demand, and banks shall comply, any information it may deem necessary to fulfil its supervisory tasks.

1863. In providing for the prudential supervisory powers of the CBK for the purposes of MFIs and other NBFIs, Article 114 of the Law on Banks empowers the CBK to issue such regulations or orders, to visit such offices of MFIs and NBFIs at such reasonable times as the Bank deems appropriate, to examine accounts, books, documents and other records, and to take such other action as the CBK shall deem necessary or advisable to give effect to the intent of the present Law or Regulations or Orders issued.

1864. In terms of the Law on Pension Funds, various articles provide for the prudential supervisory powers of the CBK. Article 13 provides for the supervisory powers of the CBK for 'pension funds', while Article 20 provides for the supervisory powers of the CBK for 'pensions providers' for the purposes of that Law.

1865. Further to the prudential supervisory powers of the CBK with respect to insurance companies (as part of the definition of a 'financial institution'), Article 4 of UNMIK Regulation 2001/25 provides for the prudential supervisory powers of the CBK[170] for the supervision of insurance companies and insurance intermediaries.

1866. The supervisory powers under Article 30 of the AML/CFT Law are directly applicable by the FIU in fulfilling its remit under the Law for the supervision of all reporting subjects with the exception of the construction companies.

1867. As the supervisor for the entire financial sector for prudential purposes the CBK is provided with adequate powers to ensure that banks and financial institutions comply with their prudential obligations under the respective laws.

170. UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

1868. Although the CBK currently applies these prudential supervisory powers in monitoring the financial sector for AML/CFT purposes there is no legal mandate empowering the CBK to do so.

1869. It follows therefore that, notwithstanding the AML/CFT supervisory mandate for the CBK for the purposes of the AML/CFT Law in terms of the MoU in accordance with the AML/CFT Law and the absence of supervisory tools under the AML/CFT Law since Article 30 applies only to the FIU, consequent to the non-applicability of the prudential supervisory powers for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 29.1.

1870. There is therefore a need to create a legal empowerment for the CBK to apply its prudential supervisory powers – with the exception of the imposition of sanctions under the respective financial laws for prudential purposes – in its AML/CFT supervisory functions as delegated to it through Article 36A of the AML/CFT Law.

1871. To this effect it is recommended to number the current paragraph as paragraph (1) and to insert a new paragraph (2) to Article 36A which provides for the delegation of a supervisory mandate for the CBK for the entire financial sector in the AML/CFT Law in this regard as follows:

> **Article 36A (paragraph (2))**
>
> *Paragraph (2):* A competent authority that is delegated a supervisory function under paragraph (1) of this Article to supervise and monitor specific reporting subjects on compliance with this Law and which authority already has a supervisory mandate for prudential purposes conferred upon it through specific laws for that sector, shall apply such prudential supervisory powers as conferred upon it and as may be applicable in fulfilling its supervisory remit for the purposes of this Law with the exception of the power to impose administrative or other sanctions and penalties contemplated by such specific laws for infringement of such laws.

1872. The proposed paragraph (2) to Article 36A of the AML/CFT Law excludes the imposition of administrative or other sanctions and penalties as otherwise there will be a legal conflict on sanctions for AML/CFT purposes contemplated under the AML/CFT Law with sanctions that are of a prudential nature contemplated for breaches under the specific financial laws.

***Authority to conduct inspections of financial institutions – Essential Criterion 29.2***

1873. EC 29.2 requires that supervisors have the authority to conduct inspections of financial institutions, including on-site inspections, to ensure compliance through the review of policies, procedures, books and records including sample testing.

1874. Article 30 of the AML/CFT Law empowers the authorised officials of the FIU to enter any premises other than a residence, at any time during ordinary business hours, *if there is a reasonable suspicion* that records which are maintained pursuant to Articles 16 to 28 of the AML/CFT Law or documents relevant to determining whether obligations under Articles 16 to 28 of the AML/CFT Law have been complied with are available in such premises. Moreover, authorised officials of the FIU may demand and inspect the records or documents; copy or otherwise reproduce any such record or document; and ask questions in order to locate and understand such records or documents. Article 30 further conditions access within those premises such that the authorised official or officials *shall limit the inspection to that part of the premises in which the relevant records or documents are reasonably likely to be found*.

1875. Article 23 of the Law on the CBK empowers the staff of the CBK, and other qualified persons appointed by the Executive Board, to visit the offices of financial institutions to examine such accounts, books, documents and other records, to obtain such information and records from them, and to take such other action as the CBK shall deem necessary or advisable.

1876. In accordance with Article 57 of the Law on Banks the appointed examiners of the CBK may visit banks at such reasonable times as CBK may deem appropriate and may take such action as may be necessary and advisable. The examiners have the right to examine the accounts, books, documents and other records of the bank or affiliates; and may require Directors and Senior Managers, employees and agents of the bank or affiliates under examination to provide all such information on any matter relating to its administration and operations as they shall reasonably request.

1877. Article 114 of the Law on Banks provides for similar powers for CBK examiners when undertaking prudential examinations of MFIs or other NBFIs.

1878. Articles 13 and 20 of the Law on Pension Funds in providing for the prudential supervisory powers of the CBK specify and limit the supervisory powers and do not directly provide for on-site visits. The CBK may appoint independent auditors for this purpose and, notwithstanding, the CBK can still undertake on-site visits as the supervisory authority for banks and financial institutions, when undertaking such activities.

1879. UNMIK Regulation 2001/25 for the insurance sector provides that the authorised officials of the CBK[171] may visit offices of insurance companies and insurance intermediaries at such reasonable times as the CBK deems appropriate, to examine such accounts, books, documents and other records for prudential purposes, and to take such other action as shall be deemed necessary or advisable to give effect to the intent of the present regulation or rules, orders or guidelines issued there-under;

1880. The supervisory powers for the FIU in terms of Article 30 in general meet the requirements under EC 29.2 but the conditions imposed through the said Article 30 may limit the extent of the FIU powers for on-site examinations since the AML/CFT Law allows such visits only *if there is a reasonable suspicion* while limiting access such that the authorised official or officials *shall limit the inspection to that part of the premises in which the relevant records or documents are reasonably likely to be found*.

1881. Moreover, such conditions and limitations as detailed in the preceding paragraph may also limit the supervisory powers of the CBK as delegated to it through the MoU by the FIU if one were to interpret such delegation to include the supervisory tools under Article 30, although the MoU does not make references to Article 30 of the AML/CFT Law.

1882. Therefore, and as already explained under the above analysis of EC 29.1 it follows that with the absence of a legal mandate for the applicability of prudential supervisory tools, through the consequent non-applicability of the prudential supervisory powers of the CBK under the specific financial laws for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 29.2.

1883. Consequently and within the same circumstances as defined, the proposed recommendation in the above analysis of EC 29.1 for a new paragraph to Article 36A in the AML/CFT Law providing for the application of prudential supervisory powers of the CBK in fulfilling its delegated supervisory remit for the purposes of the AML/CFT Law would apply for the purposes of EC 29.2.

1884. Moreover, it would be advisable that Article 30 of the AML/CFT Law be revised to remove any legal ambiguity on the powers of the FIU to undertake on-site examinations.

***Power to compel production of documents – Essential Criterion 29.3***

1885. EC 29.3 requires that supervisors have the power to compel the production of or to obtain access to all records, documents or information relevant to monitor compliance.

1886. In accordance with the provisions of Article 30 of the AML/CFT Law authorised officials of the FIU may demand and inspect the records or documents; copy or otherwise reproduce any such record or document; and ask questions in order to locate and understand such records or documents. Moreover, Article 30 requires the owner or person in charge of the premises of the institution being inspected and every person present in the premises to assist the authorised officials in accessing and copying or reproducing records and documents maintained electronically. Furthermore, in terms of the same Article, in the event that a person under examination refuses to provide documents for reasons specified by Law – for example a document is under lawyer/client relationship – the authorised official conducting the inspection shall place the disputed record or document in an envelope sealed in the presence of the person or his or her representative, and signed by the official and the person or representative. The sealed record or document shall be presented within ten (10) days to a Pre-Trial Judge of the competent District Court, who shall inspect it, and determine whether it, or any part of it, is subject to inspection and copying pursuant to the provisions of the AML/CFT Law.

171. UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

1887. Article 23 of the Law on the CBK requires financial institutions to furnish the CBK with such information and records concerning their operations and financial condition as the CBK may require for prudential purposes under the Law.

1888. Likewise in terms of Article 57 of the Law on Banks the CBK authorised officials may require Directors and Senior Managers, employees and agents of the bank or affiliates to provide all such information on any matter relating to its administration and operations as the examiners shall reasonably request for prudential supervisory purposes under the Law.

1889. While not specifically referring to the power to demand any document or information, in providing for the prudential supervisory powers of the CBK over MFIs and other NBFIs, Article 114 of the Law on Banks provides for a general power *to examine such accounts, books, documents and other records,*

1890. Articles 13 and 20 of the Law on Pension Funds in authorising the CBK to review data and records does not specifically empower the CBK to demand any documents the Bank deems necessary to fulfil its obligations but this necessarily follows as otherwise the CBK would not be able to review data and records.

1891. Finally, UNMIK Regulation 2001/25 provides that, in fulfilling its prudential supervisory responsibilities, the CBK[172] may request the provision of any information from insurance companies and insurance intermediaries, including their shareholders or owners, administrators and other employees, in whatever manner preferred by the CBK, subject to reasonable notice.

1892. The power of the FIU under Article 30 of the AML/CFT Law to compel the production of any documents or records is linked with the Unit undertaking an on-site examination where it has reasonable suspicion that such documents are held in those premises. The power to compel documents under Article 30 therefore becomes applicable for on-site examinations and where there is reasonable suspicions of the location of those documents and consequently the FIU becomes unable to undertake off-site examinations as it cannot compel the production of documents and records for this purpose unless its officials enter the premises which consequently means that an on-site examination is being applied. In this regard even paragraph (1.13) of Article 14 establishing the duties and competences of the FIU to *request documents and information in accordance with this Law* and the provisions under paragraph (1.4) of the same Article to *require data, documents and information related to specific requests of data or analyses from legal obligators*, cannot be applied for off-site examinations unless the AML/CFT Law specifically provides under Article 30 for the FIU to undertake off-site examinations. The authorities claim that the FIU has off-site powers by virtue of paragraph (1.4) of Article 14 of the AML/CFT Law which defines the duties and competences of the FIU but which is not linked to Article 30 of the AML/CFT Law which deals with the powers of the FIU to undertake compliance inspections. The assessment team does not concur.

1893. Therefore, and as already explained under the above analysis of EC 29.1, it follows that with the absence of a legal mandate for the applicability of the prudential supervisory tools, through the consequent non-applicability of the prudential supervisory powers of the CBK under the specific financial legislation for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 29.3.

1894. Consequently and within the same circumstances as defined, the proposed recommendation in the above analysis of EC 29.1 for a new paragraph to Article 36A in the AML/CFT Law providing for the application of prudential supervisory powers of the CBK in fulfilling its delegated supervisory remit for the purposes of the AML/CFT Law would apply for the purposes of EC 29.3.

1895. Moreover, and further to the recommendations for EC 29.1 and 29.2 above, the FIU would need clear legal powers to undertake off-site examinations.

1896. It is therefore proposed to insert a new paragraph (6) to Article 30 as follows:

> *Article 30 (paragraph (6)):* For the purposes of assessing compliance with the provisions of this Law or any rules or regulations issued there-under, the FIU may, by notice in writing served on a reporting subject as defined in paragraph (1) of this Article, require that reporting subject to produce, within the time and at a place as may be specified in

172. UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

that notice, any documents, including those related to internal procedures under this Law or any regulation, as may be required by the FIU to fulfil its responsibilities under this Article on an offsite basis, and the provisions of paragraphs (3), (4) and (5) of this Article shall apply accordingly.

***Requirement of court order – Essential Criterion 29.3.1***

1897. EC 29.3.1 establishes whether supervisors require a court order to compel the production of or to obtain access to records, documents or information for supervisory purposes.

1898. The AML/CFT Law empowers the FIU to demand the production of documents and records that it may need in order to fulfil its on-site supervisory remit for reporting subjects other than construction companies.

1899. Notwithstanding, Article 30 of the AML/CFT Law allows a reporting subject under examination to refuse to allow the inspection or copying of a record or document if he or she asserts either that the document or record is not held for the purposes of the provisions of the AML/CFT Law and therefore is not relevant, or that the document or record contains information that is subject to, for example, lawyer-client privilege.

1900. In such circumstances the AML/CFT Law provides for the document or record to be presented to a Pre-Trial Judge of the competent District Court, who shall inspect it, and determine whether it, or any part of it, is subject to inspection and copying pursuant to the relevant provisions of Article 30 of the AML/CFT Law

1901. The Law on the CBK, the Law on Banks, the Law on Pension Funds and UNMIK Regulation 2001/25 do not foresee the need of a court order for the CBK to undertake prudential examinations and inspections and to compel documents and other information for the purposes of the applicable laws.

1902. The exception under Article 30 where a reporting subject may refuse to provide documents in the course of an on-site visit is considered as a precaution rather than a prohibition for the FIU to obtain documents and records for supervisory purposes. The FIU has informed that in practice this provision has never been applied.

1903. It is assumed that consequent to the delegated supervisory remit to the CBK in terms of Article 36A of the AML/CFT Law, through the introduction of the proposed new paragraph to Article 36A under the analysis of EC 29.1, likewise there will be no need for court orders in this respect.

1904. Consequently this Report concludes that the power to compel the production of documents or to obtain access is not hindered by the requirement of court orders.

***Adequate powers of enforcement and sanctions – Essential Criterion 29.4***

1905. EC 29.4 requires that supervisors have adequate powers of enforcement and sanction against financial institutions, and their directors or senior management for failure to comply with or properly implement requirements to combat ML and TF.

1906. Article 31 of the AML/CFT Law imposes administrative penalties which are of a continuous nature where the FIU determines that the reporting subject has failed to comply with the obligations under the Law. This provision requires that the FIU, in consultation with the MoF may issue a sub-legal act to define the administrative offence procedure.

1907. In January 2014 the FIU, in consultation with the MoF, issued an Administrative Instruction No. 03/2014 on Procedures for Applying Administrative Sanctions for Non- compliance of Reporting Subjects with the AML/CFT Law.[173] While the Administrative Instruction "on procedures for applying administrative sanctions" defines the procedures for the imposition of fines in terms of Articles 31, 31A and 31B on reporting subjects it falls short of referring to the imposition of such fines on the directors and senior management of a reporting subject.

173. For a deeper analysis of the Administrative Directive, refer to the analysis of Recommendation 17 – *Sanctions.*

1908. Although paragraph (2) of Article 31 empowers the FIU, in consultation with the MoF to issue a sub-legal act to define the administrative offence procedures, the Administrative Instruction on procedures for applying administrative sanctions appoints the FIU as the authority responsible to impose administrative sanctions for the purposes not only of Article 31 but also Article 31A and Article 31B. The assessment team has expressed reservations on the interpretation of paragraph (2) of Article 31.

1909. The only penalties that may be imposed on directors and senior management of a financial institution are those related to 'tipping off' as contemplated by paragraph (4) of Article 33 in relation to paragraph (4) of Article 22.

1910. Article 67 of the Law on the CBK empowers the Executive Board of the CBK, by decisions, to impose administrative penalties upon all legal and natural persons operating in breach of the Law on the CBK.

1911. According to Article 67 of the Law on the CBK administrative penalties include pecuniary penalties and other administrative measures, such as written warnings or orders, suspension and dismissal of administrators of supervised financial institutions, revocation of licenses and other measures, as specified in the Law on the CBK, or in any other Law.

1912. According to Article 58 of the Law on Banks the CBK can take remedial measures against the bank, the directors and senior managers, employees, principal shareholders, or those holding significant interests in a bank, if it is determined that the bank or any such person has violated a provision of this Law or of any regulation or order of the CBK, has violated any condition or restriction attached to an authorisation issued by the CBK, or has engaged in unsafe or unsound practices in the judgment of the CBK. Such measures include penalties that may be applied on a graduated basis depending on the severity of the offence, ranging from the issue of written warnings to the revocation of the licence. On the other hand Article 82 provides for civil penalties that may be imposed on the bank or its directors or senior management for major violations of the Law on Banks.

1913. Article 105 of the Law on Banks provides for penalties and remedial measures that may be imposed on a MFI, a NBFI or any of its senior managers or directors or holders of a significant interest if, in its findings, the CBK determines that an institution or such person has violated a provision of any Regulation or Order of the CBK or has engaged in unsafe or unsound practices. However, unlike the situation for banks, the Law on Banks does not provide for civil penalties that may be imposed on MFIs and NBFIs for prudential purposes.

1914. Similar provisions for remedial measures are found in Article 32 of the Law on Pension Funds for breaches of the provisions of the Law or for have engaged in unsafe or unsound practices. Remedial measures may be applied to the institution and its directors.

1915. Likewise, UNMIK Regulations 2001/25 for the insurance sector provides for similar measures to be taken against the institution and persons under similar circumstances as provided for in the Law on Banks.

1916. While various financial sector legislation provides for remedial measures that can be taken against a financial institution or its directors and senior management, such penalties can only be applied for infringements of the respective laws or prudential regulations of the CBK for the purposes of such laws and hence are applicable only for prudential purposes and cannot be applied for the purposes of the AML/CFT Laws.

1917. Moreover, the absence of any legal provision empowering the CBK to apply its remedial measures provided by the respective financial Laws for prudential purposes for infringements of the AML/CFT Law, renders such measures inapplicable for the purpose of the AML/CFT Law.

1918. Consequently, the supervisory authorities in Kosovo have no adequate powers of enforcement and sanctions against the directors or senior management of a financial institution for failure to comply with the provisions of the AML/CFT Law.

1919. For recommendations in this respect please refer to the analysis of Recommendation 17 - *Sanctions* of this Report.

***Effectiveness***

1920. The analysis in this section has identified certain shortcoming and weakness that negatively impact on the effectiveness of the supervisory system for AML/CFT purposes.

1921. In brief these could be summarised under the lack of a legal mandate for the CBK to apply its prudential supervisory tools for AML/CFT purposes; the lack of FIU power to demand documents and information to undertake off-site compliance examinations and the serious shortcomings in powers of enforcement in particular for directors and senior management of a financial institutions.

### 3.18.2. Recommendations and Comments

1922. The absence of a legal basis for the CBK for the application of its prudential supervisory powers under the specific financial legislation for the purposes of the AML/CFT Law leaves serious gaps in the implementation of the delegated supervisory remit for the purposes of the AML/CFT Law.

1923. Moreover, although the AML/CFT Law provides for the supervisory powers of the FIU, these are limited in scope and do not appear to provide for off-site examinations.

1924. Although a full reading of the complete analysis and comments on the respective EC for Recommendation 29 is extremely important, the main weaknesses and gaps identified can be grouped as follows:

- legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations (EC 29.2);
- absence of a legal mandate to apply CBK prudential supervisory powers for the purposes of the AML/CFT Law (EC 29.1; EC 29.2);
- absence of a mandate for the FIU to undertake off-site examinations (EC 29.3);
- no adequate powers of enforcement and sanctions against financial institutions and their directors or senior management for failure to comply with the provisions of the AML/CFT Law (EC 29.4).[174]

1925. In this regard, the following recommendations, which should be read within the context of the analysis and comments for the respective EC, are made:

- insert a new paragraph (2) to Article 36A in the AML/CFT Law to the effect that a supervisory authority appointed under the AML/CFT Law that already has a supervisory remit under other legislation may apply its prudential supervisory powers under the respective laws for the purposes of supervising compliance under the AML/CFT Law with the exception of the application of administrative or other penalties and sanctions under these laws as these are contemplated under the AML/CFT Law;
- insert a new paragraph (6) to Article 30 of the AML/CFT Law providing for the off-site examination powers of the FIU; and
- clarify the general powers of the FIU to undertake unconditioned on-site examinations.

### 3.18.3. Rating for Recommendation 29

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.29** | **NC** | • absence of a legal mandate for the CBK to apply prudential supervisory powers for the purposes of the AML/CFT Law;<br>• absence of a mandate for the FIU to undertake offsite examinations;<br>• legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations;<br>• no adequate powers of enforcement and sanctions on |

174. Recommendations to rectify this weakness are provided under Section 3.19 on Recommendation 17 - Sanctions.

| | Rating | Summary of factors underlying rating |
|---|---|---|
| | | directors and senior management; and<br>• consequent effectiveness issues including:<br>– human resources for supervisory authorities are insufficient thus impacting effectiveness;<br>– lack of relevant training programmes for supervisory staff impacts effectiveness; and<br>– need for authorities to maintain more meaningful statistics, otherwise supervisory effectiveness cannot be adequately judged. |

## 3.19. Sanctions (R.17)

### 3.19.1. Description and Analysis

1926. Recommendation 17 obliges countries to ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural and legal persons covered by the AML/CFT obligations that fail to comply with their requirements for the prevention of ML and the FT.

1927. In the light of the situation where the CBK, notwithstanding its delegated supervisory remit for the purposes of the AML/CFT Law, has no power to invoke sanctions, penalties or other remedial measures conferred upon it for prudential purposes through other financial legislation for the purposes of the AML/CFT Law, the following paragraphs will focus on the sanctions under the AML/CFT Law and any reference to the former is for the sake of information and completion.

1928. The analysis for EC 29.4 above also applies for the purposes of the analysis for Recommendation 17 under this section.

1929. In January 2014 the FIU, in consultation with the MoF, issued an Administrative Instruction No. 03/2014 on Procedures for Applying Administrative Sanctions for Non- compliance of Reporting Subjects with the AML/CFT Law. The Administrative Instruction is issued on the basis of the legal provisions under Article 31 of the AML/CFT Law which requires the FIU in consultation with the Minister of Finance, to issue a sub-legal act to define the administrative offence procedure.

1930. Administrative Instruction No. 03/2014 establishes procedures for the imposition of the administrative sanctions contemplated by Articles 31, 31A and 31B of the AML/CFT Law. Further to the establishment of procedures, the Administrative Instruction provides for the designation of the FIU as the competent authority to impose administrative sanctions and for an appeals mechanism for the reporting subjects which, while introducing the first level of appeal to be made to the FIU itself and which appeal should be heard in an independent way, it further provides for appeals to the Courts.

1931. Notwithstanding the provisions of the Directive for the FIU officers involved in the imposition of the penalty not to form part of the review team on an appeal by a reporting subject, the assessment team has reservations on the transparency of the appeals mechanism with appeals being filed with the FIU who is the authority that is established for imposing the fine in the first instance. However the assessment team acknowledges that this procedure is in accordance with the provisions of Article 126 of the Law No. 02/L-28 on Administrative Procedures.

1932. It is not clear, from a legal aspect, how Administrative Instruction No. 03/2014 which is issued for the purposes of paragraph (2) of Article 31 of the AML/CFT Law, also provides for the appointment of the FIU as the competent authority for imposing administrative sanctions including those sanctions under Article 31A and Article 31B when the latter two Articles do not refer to any determination by the FIU as included in Article 31.

***Effective, proportionate and dissuasive sanctions – Essential Criterion 17.1***

1933. EC 17.1 reflects the main scope of Recommendation 17 in ensuring that effective, proportionate and dissuasive criminal, civil or administrative sanctions are available and applicable to both natural and legal persons as appropriate.

1934. As described under Section 3.18 for the analysis of EC 29.4, various financial legislation provide for the imposition of an array of sanctions and penalties that are criminal, civil and administrative in nature and that are applied to banks and financial institutions that breach the respective financial laws or rules, regulations and orders issued by the CBK there-under. Hence, such sanctions and penalties, irrespective of whether they are effective, proportionate and dissuasive, are not applicable where a financial institution or its directors or senior management fail to comply with the provisions of the AML/CFT Law.

1935. This is only natural since the AML/CFT Law itself, to an extent, provides for criminal, civil and administrative sanctions or penalties for non-compliance with the Law.

1936. Article 31 of the AML/CFT Law provides for the imposition of administrative penalties which are of a continuous nature where the FIU determines that the reporting subject has failed to comply with the obligations under the Law. Moreover Article 31A and Article 31B provide for the imposition of pecuniary penalties for specific breaches of the AML/CFT Law by legal persons and which are imposed separately from Article 31.

1937. The penalties contemplated under Article 31A and Article 31B are applicable to 'legal persons'. The assessment team therefore questions the non-applicability of sanctions under Article 31A and Article 31B of the AML/CFT Law to individual persons who are recognised as reporting subjects for the purposes of Article 16 of the AML/CFT Law.

1938. While Article 31A of the AML/CFT Law provides for a pecuniary penalty from five hundred (500) to seven thousand (7,000) euros to be imposed on legal persons for the listed infringements, Article 31B provides for a pecuniary penalty from five hundred (500) to ten thousand (10,000) euros to be imposed on legal persons for the listed infringements.

1939. It is not clear either in the AML/CFT Law or in the Administrative Instruction No. 03/2014 why the infringements under Article 31A carry a lower maximum penalty than those listed under Article 31B as the seriousness of the infringements appear to be of a similar nature.

1940. Within this context the assessment team also expresses reservations as to what extent the penalties contemplated under Article 31A and Article 31B of the AML/CFT Law do in fact cover breaches of obligations under the AML/CFT Law. For example notwithstanding that there is no obligation on banks and financial institutions to apply their internal policies, procedures and controls to their branches and subsidiaries in foreign countries, yet the AML/CFT Law under Article 31B foresees a pecuniary penalty for *failure to ensure detection and prevention measures for money laundering and terrorist financing defined in this law in its business units, subsidiaries and companies wherein he owns majority of shares and the majority of decision making rights, located in a third country (item 1.1).* Also, whereas the AML/CFT Law does not provide for simplified CDD, yet Article 31A contemplates a pecuniary penalty for *failure to obtain the required customer data within the framework of the simplified customer due diligence or failure to obtain such data in the prescribed manner with this Law (item 1.14).* Other references are found in Article 31B in relation to third party reliance when the AML/CFT Law is silent on the matter (Item 1.7 and Item 1.9).

1941. Moreover, for specific persons and entities under the AML/CFT Law, the Law provides for administrative measures that may be taken in terms of the respective laws (Articles refer to AML/CFT Law):

> *Article 24 (paragraph (8)):* The Competent body under the Law on Freedom of Association in Non-Governmental Organisations (No. 03/L-134) may suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organisations (No. 03/L-134). The imposition of such sanction shall be without prejudice to any criminal proceedings.
>
> *Article 25 (paragraph (7)):* The Political Party Registration Office may investigate a political party's compliance with the present article and may suspend the registration of a political party for a violation of any provision of the present article in accordance with

Article 5 of UNMIK Regulation No. 2004/11. A sanction under the present paragraph shall be without prejudice to any criminal proceedings.

*Article 26 (paragraph (14)):* A sanction imposed by the competent Bar Association, the Kosovo Board on Standards for Financial Reporting or any other relevant professional association of covered professionals for a breach of this Law shall be without prejudice to any criminal proceedings.

*Article 27 (paragraph (4)):* A decision by the Municipal Cadastral Office to reject registration on the grounds of failure to comply with the present article, shall be made, and may be reviewed, in accordance with Law No. 2002/5 on the Establishment of an Immovable Property Rights Register, as promulgated by UNMIK Regulation No. 2002/22 of 20 December 2002.

1942. It should be noted that the AML/CFT Law does not provide for such administrative or other measures in the case of casinos and other gaming houses (Article 28 of the AML/CFT Law) and hence casinos and other gaming houses, as legal persons, would be subject to the penalties contemplated under Article 31A and Article 31B of the AML/CFT Law.

1943. Article 33 of the AML/CFT Law provides for the punishment (through imprisonment and fines) of other criminal offences for breaches of the provisions of the Law when such offences are made intentionally and wilfully. Examples of such offences would include wilful false statements, destruction of documents, tipping off, obstructing an on-site inspection in terms of Article 30 of the AML/CFT Law and others. Punishments under this Article 33 can be imposed on the legal person, senior officials and other members of the staff of reporting entities, FIU personnel and any other person committing such offence.

1944. It should be noted, for example, that while paragraph (9) of Article 33 provides that: *Whoever unlawfully refuses or obstructs an inspection lawfully undertaken pursuant to paragraph 1 and 3 of Article 30 of this law, or willfully conceals records which shall be kept and presented pursuant to this Law, commits a criminal offence punishable by imprisonment of up to one year and a fine of up to € one hundred thousand (100,000)* this is only applicable to inspections by the FIU and there are no provisions for such penalties should the CBK, in terms of its delegated supervisory functions for the purposes of the AML/CFT Law, be obstructed in carrying out an on-site examination.

1945. According to Article 5 of the Law on Liability of Legal Persons for Criminal Offences: *A legal person is liable for the criminal offence of the responsible person, who has committed a criminal offence, acting on behalf of the legal person within his or her authorisations, with purpose to gain benefit or has caused damages for that legal person. The liability of legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person.* Moreover, according to the same Article 5: *The liability of the legal person is based on the culpability of the responsible person.*

1946. In dealing with the criminal liability of legal persons for the purposes of the AML/CFT Law, Article 34 of the Law states that if a legal person commits an offence under the AML/CFT Law, every director and other person involved in the management of that legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that the offence was committed without his or her consent or knowledge; and that he/she took reasonable measures to prevent the commission of the offence as ought to have been exercised by that person having regard to the nature of his or her functions in that capacity.

1947. Administrative, civil or criminal sanctions contemplated by various financial legislation for breaches of such legislative provisions by banks and financial institutions, their directors or senior management and that are therefore imposed for prudential or criminal purposes accordingly, are not applicable for breaches of the AML/CFT Law.

1948. The provisions under Article 31 of the AML/CFT Law are of a continuous nature and it is therefore not clear in the AML/CFT Law or the Administrative Instruction 03/2014 issued by the FIU how such continuous penalty is imposed parallel to the imposition of other pecuniary penalties contemplated under Article 31A and Article 31B.

1949. The AML/CFT Law also provides for administrative measures that can be taken by other authorities, such as the removal of licences or suspension of registration. It is debatable to what extent these provisions under the principal laws can be applied for breaches of the AML/CFT Law

when such authorities may not have sufficient information on such breaches, and where the FIU itself is the legal authority to monitor such persons for the purposes of the AML/CFT Law, thus also creating an uneven playing field in supervisory matters:

- *Article 24 (paragraph (8)):* The competent body under the Law on Freedom of Association in Non-Governmental Organisations (No. 03/L-134) is not required by the AML/CFT Law to monitor NGOs for the purposes of the AML/CFT Law as such supervisory power is vested within the FIU. Hence it is debatable to what extent the provisions of Article 24(8) can be imposed;
- *Article 25 (paragraph (7)):* On the other hand, in the case of political parties, the AML/CFT Law is empowering the Political Party Registration Office to investigate a political party's compliance with the provisions of Article 25 of the AML/CFT Law before empowering it to suspend a registration of a political party. Paragraph (7) of Article 25 may need to be reviewed in the light of the recent amendments to the AML/CFT Law which puts Political Parties as reporting subjects under Article 16 of the AML/CFT Law subject to FIU supervision;
- *Article 26 (paragraph (14)):* Covered professionals as defined in the AML/CFT Law fall within the supervisory remit of the FIU and it is therefore debatable to what extent the relevant prudential competent authorities would be in a position and legally empowered to impose sanctions for breaches of the AML/CFT Law – the more so since, according to the FIU Administrative Instruction No. 03/2014 on procedures for the application of administrative sanctions, administrative sanctions can only be applied by the FIU under Article 31 of the AML/CFT Law. This has been confirmed by the associations or chambers of covered professionals met by the assessment team in the course of the on-site visit;
- *Article 27 (paragraph (4)):* Since Article 27 establishes the requirement of a specific additional document for registration or transfer of immovable property the MCO may be in a position to take action as provided under this paragraph of Article 27.

1950. It is therefore recommended to review the above provisions, which are the result of previous UNMIK Regulations that are now repealed, within the context of the recommended redrafting of Article 31 of the AML/CFT Law as provided below.

1951. Other sanctions contemplated by Article 33 of the AML/CFT Law are of a criminal nature and apparently fall within the jurisdiction of the Law Courts.

1952. It is however noted that Article 33 of the AML/CFT Law carries certain criminal offences which are derived from previous UNMIK Regulations and which may be appropriate under other laws beyond the AML/CFT Law and which are creating legal conflict.

1953. One such case is paragraph (8) of Article 33 of the AML/CFT Law which is derived from UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, now repealed, and which establishes that: *Whoever acts as a bank or financial institution as defined in the present Regulation without registering in accordance with section 3.1 of the Banking Regulation, commits a criminal offence punishable by imprisonment of up to one (1) year and a fine of up to € one hundred thousand (100,000).*

1954. Paragraph (5) of Article 58 of the present Law on Banks provides that: *Any person who engages in unauthorised deposit-taking in contravention of Article 5 of this Law, notwithstanding any other provision of law, shall be subject to criminal penalties. In addition, the CBK may impose fines of up to ten thousand (10,000) Euros for each day that the infraction continues and be empowered to seek the liquidation of the business of such person under the provisions of applicable law.*

1955. Moreover, Article 84 of the Law on Banks which provides for criminal offences under the Act provides that: *A person who conducts the business of banking without obtaining a banking license within this Law is guilty of an offence and upon conviction may be subject to imprisonment for up to three (3) years, a fine of up to ten thousand (10,000) Euros, or both.*

1956. It follows that the same offence, which is not related to ML but which should be covered by the specific law, the Law on Banks, is considered as a criminal offence under both legislation; it carries different penalties; creates legal ambiguity and results in legal complexity in the application of the criminal penalties.

1957. It is therefore highly important that in further amending the AML/CFT Law present criminal and other offences are reviewed for legal certainty and avoidance of legal complexity in application.

1958. The FIU and the CBK have both informed that they have never imposed any sanctions. One of the main reasons being the concern on the application of sanctions under the financial laws for the purposes of the AML/CFT Law by the CBK in the absence of a legal remit to apply sanctions for the purposes of the AML/CFT Law.

1959. Without prejudice to the concerns raised by the assessment team as to why the infringements under Article 31A of the AML/CFT Law carry a lower maximum penalty than those listed under Article 31B as the seriousness of the infringements appear to be of a similar nature and level, it is recommended that Article 31 of the AML/CFT Law be amended to reflect the requirements under FATF Recommendation 17 through a graduated regime of administrative penalties which does not necessarily be of a pecuniary nature:[175]

**Article 31**
**Administrative Sanctions and Remedial Measures**

(1) The FIU, in consultation and in co-operation with any other supervisory competent authority designated under this Law, and as appropriate within their supervisory remit, and in consultation and co-operation with other competent authorities responsible for specific sectors that are subject to the provisions of this Law,[176] shall impose administrative sanctions and take such remedial measures as determined by this paragraph and which shall be applied proportionately to the severity of the offence, to individual and legal persons under this Law or their directors or senior management as the case may be:

- issue written warnings;
- issue written orders requiring the reporting subject or other person or entity to take remedial action to rectify specified identified weaknesses within specified periods of time;
- order a reporting subject or any other person or entity to periodically report on the remedial measures being taken;
- requiring a reporting subject or any other person or entity not to engage in one or more of the licensed activities;
- dismiss, suspend or replace a person from his or her position in the entity concerned;
- 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;
- restrict the powers of managers, directors or other senior officials;
- impose administrative penalties in accordance with the provisions of this Article and Article 31A and Article 31B without prejudice to any criminal proceedings;[177]
- request the relevant comptetent authority to suspend or withdraw the licence or registration.

(2) A determination made by the FIU notifying a reporting subject under this Law or any other person or entity required to take measures under this Law or any other person or entity upon whom the FIU issued an order to provide the FIU with documents or information required by the FIU for the purposes of this Law, of a failure to comply with this Law shall constitute a violation of the obligations set under this Law which shall be subject to an administrative sanction in a form of a fine of five hundred (500) Euros for each day of non-compliance following the date of notification. The imposition of such a fine on a reporting subject shall be without prejudice to the imposition of administrative penalties

175. The proposed redrafting of Article 31 includes recommendations for other Essential Criteria for Recommendation 17. These will be indicated accordingly in the respective analysis.

176. The words "and in consultation and co-operation with other competent authorities responsible for specific sectors that are subject to the provisions of this Law" are intended to create the missing link with the various Articles in the AML/CFT Law as referred above whereby the FIU and the specific competent authorities may consult and cooperate before imposing sanctions.

177. Article 31A and Article 31B in the amended AML/CFT Law provide for the application of the contemplated administrative penalties only to legal persons while the recommendation in this Report includes persons or entities as reporting subjects and their directors and senior management as may be the case – see Section 3.11.3 with respect to EC 17.3.

provided under Article 31A and Article 31B and shall be without prejudice to any criminal proceedings.[178]

(3) For the purposes of paragraph (2), the FIU, in consultation with the Minister of Finance, may issue a sub-legal act to define the administrative offence procedure, including procedures for the parallel imposition of penalties under paragraph (2) of this Article, under Article 31A and under Article 31B and to designate an authority responsible to impose administrative sanctions and penalties contemplated by therein.
(4) The imposition of the administrative sanctions in accordance with paragraph (2), Article 31A and Article 31B may be contested before a court of competent jurisdiction.[179]

**Article 31A –**
**Administrative Pecuniary Penalties**

(*It is recommended to retain the provisions of the present Article 31A but to carry out an assessment of each penalty in relation to the presence of obligations under the Law*)

**Article 31B –**
**Further Administrative Pecuniary Penalties**

(*See comments for Article 31A but with reference to the present Article 31B in the AML/CFT Law*).

***Designation of authority to impose sanctions – Essential Criterion 17.2***

1960. EC 17.2 requires the designation of an authority (e.g supervisory authority or FIU) empowered to apply sanctions. The Standard does not expect that only one authority is designated and provides for the designation of different authorities that may be responsible for applying sanctions depending on the nature of the requirement that was not complied with.

1961. The AML/CFT Law currently does not provide for a competent authority responsible for the imposition of administrative sanctions or administrative penalties except indirectly, and subject to interpretation, for the FIU under Article 31.

1962. Since the AML/CFT Law provides for the imposition of further administrative sanctions in Article 31A and Article 31B it is apparently being assumed by the FIU that consequent to the interpretation of the provisions of Article 31 the FIU has competence for the imposition of the administrative penalties under Article 31A and Article 31B. The authorities claim that the FIU further has such powers by virtue of Administrative Instruction 03/2014 on procedures for applying administrative sanctions for non-compliance of reporting subjects with AML/CFT Law issued in terms of paragraph (2) of Article 31 of the AML/CFT Law. The assessment team begs to differ from this opinion mainly because the empowerment for the issue of the Administrative Instruction comes from Article 31 of the AML/CFT Law which defines the administrative sanction. Paragraph (2) of Article 31 infact states that *The FIU in consultation with Minister of Finance, may issue a sub-legal act to define the administrative offence procedure.* It is debatable whether this provision covers the designation of an authority to impose the administrative sanctions.

1963. The AML/CFT Law is not clear on the responsibilities to impose administrative penalties. While the FIU is indirectly and subject to interpretation referred to under Article 31 and for the purposes of Article 31, there is no reference to any competent authority for the purposes of Article 31A and Article 31B, even if the intention of the legislator was for an interpretation as is being assumed by the FIU. There is a need to introduce provisions to designate an authority/ies to impose them. To this effect the Kosovo authorities may wish to consider the proposed amendments to Article 31 as detailed above.

1964. As already determined under this Report, while the financial legislation does provide for administrative sanctions that may be imposed upon the financial sector by the CBK, such

178. The proposed paragraph (2) draws on the current and the previous paragraph (1) of Article 31 of the AML/CFT Law.

179. The proposed paragraph (4) reflects the current paragraph (3) to Article 31 but is slightly amended to refer to the financial administrative sanction under paragraph (2) and Articles 31A and 31B only since the proposed administrative sanctions under the proposed new paragraph (1) shall be within the discretion of the FIU and the relevant supervisory authorities – however Kosovo Authorities may wish to consider this within the legal structure of Kosovo.

administrative sanctions are of a prudential nature and not applicable for breaches of the AML/CFT Law as already demonstrated under this Report.

1965. Indeed, no administrative sanctions have been imposed by the CBK or the FIU for the purposes of the AML/CFT Law.

1966. Criminal penalties contemplated by the AML/CFT Law fall within the jurisdiction of the Courts.

1967. There is therefore a clear need to provide for a graduated system of non-pecuniary administrative sanctions and to designate an authority/ies to impose the administrative and pecuniary sanctions as provided for under Articles 31, 31A and 31B of the AML/CFT Law.

1968. The proposed redrafting of the present Article 31 and the proposed amendments to Article 31A and Article 31B of the AML/CFT Law under the recommendation for EC 17.1 aim to cover this requirement.

***Sanctions applicable to directors and senior management – Essential Criterion 17.3[180]***

1969. EC 17.3 requires that sanctions are available not only against the legal persons that are financial institutions and businesses but also to their directors and senior management.

1970. Administrative sanctions under Article 31 of the AML/CFT Law are only applicable to reporting subjects while sanctions under Article 31A and under Article 31B are applicable to legal persons.

1971. Article 33 of the AML/CFT Law provides for other criminal offences. In some instances it refers to 'Whoever… commits a criminal offence punishable by …'. In other instances, for example in paragraph (4), reference is made to *an officer, director, agent or employee of a bank or financial institution*. While in other instances, for example paragraph (6), the Law specifically refers to *An official of the FIU who willfully:*

1972. However, under Article 34, in establishing the criminal liability of a legal person, the AML/CFT Law provides that: *If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that:*.

1973. With the absence of provisions for the imposition of non-pecuniary administrative sanctions and the imposition of pecuniary sanctions on legal persons only, the imposition of sanctions on directors and senior management under the AML/CFT Law is also absent.

1974. In the case of criminal offences, Article 33 of the AML/CFT Law appears to be ambiguous in interpretation although at times (paragraph 4) it specifically imposes penalties on directors, officers, agents or employees of a bank or financial institution. This ambiguity is partly mitigated through the provisions of Article 34 of the AML/CFT Law which holds directors and senior management responsible for an offence under the Law committed by the legal person unless they can prove otherwise. Indeed, in the replies to the Questionnaire for Cycle 1 with respect to the analysis of EC 17.3 the FIU states that: *Applicable legislation in Kosovo does not foresee sanctions or offences against directors and their senior managers. But, in the framework of amending and supplementing the Law No. 03-L/196 on Prevention of money laundering and terrorist financing, a recommendation was made that such sanctions be incorporated in the concerned law.*

1975. This statement is contrary to the interpretation being given to Article 34 of the AML/CFT Law and leaves concerns on the application of Article 34 in practice. Moreover, the new Article 31A and Article 31B state that *A pecuniary penalty ranging from …… shall be imposed on legal persons for the following infringements:*. The assessment team therefore does not find that such provisions have been incorporated in the AML/CFT Law as amended in 2013.

1976. Therefore, further to the recommendations for redrafting Article 31 and for amending the introduction to Article 31A and Article 31B of the AML/CFT Law under the analysis for EC 17.1 of

180. Refer also to the analysis and comments under Section 3.18 regarding EC 29.4 for FATF Recommendation 29.

this Report, it may be appropriate to clarify paragraph (1) of Article 34 of the AML/CFT Law as follows (recommendation in italics):

> *Article 34 (paragraph (1):* If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence *and shall be liable to the penalties contemplated thereto by this Law,* unless that person proves that:

***Range of sanctions – Essential Criterion 17.4***

1977. EC 17.4 requires a range of sanctions that is broad and proportionate to the severity of the situation. A range of sanctions would include the power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend the financial institution's licence, as and where applicable.

1978. As already determined under this Report the AML/CFT Law does not provide for a range of sanctions. Indeed it only provides for administrative sanctions that are of a pecuniary nature – see the analysis above for EC 17.1.

1979. Administrative sanctions that are not pecuniary in nature are provided by specific financial legislation but applicable only for *prudential* purposes for breaches of the specific legislation. Hence such sanctions cannot be applied for breaches of the AML/CFT Law as otherwise there would be conflicts between the respective legislative provisions - please refer also to the Description and Analysis in the previous paragraphs for Recommendation 17.

1980. Whereas in its replies to the Cycle 1 Questionnaire the CBK does not provide a reply, the reply provided by the FIU raises concerns that have been repeatedly debated in this Report.

1981. In its replies to the Cycle 1 Questionnaire on the other hand the FIU states that: *Applicable legislation on prevention of money laundering and terrorist financing in Kosovo, does not foresee disciplinary and financial sanctions and the competence to withdraw, limit or suspend the license of the financial institution. But, there are special laws in Kosovo on reporting subjects enabling to competent authorities suspension of license of those subjects, which are covered under the law on prevention of money laundering and terrorist financing.*[181]

1982. This statement indicates that, despite the absence of a legal mandate to the CBK or to any other supervisory authority provided through the AML/CFT Law, the FIU is of the opinion that supervisory authorities, such as the CBK, can apply measures of a prudential nature under the specific financial legislation for the purposes of the AML/CFT Law.[182]

1983. Indeed the AML/CFT Law does not even empower the FIU to propose the application of such prudential measures to other supervisory authorities – the analysis for EC 17.1 above of this Report indeed questions the applicability of certain provisions with respect to NGOs, Political Parties and others as contemplated by the AML/CFT Law.

1984. For these purposes, this Report concludes that currently there are no legal provisions under the AML/CFT Law for the imposition of disciplinary administrative sanctions, although the Law does provide for sanctions of a pecuniary nature and sanctions for criminal offences.

1985. The recommendations made above under the analysis of EC 17.1 for the redrafting of Article 31 of the AML/CFT Law should therefore apply also for the purposes of EC 17.4.

***Effectiveness***

1986. The sanctioning regime for AML/CFT purposes is rather weak and hence negatively impacts on the effectiveness of the AML/CFT regime. Indeed, the authorities have reported that no sanctions of any nature have ever been imposed. As already indicated earlier in the Report, the

181. Pecuniary (financial) sanctions have since been introduced in the AML/CFT Law through the new Article 31A and Article 31B.

182. It is probably because of this reason that the AML/CFT Amending Law has not provide for such non-pecuniary administrative sanctions as required for the purposes of EC 17.4.

assessment team does not consider that overall the available sanctions are effective, proportionate and dissuasive.

1987. Although the AML/CFT Law provides for administrative sanctions that are pecuniary in nature there is a complete lack of any system of graduated disciplinary sanctions that can be applied. This further raises concerns of effectiveness as some authorities seem to hold that such administrative sanctions for the financial sector can be imposed by the CBK under its respective financial sector laws such as the Law on Banks.

1988. Moreover, there are duplication of offences in the AML/CFT Law and other financial legislation, such as the Law on Banks and which carry different penalties for the same offence thus creating legal ambiguity which negatively impacts on the effective implementation.

### 3.19.2. Recommendations and Comments

1989. The analysis of the legal provisions for sanctions under the AML/CFT Law identifies shortcomings and lack of legal clarity on the application of sanctions contemplated by other laws for the purposes of the AML/CFT Law.

1990. Moreover, there appears to be conflicts in the criminal offences contemplated by the AML/CFT Law with respect to other laws resulting from previous UNMIK Regulations which have now been repealed with the introduction of the specific laws.

1991. Furthermore there is legal ambiguity as to which authority is responsible to impose pecuniary administrative sanctions contemplated under Article 31, Article 31A and Article 31B of the AML/CFT Law although the FIU seems to have assumed such responsibility consequent to the interpretation of the provisions of Article 31 and in accordance with Administrative Instruction 03/2014 on procedures for applying administrative sanctions for non-compliance of reporting subjects with the AML/CFT Law issued in terms of paragraph (2) of Article 31 of the AML/CFT Law.

1992. In brief, some of the main findings are as follows. It should however be mentioned that a reading of the following does not substitute a reading of the context within which such weaknesses have been identified;

- need of legal clarity on the imposition of the continuous penalty provided for under Article 31 parallel to the imposition of other pecuniary penalties contemplated under Article 31A and Article 31B (EC 17.1);
- need of clarification why the infringements under Article 31A carry a lower maximum penalty than those listed under Article 31B as the seriousness of the infringements appear to be of a similar nature;
- non-applicability of sanctions under Article 31A and Article 31B to individual persons who are recognised as reporting subjects for the purposes of Article 16 of the AML/CFT Law (EC 17.1);
- the imposition of penalties under Article 31A and Article 31B for breaches of obligations that are not imposed by the AML/CFT Law;
- concern over the applicability of certain provisions of the Law for administrative sanctioning purposes in particular for paragraph (8) of Article 24 for NGOs and paragraph (14) of Article 26 for covered professionals (EC 17.1);
- concern over criminal offences under the AML/CFT Law which are also reflected in the specific financial legislation and which carry different penalties thus creating legal conflict (EC 17.1);
- reservations on the designation of the competent authority to impose administrative sanctions under Article 31A and Article 31B (EC 17.2);
- legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects (EC 17.3);
- absence of range of sanctions to be applied proportionately to the severity of the offence (EC 17.4); and
- concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law (EC 17.4).

1993. Moreover no sanctions have been applied by the FIU, the CBK or any other authority under the Law for any breaches of the AML/CFT Law.

1994. Having identified these shortcomings, the Report makes various recommendations to rectify them. It is extremely important that all recommendations made are read within the analysis of the situation and comments made in this Report for the specific EC.

- review of Article 24 paragraph (8), Article 25 paragraph (7), Article 26 paragraph (14) and Article 27 paragraph (4) within the context of the proposed amendments to Article 31 of the AML/CFT Law and the new designation of reporting subjects;
- review present criminal and other offences for legal certainty and avoidance of legal complexity in application due to dual offences and different penalties;
- redraft Article 31 to provide for a broader range of determination by the FIU for non-compliance with the provisions of the AML/CFT Law;
- review the penalties under Article 31A and Article 31B with relation to obligations under the AML/CFT Law;
- clarify paragraph (2) of Article 31 for the designation of an authority/authorities to impose sanctions through the revised Article 31 for the purposes of paragraph (2) of Article 31 itself, Article 31A and Article 31B of the AML/CFT Law;
- ensure sanctions are applicable to directors and senior management through the revision of Article 31 and for this purpose amend Article 34 of the AML/CFT Law; and
- introduce range of disciplinary administrative sanctions that are not pecuniary in nature through the revision of Article 31 as proposed.

### 3.19.3. Rating for Recommendation 17

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.17** | **PC** | • concern over the applicability of certain provisions of the Law for administrative sanctioning purposes;<br>• concern over dual criminal offences in the AML/CFT Law and specific financial legislation carrying different penalties;<br>• non applicability of sanctions under Article 31A and Article 31B to reporting subjects that are not in the form of a legal person;<br>• legal ambiguity on the application of penalties under Article 31A and Article 31B for breaches of obligations that are not covered by the AML/CFT Law;<br>• legal uncertainty on the designation of a competent authority to impose administrative sanctions under Article 31A and Article 31B;<br>• legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects;<br>• absence of range of disciplinary administrative sanctions;<br>• concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law; and<br>• consequent effectiveness issues arising out of the inadequacy of the range of sanctioning regime and the lack of application of sanctions. |

## 3.20. Money or Value Transfer Services (SR.VI)

### 3.20.1. Description and Analysis

1995. SR VI on alternative remittance services requires that persons or legal entities, including agents, that provide a MVT service, including transfers through informal systems or networks,

should be registered or licensed and subject to supervision on compliance with the prevention of ML and FT obligations that apply to banks and non-bank financial institutions. Persons and entities providing such services should further be subject to administrative, civil or criminal sanctions.

1996. This Report has analysed the issue of 'non-bank financial institutions' under Section 3 under subtitle *Scope of coverage of AML/CFT preventive measures* and, with more relevance to Section 3.17 under the analysis for *Licensing or registration of money value transfer and currency exchange services – EC 23.5.*

1997. The analysis that follows for the essential criteria for SR VI will therefore refer to the above mentioned analysis as necessary where such analysis reflects specific essential criteria for the SR.

***Licensing and/or registration of money or value transfer services – Essential Criterion SR VI.1***

1998. EC SR VI.1 requires that MVT service providers are to be licensed or registered, maintained in a reference register and be subject to compliance monitoring with their licensing or registration conditions.

1999. The analysis in Section 3.17 of this Report for EC 23.5 dealing with the licensing or registration of MVT and currency exchange services applies to the analysis of EC SR VI.1 and should be read accordingly.

2000. In terms of the Law on Banks, an MVT service is an activity that is attributed to banks under Article 44 and to NBFIs in terms of Article 94 on the permitted activities for NBFIs. The definition of NBFIs in the Law on Banks however does not attribute this activity to NBFIs.

2001. Article 8 of the Law on the CBK states in paragraph (1) that the tasks of the CBK in pursuit of the objectives set forth in Article 7 and in other provisions of the Law on the CBK shall include to regulate, license, register and supervise financial institutions as further specified in this Law or any other Law. Moreover Article 23 of the Law on the CBK further states that the CBK shall be exclusively responsible for the prudential regulation, licensing, registration and supervision of banks and other financial institutions as further specified in the relevant Laws.

2002. Moreover, Article 4 of the Law on Banks attributes the sole responsibility for the issuance of licences to all banks and registration of all MFIs and NBFIs to the CBK.

2003. Article 4 of the Law on Banks further requires the CBK to maintain a central register that shall record for all financial institutions the name, the head office and branch office addresses, and current copies of its charter or equivalent establishing documentation and by-laws for inspection by the public. The register shall further maintain a list of all financial institutions whose licence or registration has been revoked, but their charter documentation and by-laws shall be removed.

2004. Article 91 of the Law on Banks specifies that no person shall engage in the business of a NBFI unless that person has first registered with the CBK under the provisions of the Law on Banks, and without being at all times in full compliance with the Law on Banks and with all applicable Regulations and Orders issued by the CBK under its regulatory powers under the Law. Moreover Article 92 of the Law on Banks provides that all NBFIs must be regulated by the CBK while Article 104 requires that all NBFIs are subject to examinations by the examiners of the CBK on their prudential compliance with the licence and the Law on Banks or any Regulations or Orders issued there-under.

2005. The licensing and the prudential regulatory and supervisory legal powers of the CBK for NBFIs are further reflected and clarified in Rule XVI of the CBK on the Registration, Supervision and Operations of Non-Bank Financial Institutions.

2006. Therefore although MVT services providers are not included in the definition of a financial institution in the Law on the CBK and in the Law on Banks, the service itself is included as an activity under Article 94 of the Law on Banks for NBFIs.

2007. As established under the analysis of the licensing framework for financial institutions under the analysis for EC 23.5 in this Report it transpires therefore that the various definitions of a financial institution which differ in substance could create legal uncertainties.

2008. Hence in the analysis of EC 23.5 this Report recommends harmonisation of the various definitions of a 'financial institution' and the permitted activities of financial institutions should be cross-defined accordingly in the different laws in order for legal clarity for the licensing powers of the CBK in this regard. This recommendation also applies to EC SR VI.1.

2009. Notwithstanding, according to the Law on Payment System entities that shall be allowed to provide payment services in Kosovo are banks as regulated and duly licensed by the CBK in accordance with the Law on Banks and financial institutions established by the Law on Banks authorised by the CBK to be engaged in the payment services specified by an authorisation.
2010. Without prejudice to the above, from a prudential aspect the CBK has the necessary procedures under the Law on Banks and the Law on the CBK to regulate and supervise persons providing a MVT service, including the maintenance of a register accordingly.

***Monitoring AML/CFT compliance – Essential Criterion VI.2 and Essential Criterion VI.3***

2011. EC VI.2 requires that MVT service operators are subject to the requirements and obligations for the prevention of ML and the FT, including those for the obligations under SR VII for information accompanying wire transfers.

2012. In its definition of a 'financial institution' for the purposes of the obligations for the prevention of ML and the FT, the AML/CFT Law specifies the inclusion of the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions' system.

2013. Financial institutions are included as reporting subjects under Article 16 for the purposes of the AML/CFT Law. Hence all obligations of reporting subjects, and in particular those related to banks and financial institutions, under the AML/CFT Law are applicable to MVT service providers.

2014. Under Article 19 of the AML/CFT Law, and in accordance with SR VII, banks and financial institutions providing a MVT services are further obliged to:

- obtain and verify the full name, account number, the address, or in absence of address the national identity number or date and place of birth, including when necessary the name of the financial institution, of the originator of such transfers;
- use a unique reference number if there is no account number to accompany the transfer;
- include such information in the message or payment form accompanying the transfer;
- maintain all such information and transmit it when they act as intermediaries in chain of payments;
- take measures to obtain and verify the missing information from the ordering institution or the beneficiary when they receive wire transfers with missing information;
- refuse acceptance of transfer where the missing information is not obtained; and
- report such situation to the FIU accordingly.

2015. Moreover, Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions provides further guidance to MVT service providers on their operations.

2016. In requiring MVT service providers to comply with the general principles for the prevention of ML and the FT established therein, Rule X of the CBK also provides further procedures that have to be undertaken in the course of carrying out their activities, although most of the guidance provided refers to the procedures for reporting cash transactions exceeding the €10,000 benchmark. The assessment team is informed that the proposed new CBK Regulation replacing Rule X shall provide more detailed guidance on wire transfers, related also to Special Recommendation VII.

2017. Moreover, for the purposes of obtaining an authorisation to provide payment services in terms of the Law on Payment System, a financial institution must provide proof of its ability to comply with the AML/CFT Law.

2018. EC VI.3 requires that MVT service providers be subject to monitoring systems on their compliance with their obligations under the AML/CFT Law for the prevention of ML and the FT.

2019. In accordance with the provisions of Article 36A of the AML/CFT Law and consequent to the MoU between the FIU and the CBK, the CBK is the designated authority responsible to monitor banks and financial institutions on their compliance with the AML/CFT Law and any Rules or Regulations issued there-under.

2020. Since the activities of a MVT service provider are included in the definition of a 'financial institution' for the purposes of the AML/CFT Law, MVT service providers are recognised as reporting subjects for the purposes of the Law and hence would fall within the monitoring and supervisory remit of the CBK for the purposes of the AML/CFT Law.
2021. Moreover, consequent to the harmonisation of the definition through the inclusion of MVT services in the definition of a 'financial institution' and consequently the application of all requirements and obligations under the AML/CFT Law, it follows that all weaknesses and shortcomings identified in the analysis in Sectiion 3 of this Report on such obligations also apply to MVT service provides for the analysis of EC SR VI.2.

2022. These would include concerns raised in this Report on the application of the full CDD measures including beneficial ownership; timing of verification; risk based approach; PEPs; tipping off; and others as detailed in this Report.

2023. All relevant recommendations made in this Report for such weaknesses or shortcomings are therefore also applicable to MVT service providers under SR VI.

2024. On the other hand the Report positively notes the application of additional obligations to MVT services providers in accordance with SR VII on the inclusion of customer details on remittance transfers and actions to be taken where customer information is missing in an inward transfer.

***List of agents – Essential Criterion SR VI.4***

2025. EC SR VI.4 requires licensed or registered MVT service providers to maintain a list of its agents which must be made available to the designated competent authority.

2026. It is not clear from the Law on Banks whether MVT service providers are allowed by the Law to appoint agents. Although there is no specific prohibition yet there is no specific allowance or authorisation to do so. An analysis of the Law on Banks in this regard shows that there is no definition of the term 'agent' although the term is used throughout the Law for different purposes, and the definition of the term 'non-bank financial institution' does not refer to 'agents'.

2027. Article 2 of the Law on Banks specifies the application of the Law to all entities exercising banking and financial activities, their shareholders, Board of Directors and Senior Managers, employees, *agents* and affiliates as well as to the operations of MFIs and other NBFIs.

2028. Within the context of banks the Law on Banks makes various references to 'agents' of banks – for example under Article 57 in connection with the supervisory powers of the CBK; Article 77 in connection with receivership provisions; and Article 80 in connection with secrecy provisions. Within the context of the provisions in the Law on Banks for NBFIs, the Law also makes references to 'agents' of NBFIs – for example under Article 100 on secrecy provisions.

2029. Likewise the AML/CFT Law does not provide a definition of the term 'agent' and the definition of 'financial institution' does not refer to 'agents' although the term is used throughout the Law for various purposes.

2030. Item (d) of Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions requires the institution to inform the CBK on changing of address. Item (e) further requires that a financial institution must get prior approval of the CBK before establishing branches or new offices. This is reflected from paragraph (1.2) of Article 95 of the Law on Banks which requires NBFIs to obtain the prior approval of the CBK before the opening of new locations or any change of location.

2031. Under Article 22 of the AML/CFT Law in dealing with the reporting to the FIU and more specifically in addressing the 'tipping off' issue, the AML/CFT Law refers to directors, officers, employees and *agents* of any bank or financial institution (paragraph 4); and in paragraph (11) of Article 26 in relation to covered professionals.

2032. The term "new locations" under paragraph (1.2) of Article 95 of the Law on Banks is not necessarily referring to "agents" in the wire transfer context as "agents" could be, and very often are, other entities carrying out commercial business but which may receive or transfer money on behalf of the authorised service provider in terms of law.

2033. However, and prior to the coming into force of the Law on Payment System in April 2014, in practice the CBK interpreted its own Rule and consequently paragraph (1.2) of Article 95 of the Law on Banks is being interpreted as allowing NBFIs to establish agents – in which case there is a need for legal clarity of the definition of an 'agent' and its functions – the assessment team does not concur with this interpretation.

2034. The legal uncertainty as to whether a financial institution, and more specifically a MVT service provider, can appoint agents is important for the assessment of compliance with EC VI.4.

2035. Within this context it becomes important to analyse the provisions of the Law on Payment System on the appointment of *agents*. The Law on Payment System defines an agent as *a person acting on behalf of banks or other payment institutions to provide some of their services.* In terms of Article 13 of the Law on Payment Systems banks and other authorised payment institutions shall be permitted to use agents under special authorisation by the CBK. The Law however falls short from defining who could be an *agent* for the purposes of the provision of payment services, which includes money transfers – whether the agent has to be another authorised financial institution or any other entity or person not regulated for the purposes of financial services – more likely the Law is referring to the former.

2036. The Law on Payment System under Article 13 further requires that when the CBK receives a request for an agency arrangement and is eventually provided with all the necessary information in accordance with Article 13, and following the grant of the relevant authorisation, then the CBK lists the agent in a register which is to be made available to the public. There is however no obligation on the payment institution to maintain a register of its agents.

2037. In the circumstances it is recommended that legal clarity be provided through appropriate provisions either directly in the Law on Payment System or through regulations issued by the CBK defining who could act as an agent for the purposes of the Law on Payment System within the present or a redrafted definition of the term 'agent'.

2038. Furthermore, for better compliance with the provisions of EC VI.4 in ensuring that, further to the register kept by the CBK, each payment service provider keeps its own register of agents, consideration should be given to include a provision either in the AML/CFT Law or, better and more appropriately, directly in the Law on Payment System as follows:

- Where a [*bank or financial institution*] [*MVT service provider*] appoints agents to carry out activities on its behalf as established by this Law, that [*bank or financial institution*] [*MVT service provider*] shall maintain a register of such agents that shall include the name, address, business activity, date of appointment and other relevant information and conditions and shall make such register available to the relevant competent authorities.

***Sanctions – Essential Criterion SR VI.5***

2039. EC SR VI.5 requires that effective, proportionate and dissuasive criminal, civil or administrative sanctions as required under Recommendation 17 are available for obligations under FATF SR VI.

2040. The availability of sanctions and their application has already been discussed under the analysis of Recommendation 17 in this Section of this Report. The analysis under Recommendation 17 applies to EC SR VI.5 and the following paragraphs will put such analysis in perspective for SR VI.

2041. The administrative sanctions contemplated under the present Article 31 of the AML/CFT Law are applicable to all 'obligors' or 'reporting subjects' and hence, since as already established the AML/CFT Law identifies MVT service providers as reporting subjects, then Article 31 becomes applicable to MVT service providers.

2042. Other criminal offences contemplated by Article 33 of the AML/CFT Law would also be applicable to MVT services providers as financial institutions recognised as reporting subjects under Article 16 of the Law and subject to all obligations under the AML/CFT Law.

2043. The AML/CFT Law further provides for administrative sanctions of a pecuniary aspect which are applicable to all reporting subjects that are 'legal persons'. As already argued earlier in this Report it is not clear whether and how such sanctions become applicable to reporting subjects that are not legal persons. It is therefore concluded that a MVT service provider who is not a legal person may not be subject to the sanctions contemplated under Article 31A and Article 31B of the AML/CFT Law.

2044. More generally, the analysis for EC 29.4 of Recommendation 29 has identified a number of shortcoming and weaknesses in the application of sanctions to the financial sector. These findings apply in this Section to MVT services providers as financial institutions under the AML/CFT Law.

2045. Consequently the recommendations and proposals for rectifying this situation through the AML/CFT Law provided in this Report under the analysis of EC 29.4 and Recommendation 17 for a review of Article 31 of the AML/CFT Law are likewise applicable for the purposes of SR VI.

***Implementation of FATF Best Practice Paper for SR VI – Additional Element VI.6***

2046. AE SR VI.6 tries to identify whether and what measures have been taken by the country to implement the recommendations in the Best Practice Paper for SR VI.

2047. In general, the Best Practice Paper provides guidance for the licensing or registration requirements for MVT service providers; for strategies to identify the provision of such services in the informal market; for conducting an awareness campaign to inform informal service providers of their obligations; and for the application of obligations for the prevention of ML and the FT including the reporting obligations. The Best Practice Paper further provides guidance on the monitoring and supervision of these institutions and for the application of sanctions.

2048. In its appointment as the relevant competent authority for the supervision of the entire financial sector for the AML/CFT Law, the CBK becomes responsible for such matters. Moreover, it should be noted that in attributing the competences of the FIU, the AML/CFT Law charges the Unit to organise and/or conduct training regarding ML, the FT activities and the obligations of reporting subjects. Moreover, as the prudential supervisory authority, the CBK has published Rule XVI on the Registering, Supervision and Operations of Non-Bank Financial Institutions, although not specifically within the context of MVT services.

2049. Notwithstanding, there is no strategy to identify the provision of informal MVT services or to raise awareness on their obligations under the AML/CFT Laws even though the Law on Banks requires that no person may undertake the activities of a financial institution unless that person is so authorised by the CBK.

2050. It may be appropriate from a prudential aspect, which would also have implications for the prevention of ML and the FT, for the CBK to develop an identification strategy for informal activities in MVT services as part of a broader programme to assess the risk and vulnerabilities of the financial sector for ML and the FT following the NRA undertaken in 2013.

***Effectiveness***

2051. This Report finds various legal uncertainties surrounding MVT institutions which could have a negative impact on the effectiveness of the AML/CFT regime in this regard.

2052. The overall concerns expressed for the rest of the financial sector apply to MVT including the absence of a legal mandate for the CBK to apply its supervisory powers and tools under the Law on Banks for the purposes of the AML/CFT supervision of the financial sector. Moreover, this Report expresses concern on the legal uncertainty for MVTs to appoint agents within the terminology of the Methodology.

2053. Concerns on effectiveness expressed in this Report are further supported by the low number of on-site visits.

### 3.20.2. Recommendations and Comments

2054. The analysis and assessment of the implementation of the requirements under the FATF SR VI is partly covered through the analysis of other FATF Recommendations, such as Recommendations 17, 23 and 29. It follows that most findings, shortcoming and weaknesses identified in the analysis of these Recommendations become applicable to MVT service providers as financial institutions under the AML/CFT Law.

2055. While a full reading of the description, analysis and comments for this Section and other relevant parts of the Report as indicated above is highly recommended to put into context such findings, the main weaknesses can be grouped as follows:

- findings for other Recommendations, such as CDD, also apply directly to MVT services providers;
- lack of legal clarity on the type of 'agents' that may be appointed in terms of the Law on Payment System;
- absence of a legal mandate for the CBK as the relevant supervisory authority for monitoring the financial sector for AML/CFT purposes to apply its supervisory powers under the respective financial laws for the purposes of the AML/CFT Law (EC SR VI.3);
- no obligation for MVT service providers to maintain a list of agents (EC SR VI.4); and
- doubts on the applicability of effective, proportionate and dissuasive criminal, civil or administrative sanctions to MVT service providers that are not legal persons (EC SR VI.5).

2056. In order to rectify this situation various recommendations are made in this Section and other relevant parts of the Report as indicated above. Such recommendations should be read within the context of the description and analysis and comments made for the relevant criteria. The following are only indicative of such recommendations:

- harmonise the definition of a 'financial institution' in the respective legislation with that in the AML/CFT Law, including activities that may be undertaken by NBFIs;
- provide the CBK as the designated competent supervisory authority with a legal mandate to apply its prudential supervisory powers remit for the purposes of the AML/CFT Law;
- clarify in the Law on Payment System or through regulation the type of agents that may be appointed and under what conditions;
- insert a new paragraph or Article in the Law on Payment System or the AML/CFT Law obliging MVT services providers to maintain a list of agents appointed under the Law on Payment System in addition to the register mainained by the CBK;
- redraft Article 31 of the AML/CFT Law as recommended under Section 3.19 of this Report.

### 3.20.3. Rating for Special Recommendation VI

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.VI** | **PC** | • absence of a legal mandate for CBK to apply its prudential supervisory powers under the financial legislation for the purposes of the AML/CFT Law;<br>• no legal clarity on the type of agents that may be appointed;<br>• no obligation for MVT service providers to maintain a list of agents;<br>• lack of effective, proportionate and dissuasive administrative sanctions where the MVT service provider is not a legal person;<br>• low number of on-site examinations; and<br>• effectiveness issues arising mainly out of legal uncertainties. |

## 4. PREVENTIVE MEASURES – DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS (DNFBPs)

### *Main Legal Framework*

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law";
- Law on Precious Metal Works (Law No. 04/L-154 of 13 December 2012);
- Law on Accounting, Financial Reporting and Audit (Law No. 04/L-014 of 29 July 2011);
- Law on the Bar (Law No. 04/L-193 of 2 May 2013);
- Law on Notary (Law No. 03/L-010 of 17 October 2008);
- Law on Amending and Supplementing the Law No. 03/L-010 on Notary (Law No. 04/L-002 of 21 July 2011);
- Law on Games of Chance (Law No. 04/L-080 of 6 April 2012);
- MoF - Administrative Instruction No. 3/2013 on implementation of Law No. 04/L-080 on Games of Chance;
- FIU – Administrative Directives and Administrative Instructions.

### General

2057. Article 16 of the AML/CFT Law establishes the range of reporting subjects, other than the financial sector, who are subject to the obligations under the Law. It should be noted that the AML/CFT Law extends the AML/CFT obligations to other types of reporting subjects (DNFBPs) that are not included in the FATF definition. This is a positive step by the Kosovo authorities which the assessment team positively welcomes.

2058. The table below compares the reporting subjects under the AML/CFT Law with the definition in the Glossary to the FATF Methodology.

2059. Although with some minor exceptions, DNFBPs as defined in the Glossary to the FATF Methodology are broadly covered by Article 16 of the AML/CFT Law yet there are some divergences that are worth mentioning for the sake of clarity:

- While the AML/CFT Law provides a definition of a *Casino* and of a *Licensed Object of Games of Chance*, Article 16 of the AML/CFT Law only recognises casinos (including internet casinos) as subject persons, while Article 28 of the AML/CFT Law specifies that *Casinos* and *Licensed Object of Games of Chance* as defined in Article 2 of the Law are subject to the AML/CFT provisions of the Law and are obligated to take specific measures to address the risk of ML and the FT in providing gambling services. Article 28 then imposes AML/CFT obligations on *Casinos* and *Licensed Object of Games of Chance* (paragraphs 1, 2, 3); on *Gaming Houses* (paragraphs 4, 5); and on *Casinos* and *Licensed Object of Games of Chance* and *Gaming Houses* (paragraphs 6, 7). It does not appear that the Law is referring to the same type of entity but under different names and hence this gives rise to legal uncertainty and interpretation.
- Certified accountants and licensed auditors and tax advisers are recognised as reporting subjects under Article 16 of the AML/CFT Law in carrying out their professional activities. However, Article 16 further includes (accountants) with lawyers and notaries when carrying out the specified activities as per the FATF Recommendations. It is not clear why the reference to *accountants* is bracketed. Otherwise, it is debatable whether accountants would be subject to the AML/CFT obligations when undertaking the specified activities. Moreover licensed auditors and tax advisors are not included with lawyers and notaries under the specified activities. Finally, in referring to the specified activities under Article 26 the AML/CFT Law only refers to lawyers.
- While there is no threshold for dealers in precious metals and dealers in precious stones, a threshold of €10,000 is established for traders in general when payment is in cash equal to or above the threshold.
- While the AML/CFT Law recognises "trust and company service providers" as reporting subjects under Article 16, as established under the analysis of Recommendation 34 in this Report, there is no legal framework in Kosovo for the establishment, registration and legal status of entities such as 'express trusts' or similar legal arrangements.

- While recognising NGOs and political entities as subject persons Article 24 and Article 25 of the AML/CFT Law respectively impose additional obligations on NGOs and political parties and registered candidates.

2060. The preventive measures for DNFBPs fall within three main categories although other relevant Recommendations will be analysed in their applicability to DNFBPs:

- Customer due diligence and record keeping (Recommendation 12);
- Monitoring of transactions, reporting and other issues (Recommendation 16); and
- Regulation, supervision and monitoring (Recommendation 24).

***Table 22 – Comparative FATF/LPML DNFBPs***

| FATF Methodology (Glossary) | AML/CFT Law (Article 16) |
|---|---|
| Casinos (which also includes internet casinos) | Casinos, including internet casinos |
| Real Estate Agents | Real Estate Agents and Real Estate Brokers |
| Dealers in precious metals<br>Dealers in precious stones | Dealers in precious metals and dealers in precious stones |
| Lawyers, notaries, other independent legal professionals and accountants<br>• buying and selling of real estate;<br>• managing of client money, securities or other assets;<br>• management of bank, savings or securities accounts;<br>• creation, operation or management of companies;<br>• creation, operation or management of legal persons or arrangements and buying and selling of business entities. | Lawyers and notaries (accountants) when they prepare for, carry out or engage in transactions for their client concerning the following activities:<br>• buying and selling of real estate;<br>• managing of client money, securities or other assets;<br>• management of bank, savings or securities accounts;<br>• organisation of contributions for the creation, operation or management of companies; or<br>• creation, operation or management of legal persons or arrangements and buying and selling of business entities. |
| | Certified accountants and licensed auditors and tax advisers. |
| Trust and company service providers provide any of the following services to third parties:<br>• acting as a formation agent of legal persons<br>• acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;<br>• providing a registered office<br>• acting as (or arranging for another person to act as) a trustee of an express trust;<br>• acting as (or arranging for another person to act as) a nominee shareholder for another person. | Trust and company service providers that are not covered elsewhere in this law, providing the following services to third parties on a commercial basis:<br>• acting as a formation agent of legal persons;<br>• acting as, or arranging for another person to act as, a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;<br>• providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;<br>• acting as, or arranging for another person to act as, a trustee of an express trust; and<br>• acting as, or arranging for another person to act as, a nominee shareholder for another person. |

| FATF Methodology (Glossary) | AML/CFT Law (Article 16) |
|---|---|
| | **Other DNFBPS in Article 16 of AML/CFT Law** |
| | • Natural or legal persons trading in goods when receiving payment in cash in an amount of ten thousand (€10,000) Euro or more;<br>• Non-Government Organisations (NGOs);<br>• Political entities;<br>• Building construction companies. |

### 4.1. Customer due diligence and record-keeping (R.12 - Applying R.5, R.6 and R.8 to R.11)

2061. Recommendation 12 requires that DNFBPs comply with the customer due diligence requirements set out under Recommendations 5 and with the criteria set under Recommendation 6, and Recommendations 8 to 11 under prescribed situations and the established thresholds under the Interpretative Notes for Recommendations 5, 12 and 16 as follows:

- Casinos - when engaging in financial transactions equal to or above €/$ 3,000;
- Real estate agents - when buying or selling real estate for their clients;
- Dealers in precious metals and dealers in precious stones – when engaged in cash transaction equal to or above €15,000;
- Lawyers, notaries, other independent legal professionals and accountants – when preparing for or carrying out transaction for their clients under the specified activities;
- Trust and company service providers – when involved in the specified activities.

#### 4.1.1. Description and Analysis

2062. The paragraphs that follow will assess the application of the relevant Recommendations to DNFBPs through the essential criteria under the FATF Methodology. It should be mentioned that in general all the gaps, weaknesses and shortcomings identified in the same Recommendations under Section 3 of this Report on the preventive measures for financial institutions apply to DNFBPs. Notwithstanding, the following analysis identify other gaps, weaknesses and shortcomings that are specific for the DNFBPs sector. All the identified weaknesses will contribute for the consolidated rating of Recommendation 12.

2063. SCAAK representatives informed that in their view their members are aware of their obligations under the AML/CFT Law. Their Continued Programme on Education (CPE) also includes training on the prevention of ML and the FT for accountants and auditors. Training is organised by SCAAK but normally provided by the FIU. According to SCAAK members may not have a full understanding of the Law but they are aware of their obligations.

2064. On the other hand the representatives of the KCN informed that since the notary profession is relatively new most of the obligations under the AML/CFT Law are new and notaries need to become better aware of the obligations under the AML/CFT Law. Notwithstanding, notaries believe that their activities are guided by the Law on Notaries and not by the provisions of the AML/CFT Law. In particular this is reflected in the customer identification procedures and confidentiality where the general belief is that the Law on Notary prevails over the AML/CFT Law.

2065. Unfortunately the assessment team did not have the opportunity of meeting with the lawyer-representatives of the KCA and hence the assessment team could not judge the degree of awareness of the AML/CFT obligations within this category of DNFBPs.

2066. While the position on awareness on the AML/CFT obligations within the casinos could not be established as there are no operative casinos currently, likewise for other games of chance since TAK informed that its supervisory responsibilities do not cover prevention of ML and the FT. The FIU however informed that during 2014 it would be meeting with the Association of Casinos and Games of Chance with the objective of organising awareness training.

2067. The Laboratory for Control of Works on Precious Metals within the MTI informed that dealers in precious metals and dealers in precious stones are only monitored by the Laboratory for quality services and their obligations under the AML/CFT Law are not within its remit. It could not therefore comment on their awareness of obligations under the AML/CFT Law.

2068. Although the FIU informed that as the competent authority under the AML/CFT Law it tries to outreach to all sectors of reporting subjects through its training programmes and meetings it cannot be excluded that some reporting subjects are less aware than others.

### *Applying Recommendation 5 – Customer Due Diligence*

*Casinos (including internet casinos)*

2069. Casinos and games of chance are governed by Law No. 04/L-080 on Games of Chance. The assessment team is informed that currently there is work in progress at Parliament for a revised new law which should be enacted soon. The main objective of the revisions is to provide legislative provisions for TAK to compel certain places from operating by making the obligations too high for them to comply with. TAK informed it is currently working on the financial analysis and has presented all data to assist in the decision making in this respect. The amendments to the Law have been initiated by Parliament. The proposal for a change in the Law has been approved by Parliament and Parliament is now working on a draft.

2070. During the on-site visit the TAK informed that currently there are 18 businesses licensed in betting; 13 for slot machines; 10 bingo places; and 1 casino which is inoperative. There are no internet casinos operating or licensed in Kosovo. On the basis of the criteria that will be enacted into the new law TAK has already removed 18 licences because they were not operating in compliance with the Law No. 04/L-080.

2071. Article 17 of the AML/CFT Law places on all reporting subjects the obligations to identify high risk customers and apply enhanced measures; identify the beneficial owner; obtain information on the purposes and intended nature of the business relationship; and the identification and verification of the customer in specified circumstances reflecting international standards.

2072. The AML/CFT Law then provides for additional obligations for specific sectors of reporting subjects.[183]

2073. Article 28 of the AML/CFT Law in dealing with additional obligations for casinos and other gaming houses seems to be establishing all AML/CFT obligations to these entities independent of the relevant provisions of the AML/CFT Law. For example, as already indicated in the introduction to this Section, although Article 16 of the AML/CFT Law recognises casinos as reporting subjects and hence subject to the provisions of the Law, Article 28 again puts casinos subject to the Law.

2074. Without prejudice to the ambiguity in the Law in referring to Casino, Gaming House, or Licensed Object of Games of Chance as identified in the introduction to this Section, paragraph (2) of Article 28 first imposes the obligation of identifying the customer and verifying the identity on Casinos and Licensed Object of Games of Chance. The same paragraph continues by stating that *If the Casino, Gaming House, or Licensed Object of Games of Chance is not able to verify the identity of a client, it shall not enter into the transaction.* The reference to *gaming house* which term is not even defined in the Law and upon which the same paragraph does not impose the identification and verification obligations creates ambiguities and inconsistencies in the Law and its interpretation and application, and hence the effectiveness of the system.

2075. Casinos and Licensed Object of Games of Chance are required to verify and record in permanent fashion the identity of a client before entering into a transaction or multiple or linked transactions to sell, purchase, transfer, or exchange gambling chips, tokens, or any other evidence of value in an amount of two thousand (2,000) euros or more or the equivalent value in foreign currency. There is no obligation to identify customers upon entry and hence a person who enters the casino but does not engage in any of the listed transactions is not identified. Although the FATF

183. Specific obligations for the financial sector are identified and analysed under the respective essential criteria for Recommendation 5 under Section 3 of this Report.

Methodology does not exclude this procedure it holds that identification at the entrance level may not be necessarily sufficient to link the customer identification to the customer's transactions.[184]

2076. Paragraph (2) of Article 28 further states that the identity, verification and recording requirement of customers also extends to financial transactions such as the opening of an account (including safekeeping), a wire transfer or a currency exchange in the amount of two thousand (2,000) euros or more or the equivalent in foreign currency. It is not clear under Law No. 04/L-080 on Games of Chance whether casinos could in fact enter into such financial transactions. The only reference is to currency exchange where under Article 60 the Law on Games of Chance refers to the requirement of a currency exchange office as a condition for operating the licence. As to wire transfers, upon which the Law is silent, there is a counter reference in Article 57 stating that *The type and amount of winnings is paid at the place of play after each round of playing*. Paragraph (4) of Article 28 of the AML/CFT Law prohibits activities for gaming houses except where payment is made directly in the name of the winning customer.

2077. Notwithstanding that all other CDD obligations under the AML/CFT Law for casinos (including internet casinos) are applicable within the context of the recognition of casinos as reporting subjects for the purposes of Article 16 of the Law where such obligations specifically apply to ***all*** *reporting subjects*, this is not the case for *gaming houses* and *licensed objects of games of chance* which are not recognised as reporting subjects under the Law, except for the reference to the latter under paragraph (1) of Article 28.

2078. In some instances the AML/CFT Law places specific obligations on banks and financial institutions while in other cases it refers to all reporting subjects. Thus, for example, the maintenance of anonymous accounts, and hence anonymous relationships, under Article 18 refers only to the financial sector and hence it would not cover casinos and other DNFBPs.

2079. In the course of the on-site visit, in reply to a query on the ambiguity in the AML/CFT Law in referring to Casinos, Licenced Object of Games of Chance and Gaming Houses separately, which indicates that these are different types of entities, the TAK informed that based on the Law No. 04/080 on Games of Chance there are four types of games of chance: slot machines; betting places; casinos; and bingo in closed environment. The terminology all refers to casino. There is one casino licence that has been issued but is inoperative. Others are mostly the slot machines. 'Other Gaming Houses' might be referring to other places where games of chance are provided. TAK claims that, in the case of ML if TAK is investigating it investigates on all types of games of chance.

2080. The assessment team questions this interpretation because the AML/CFT Law is specific in referring to the three different entities separately even though while the Law defines a casino and a licenced object of games of chance without defining gaming houses. But it provides for different conditions and obligations for the three entities separately.

2081. The assessment team concludes that, further to the gaps and weaknesses identified in the application of Recommendation 5 to the financial sector, there are further and additional shortcomings when applying Recommendation 5 to casinos as identified in the above analysis.

2082. There is therefore a need to revise the AML/CFT Law first to clarify the references, definitions and individual obligations for Casinos, Licenced Objects of Games of Chance and Gaming Houses under Article 28 and second to ensure that all obligations under Recommendation 5 are also applicable to casinos and similar entities.

*Lawyers, notaries and (accountants)*
*Certified accountants and licensed auditors and tax advisers*

2083. As already analysed in the introduction to Recommendation 12 above, the AML/CFT Law refers to (*accountants*) – bracketed form – with lawyers and notaries as reporting subjects when undertaking the specified activities under Recommendation 12. However the AML/CFT Law further recognises *certified accountants and licensed auditors and tax advisers* separately as reporting subjects. Article 26 of the AML/CFT Law further provides for additional obligations of lawyers, notaries, certified accountants, licensed Auditors and tax advisors, which again distinguishes in the various categories of DNFBPs.

184. Refer to footnote 22 for Recommendation 12 in the FATF Methodology.

2084. Although it may be argued that once *certified accountants and licensed auditors and tax advisers* are recognised separately as reporting subjects under Article 16 and hence their obligations under the AML/CFT Law would be applicable under whatever activity is undertaken by them, it is also a counterargument that since the AML/CFT is specific in the case of lawyers and notaries, then the AML/CFT obligations under the Law would not apply to *certified accountants and licensed auditors and tax advisers* since the specified activities for Recommendation 12 are not part of the professional activities of this category of professionals.

2085. Notwithstanding, with reference to the reporting obligation analysed under Recommendation 16 in this Report, Article 26 makes a distinction between *certified accountants and licensed auditors* whose reporting obligation is not limited to circumstances under the specified activities (paragraph (7)) and *lawyers* whose reporting obligation is limited to the specified activities (paragraph (8)).

2086. As already explained above in the introduction to the analysis of Recommendation 12 this creates legal ambiguity which lends itself to interpretation as to what extent certified accountants, licensed auditors and tax advisors are recognised as subject persons for the purposes of Recommendations 12. For this purpose, the legal profession and the accountancy profession are analysed together in the paragraphs that follow.

2087. Where the AML/CFT Law provides for obligations that are applicable to all reporting subjects for CDD measures – refer for example to Article 17 of the AML/CFT Law – for the purposes of this section these would apply to lawyers, notaries, certified accountants, licensed auditors and tax advisors. Since the AML/CFT Law refers to the former categories of reporting subjects as "covered professionals" this term will be used in the paragraphs that follow where the reference is to the whole group of reporting subjects.

2088. Notwithstanding, paragraph (1) of Article 26 of the AML/CFT Law limits the obligations under Article 18 to paragraphs (4), (5) and (6). Hence, it is not clear from the AML/CFT Law whether there is a requirement for "covered professionals" not to enter into anonymous relationships (paragraph (1) of Article 18); for a person to declare whether he is acting as principal or agent (paragraph (3) of Article 18) although he would still be obliged to present relevant CDD documentation (paragraph (4) of Article 18); and the obligation to report to the FIU should the "covered professional" not be able to verify identity (paragraph (5) of Article 18).

2089. During the Cycle 2 on-site visit the assessment team did not meet with the KCA or any practicing lawyer as the Chamber could not attend due to other commitments. Notwithstanding, following the Cycle 2 on-site visit the assessment team provided the KCA with a series of questions in order for the assessment team to understand and assess the implementation of the AML/CFT system within the sector.

2090. Unfortunately the KCA, for reasons unknown to the assessment team, opted not to provide any replies to these questions. Consequently this section of the Report could not assess the effectiveness of the way lawyers fulfil their obligations under the AML/CFT Law.

2091. In the meeting with the KCN the notaries present informed that they identify their clients in accordance with the provisions of Law No. 03/L-010 on Notary of 2008 as amended by Law No. 04/L-002 amending and supplementing the Law No. 03/L-010 on Notary of 2011. The KCN informed that this Law governs their activities and therefore they are professionally bound to follow it. Should any notary encounter problems in the customer identification process that notary would inform the KCN for assistance to find a solution.

2092. Paragraph (1) of Article 38 of the Law on Notary states that where the notary does not know the parties personally and by their names, he shall ascertain their identity on the basis of the available official documents such as their identification card or their passports and where official documents are not available, the notary may consider other identifying documents. Where no such documents are available, or where the Notary is not satisfied of the identity of the parties in view of the documents produced, their identity must be confirmed by another notary, or two (2) witnesses**,** advising them for responsibility.

2093. Although in principle these procedures may be considered to be partially in compliance with the provisions of the AML/CFT Law for identification purposes they fall short of certain obligations under the AML/CFT Law in this regard. In particular the identification provisions under the Law on Notary do not define procedures should the verification process fail. Being recognised as reporting subjects and having additional obligations implemented upon them for the purposes of the

AML/CFT Law notaries should follow these provisions. However, according to the KCN this is not usually the case as the governing law is the Law on Notary.

2094. Moreover, Article 27 of the AML/CFT Law provides for additional obligations for immovable property transactions which include a declaration to be filed with the MCO for the registration of transfers of immovable property. Among other information the declaration, which should be filed in the manner and in the format specified by the FIU and signed by the transferor and transferee, includes information on the transferor and the transferee and the identity of any person or entity which has a financial interest in or is a beneficiary of the property being transferred, and the nature of that interest or beneficiary status. Although it appears that the FIU has issued instructions on the manner and format of declaration, it is not clear from the AML/CFT Law whether the responsibility to complete the form lies with the notary as part of the customer identification process or whether the form is simply completed by the transferor and transferee directly.

2095. The assessment team also met with representatives of SCAAK which is the association representing certified accountants and licensed auditors. SCAAK confirmed that part of the training provided by the FIU to its members dealt with customer identification. Although Law No. 04/L-014 on Accounting, Financial Reporting and Audit governs the functions of accountants and auditors, the Law is silent on customer identification. According to SCAAK in order to undertake professional assignments it is important for certified accountants and licensed auditors to identify their clients. However SCAAK could not confirm whether this is done in full compliance with the AML/CFT Law.

2096. The assessment team concludes that, further to the gaps and weaknesses identified in the application of Recommendation 5 to the financial sector, there are further and additional shortcomings when applying Recommendation 5 to "covered professionals" consequent to the legal ambiguities and legal inconsistencies arising out of the "additional obligations" under Article 26 and the circumstances under which *certified accountants* and *licensed auditors* and *tax advisers* are subject to the AML/CFT Law as identified in the above analysis.

2097. There is therefore a need to revise the AML/CFT Law first to clarify the circumstances under which *certified accountants* and *licensed auditors* and *tax advisers* are subject to the AML/CFT Law in relation to the specified activities; second to remove legal ambiguities and legal inconsistencies through Article 26 and third to ensure that all obligations under Recommendation 5 are also applicable to all "covered professionals".

*Real Estate Agents and Real Estate Brokers*

2098. While the AML/CFT Law recognises real estate agents and real estate brokers as reporting subjects under Article 16 it does not provide additional obligations for this sector. Therefore, as reporting subjects real estate agents and real estate brokers are subject to all the provisions of the AML/CFT Law that are attributed to *all reporting subjects*. For the purposes of the applicability of Recommendation 5 on CDD measures, covered by Article 17 and Article 18, is applicable to the extent identified under Section 3 of this Report for the financial sector.

2099. As mentioned above under the analysis of the application of Recommendation 5 to notaries, the AML/CFT Law requires the completion of a transfer form for immovable property to be filed with the MCO. It is not clear whether the completion of the form, as defined by the FIU, lies within the responsibility of real estate agents or real estate brokers as part of their customer due diligence obligations.

2100. Unfortunately in the course of the second on-site visit the assessment team did not have the opportunity of meeting with real estate agents and real estate brokers and hence it is not possible to comment on the effectiveness or otherwise of the implementation process for Recommendation 5 by this sector.

2101. Notwithstanding, the assessment team concludes that, for the purposes of the AML/CFT Law, the gaps and shortcomings identified for the financial sector and for other DNFBPs under this section appear also to apply in the case of real estate agents and real estate brokers.

*Dealers in precious metals and dealers in precious stones*
*Natural or legal persons trading in goods when receiving payment in cash*

2102. The AML/CFT Law recognises dealers in precious metals and dealers in precious stones as reporting subjects under Article 16 and hence places persons and entities in these activities under the full obligations of the Law for the prevention of ML and the FT.

2103. The AML/CFT Law further and separately recognises natural or legal persons as reporting subjects when trading in goods and receiving payment in cash in an amount equal to or over €10,000.

2104. While the FATF Methodology establishes a threshold of €15,000 for any transaction payable in cash for dealers in precious metals and dealers in precious stones, it does not recognise other persons or entities trading in other goods as reporting subjects. In principle, the assessment team considers the latter addition as positive for Kosovo reflecting the position under the EU Third Money Laundering Directive.

2105. In principle both dealers in precious metals and dealers in precious stones and natural or legal persons trading in goods and receiving payment in cash are therefore subject to the customer identification procedures under the AML/CFT Law where such obligations are applicable to all reporting subjects, for example Article 17 and Article 18 as applicable. However, the absence of a threshold for the latter can create ambiguity in the timing of the applicability of customer identification and verification procedures.

2106. Thus, while persons and entities trading in goods must apply customer identification and verification measures for transactions where payment equal to or exceeding €10,000 is made in cash, the AML/CFT Law does not specify whether this is in a single transaction or a series of transactions that appear to be linked – unless all transactions can be considered as occasional transactions in terms of paragraph (2.2) of Article 17, a term that is not defined in the Law.

2107. On the other hand, since no threshold is established in the case of dealers in precious metals and dealers in precious stones in the Law, then the customer identification and verification procedures in terms of Article 17 must be applied either when establishing the business relationship or when carrying out an occasional transaction of €10,000 or over, including where the threshold for occasional transactions is made up of a series of transactions that appear to be linked, or in both instances depending whether a business relationship is established.

2108. During the on-site visit the assessment team met with the Metrology Agency, and the Laboratory for Control of Works on Precious Metals within the MTI. Unfortunately no information could be provided on the implementation of AML/CFT obligations by dealers in precious metals and dealers in precious stones as the Laboratory is only responsible to register dealers and to ensure the quality of the product.

2109. Consequently, the assessment team perceives legal ambiguity in the circumstances when timely application of the customer due diligence procedures for the mentioned reporting subjects is required. The assessment team further concludes that, for the purposes of the AML/CFT Law, the gaps and shortcomings identified for the financial sector and for other DNFBPs under this section for the application of customer due diligence procedures also apply to dealers in precious metals and dealers in precious stones and to natural or legal persons trading in goods where payment is effected in cash up to or exceeding the established threshold.

2110. The assessment team recommends that the legal ambiguity for the timely application of customer identification and verification procedures by these categories of reporting subjects be immediately addressed either through amendments of the AML/CFT Law or through instructions issued by the FIU for the sector.

*Trust and Company Service Providers*

2111. The AML/CFT Law recognises TCSPs as reporting subjects where the profession is not covered elsewhere in the Law, and when providing the specified services to third parties on a commercial basis. This reflects the obligations of TCSP under the FATF Standards.

2112. Notwithstanding that Article 16 does not recognise any other persons or entities providing such services, it is not clear where this profession is further covered under the AML/CFT Law. A

broad interpretation of reporting subjects under Article 16 could place this activity as part of the activities of lawyers and accountants. However, in the absence of clear provisions, the reference to *where the profession is not covered elsewhere in the Law* puts the coverage of TCSPs overall for the purposes of the AML/CFT Law subject to interpretation.

2113. Since according to the KBRA any citizen can complete the forms and register a company it is not clear to what extent TCSP operate in Kosovo, particularly as there is no registration process for such activity. In the replies to the Questionnaire for Cycle 1 the authorities indicated that they are not aware of the number of persons who operate as TCSPs.

2114. Notwithstanding, being recognised as reporting subjects, TCSPs would be subject to all the customer identification obligations under the AML/CFT Law that are attributed to all reporting subjects. Consequently, all identified shortcomings for the application of Recommendation 5 to the financial sector and other DNFBPs as detailed in this Report become applicable to TCSPs.

*Non-Government Organisations (NGOs)*
*Political Entities*
*Building construction companies*

2115. The AML/CFT Law additionally recognises NGOs, political entities and building construction companies as reporting subjects in terms of Article 16. Hence these three categories of reporting subjects, added recently to the AML/CFT Law, become subject to all the obligations under the Law attributed to all reporting subjects.

2116. In addition Article 24 of the AML/CFT Law provides for additional obligations for NGOs while Article 25 provides for additional obligations for political parties and registered candidates. Both articles however do not cover any additional obligations for customer due diligence.

2117. Notwithstanding the customer identification and verification obligations for these categories of reporting subjects it is not clear who would constitute a customer/client upon whom identification and verification obligations are to be applied within the context of the definition of client in the Law as being any person that conducts, or attempts to conduct, a transaction with or use the services of a reporting subject as defined in Article 16, and shall include any owner or beneficiary or other person or entity on whose behalf the transaction is conducted or the services are received.

2118. With a possible exception to building construction companies, the assessment team therefore expresses reservation on the appropriate and effective applicability of the customer identification and verification procedures and, to a larger extent, the full application of the customer due diligence measures by these categories of DNFBPs.

### *Applying Recommendation 6 – Politically Exposed Persons*

2119. Paragraph (5) of Article 21 of the AML/CFT Law imposes the obligation on all reporting subjects to take reasonable measures to determine if their clients are domestic PEPs, and if such determination results in a client being determined to be a domestic PEP, then reporting subjects shall take measures as stipulated in the Law.[185]

2120. Paragraph (5.1) of Article 21 of the AML/CFT Law further requires all reporting subjects to ensure that they determine whether their clients are foreign PEPs, and if such determination results in a client being a foreign PEP then reporting subjects shall take the additional enhanced measures stipulated therein. It should be noted that the Law does not indicate that such measures are to be taken in addition to the normal customer due diligence measures. Although this may be inferred from paragraph (1) of Article 17, paragraph (1) of Article 17 links this obligation only in the circumstances under paragraph (1) of Article 21.

2121. Since, as established under the applicability of Recommendation 5 for the purposes of Recommendation 12 the assessment team expressed reservations on the interpretation and recognition of *licensed objects of games of chance* and *gaming houses* as reporting subjects within

185. Article 21 erroneously makes references to measures in accordance with Article 19 paragraph (1) which refers to wire transfers. This error in reference is repeated in the FIU Administrative Instruction 04/2014 on PEPs.

the context of the definition of casino, the assessment team further reserves concern on the applicability of paragraph (5) of Article 21 of the AML/CFT Law for such entities for the identification of PEPs.

2122. Further to the limitations that appear to be imposed by paragraph (1) of Article 26 on the identification and verification procedures for "covered professionals" there may be legal ambiguity for a legal interpretation on the application of paragraph (5) of Article 21 for "covered professionals" for the identification of PEPs as there is no reference to it in paragraph (1) of Article 26.

2123. As the identification of PEPs under Recommendation 6 is a continuation of the customer due diligence measures applied under Recommendation 5 as analysed above for Recommendation 12 all findings and reservations expressed in the analysis of Recommendation 5 are also applicable in the implementation of Recommendation 6 for the purposes of Recommendation 12.

2124. Likewise are the findings in the analysis of Recommendation 6 for the purposes of the financial sector under Section 3 of this Report.

2125. It is therefore recommended that all recommendations made therein be implemented also for the purposes of the application of Recommendation 6 for the purposes of DNFBPs under Recommendation 12. It is also recommended to review paragraph (1) of Article 26 on the applicability of all customer due diligence measures as stipulated in the AML/CFT Law for "covered professionals".

***Applying Recommendation 8 – New technologies***

2126. As detailed under Section 3.5 of this Report the objective of Recommendation 8 is twofold. First is the requirement to have policies in place for the prevention of the misuse of technological developments in ML or TF activities. Second is the requirement for policies and procedures to be in place to address specific risks associated with non-face-to-face business relationship or transactions i.e. where the customer is not physically present.

2127. The obligations in this regard under paragraph (7) of Article 21 are applicable to all institutions and persons subject to the AML/CFT Law. However the assessment team, similar to the application of other obligations as detailed hereunder, expresses reservations on the applicability of paragraph (7) of Article 21.

2128. Since, as established under the applicability of Recommendation 5 for the purposes of Recommendation 12 the assessment team expressed reservations on the interpretation and recognition of licensed objects of games of chance and gaming houses as reporting subjects within the context of the definition of casino, the assessment team further reserve concern on the applicability of paragraph (7) of Article 21 of the AML/CFT Law for such entities.

2129. Further to the limitations that appear to be imposed by paragraph (1) of Article 26 on the identification and verification procedures for "covered professionals" there may be legal ambiguity for a legal interpretation on the application of paragraph (7) of Article 21 for "covered professionals" as there is no reference to it in paragraph (1) of Article 26.

2130. Although those DNFBPs or authorities related to DNFBPs have informed that they do not have non-face-to-face relationships, some of them, like casinos, can offer new products. The assessment team expresses concern as to what extent in practice such DNFBPs are implementing procedures for the purposes of Recommendation 8 as reflected in paragraph (7) of Article 21 of the AML/CFT Law.

2131. Otherwise, all findings identified in the analysis of Recommendation 8 under Section 3 of this Report and that are not specific to the financial sector are in principle applicable to DNFBPs and consequently any recommendations made are likewise applicable.

***Applying Recommendation 9 – Third Party Reliance***

2132. As established under the analysis of Recommendation 9 for the purposes of Section 3 of this Report, the AML/CFT Law is silent on reliance on third parties without either prohibiting it or allowing it outright. Consequently this may lend itself to interpretation as to whether there could be reliance on third parties or not.

2133. Although the Kosovo authorities have not provided any information in this regard through the Cycle 2 Questionnaire, from information obtained in the course of the on-site visit the assessment team concludes that reliance on third parties for the purposes of the application of certain elements of the customer due diligence process is apparently not practised by DNFBPs except in some exceptions that may be interpreted as such.

2134. One such example could be done through notaries who, as already detailed in this Report, maintain that their customer identification and verification obligations are as covered by the Law on Notary rather than the AML/CFT Law. Paragraph (1) of Article 38 of the Law on Notary may be subject to interpretation whether the notary is confirming the identification or whether there is placing reliance on other persons (not necessarily in accordance with the provisions of the AML/CFT Law) where paragraph (1) of Article 38 states that *Where no such documents are available, or where the Notary is not satisfied of the identity of the parties in view of the documents produced, their identity must be confirmed by another Notary, or two (2) witnesses, advising them for responsibility.*

2135. Notwithstanding the assessment team expresses reservations as to whether this is not done due to practice and the circumstances around the activities of DNFBPs or whether there is lack of awareness of the implications for the AML/CFT system should DNFBPs, such as accountants, notaries and lawyers, undertake activities through which they rely on third parties.

2136. Consequently the findings under the analysis of Recommendation 9 in Section 3 of this Report for the financial sector are applicable also for the DNFBPs sector

***Applying Recommendation 10 – Record Keeping***

2137. The provisions of the AML/CFT Law on recording keeping are applicable to all reporting subjects. However, for the purposes of the analysis for the DNFBPs sector there may be some exceptions in the Law or in practice for some categories of DNFBPs. In such instances, the obligations for that particular category of DNFBPs will be analysed separately in the paragraphs that follow.

*Casinos (including internet casinos)*

2138. Notwithstanding the provisions for record keeping arising out of the obligations of all reporting subjects under paragraph (6) of Article 17 of the AML/CFT Law, paragraph (7) of Article 28 requires that *Each Casino, Gaming House and Licensed Object of Games of Chance shall in a manner required by the FIU, create, and keep accurate, complete, legible, and permanent original records to ensure compliance with this Law and related sub-legal acts within Kosovo for a minimum period of five (5) years.*

2139. The assessment team has already expressed concern on the interpretation of the terminology used for *casinos*, *licensed objects of games of chance* and *gaming houses* within the context of reporting subjects recognised under Article 16 of the AML/CFT Law for the purposes of the obligations under the Law which only recognises *casinos*. Although the title to Article 28 refers to 'additional obligations' the provisions of paragraph (7) of Article 28, which reflect the record retention period already established by the Law under Article 17, therefore raise questions on the level playing field in the applicability of record keeping for *casinos*, *licensed objects of games of chance* and *gaming houses*.

2140. Being recognised as reporting subjects *casinos* become subject to the record keeping procedures and obligations under paragraph (6) of Article 17 which, as already analysed for the purposes of Section 3 of this Report, provides not only for the period of retention but also for the timing of the period.[186] Paragraph (7) of Article 28 only establishes the retention period and does not specify whether the records referred to incorporate both identification and transaction records. Therefore, read within the context of Article 28, it is unclear whether paragraph (7) is providing any additional obligation for recording keeping for casinos or whether it is a replacement of the provisions of paragraph (6) of Article 17 as applied to casinos in which case issues as to the commencement period would be raised.

186. Refer to the analysis of Recommendation 10 under Section 3 of this Report for the comments and findings in this regard.

2141. On the other hand, while the AML/CFT Law does not recognise *licensed objects of games of chance* as reporting subjects for the purposes of Article 16, paragraph (1) of Article 28 imposes the anti-ML and anti-TF provisions of the AML/CFT Law upon them. Hence, similar to casinos, *licensed objects of games of chance* become subject to the provisions of paragraph (6) of Article 17. As a result, the concerns expressed above for the application of paragraph (7) of Article 28 within the context of paragraph (6) of Article 17 become applicable also to *licensed objects of games of chance*.

2142. Likewise *gaming houses*, which are only referred to as a separate category in the gaming sector under Article 28 and which are not defined in the AML/CFT Law, are not recognised as reporting subjects for the purposes of the AML/CFT Law. Further, paragraph (1) of Article 28 does not impose the obligations under the AML/CFT Law upon *gaming houses* with some obligations being separately imposed through the said Article 28.

2143. Consequently, while the provisions on record keeping under paragraph (6) of Article 17 are not applicable to *gaming houses*, they would still be subject to record keeping obligations imposed through paragraph (7) of Article 28. However, as already indicated above, paragraph (7) falls short of providing for the commencement period of the five year retention period for both identification and transaction records and does not distinguish between identification and transaction records.

2144. Therefore, further to the concerns expressed under the analysis of Recommendation 10 for the purposes of Section 3 of this Report and which concerns are also applicable for these categories of DNFBPs, the assessment team expresses concern on the effective application of Recommendation 10 for these categories of DNFBPs.

2145. Moreover, while paragraph (7) of Article 28 requires that records are created and maintained in a manner required by the FIU it does not appear that the FIU has provided the sector with such guidance.

2146. It is therefore recommended that, further to the clarifications of these three types of entities for the purposes of Article 16 of the AML/CFT Law, the legal ambiguities on record retention for *casinos*, *licensed objects of games of chance* and *gaming houses* be clarified and removed from the Law or through guidance issued by the FIU.

*Lawyers, notaries and (accountants)*
*Certified accountants and licensed auditors and tax advisers*

2147. "Covered Professionals", being individually recognised as reporting subjects under Article 16 for the purposes of the AML/CFT Law are subject to the record keeping obligations established under paragraph (6) of Article 17 which are applicable to all reporting subjects identified under the AML/CFT Law.

2148. Article 26 of the AML/CFT Law provides for additional obligations for *Lawyers, notaries, certified accountants, licensed auditors* and *tax advisers.* Within this context, paragraph (10) of this Article states that *Records collected pursuant to this Article shall be maintained for a period of five (5) years from the date that the business relationship or representation ended. Records relevant to a suspicious act or transaction shall be maintained for a period of five (5) years from the date on which the suspicious act or transaction was reported to the FIU. To the extent possible, records maintained pursuant to the present article shall be maintained separately from files containing information subject to lawyer-client privilege.*

2149. Since Article 26 provides for 'additional obligations' it is unclear whether the provisions of paragraph (10) when read within the context of the title of this provision are providing for additional obligation or whether these are in replacement of the main obligations for record keeping under Article 17. However, since in principle they establish the same obligations, it is immaterial whether they provide additional requirements or a replacement requirement - but they create legal uncertainty and complexity.

2150. Within this context this Report analysis the provisions of paragraph (10) of Article 26 in which case it identifies the following divergences which result in concerns on the appropriate and effective applicability of the record keeping obligations for the legal and accountancy professions category of DNFBPs:

- it is not clear whether the provisions of paragraph (10) of Article 26 are applicable to lawyers, notaries, certified accountants, licensed auditors and tax advisors or to lawyers only. First because while it refers to *Records collected pursuant to this Article* and hence referring to all 'covered professionals' at the end it only makes reference to *information subject to lawyer-client privilege*. Second because where appropriate this Article refers to the relevant category separately (covered professionals, lawyers, accountants) while in the case of paragraph (10) there is no reference to any category;
- the paragraph reflects the same provisions for the retention period of five (5) years commencing from the termination of the relationship or representation which is interpreted to refer to identification and verification documentation;
- with reference to the retention of documentation related to transactions, paragraph (10) of Article 26 only requires the retention of documents related to reported suspicious transactions or activities for a five (5) year retention period from the reporting date but does not require the retention of documents for all transactions. This creates an uneven level playing field with the rest of the reporting subjects, including the financial sector, which are required to retain records for all transactions in a specified manner and to make these available to the relevant authorities as may be requested in accordance with the AML/CFT Law.

2151. Therefore, further to the concerns expressed under the analysis of Recommendation 10 for the purposes of Section 3 of this Report and which concerns are also applicable for these categories of DNFBPs, the assessment team expresses concern on the effective application of Recommendation 10 for these categories of DNFBPs.

2152. It is therefore recommended that legal ambiguities for the retention of records by 'covered professions' be removed and that a level playing field on obligations by all DNFBPs as reporting subjects be maintained.

*Non-Government Organisations*

2153. Article 24 of the AML/CFT Law in providing for additional obligation for NGOs does not provide for additional customer identification or transaction records for the purposes of the obligations of NGOs as reporting subjects under paragraph (6) of Article 17 and therefore NGOs remain subject to such provisions under Article 17.

2154. However in the light of earlier comments under the applicability of Recommendation 5 to NGOs in the absence of a definition of who constitutes a client of an NGO for the purposes of the customer due diligence and record keeping under the AML/CFT Law it is not clear what type of documents NGOs are expected to maintain for the purposes of paragraph (6) of Article 17.

2155. Article 24 of the AML/CFT Law however requires NGOs to provide annual information, and therefore indirectly an obligation to maintain records, on:

- each contribution in currency during the year from a particular source, if the total value in currency of the contributions from that source during the year is in excess of € five thousand (5,000) identifying the source, amount and date of each contribution; and
- each disbursement in currency during the year to a particular recipient if the total value in currency of disbursements to that recipient is in excess of € ten thousand (10,000), identifying the recipient, amount and date of each disbursement, and the intended use of the money.

2156. There is therefore a need to clarify who constitutes a client for an NGO for the purposes of the AML/CFT Law and thus the type of identification and transaction records to be maintained for the purposes of Article 17 of the Law.

*Political Entities*

2157. Article 25 of the AML/CFT Law in providing for additional obligation for political parties and registered candidates does not provide for additional customer identification or transaction records for the purposes of the obligations of political entities as reporting subjects under paragraph (6) of Article 17 and therefore political entities remain subject to such provisions under Article 17. However this is not the case for registered candidates since registered candidates are not considered as reporting subjects and hence are not subject to the general obligations under the

AML/CFT Law except as provided for under Article 25. Therefore the paragraph that follows will refer only to political entities (referred to as political parties for the purposes of Article 25 of the AML/CFT Law).

2158. However in the light of earlier comments under the applicability of Recommendation 5 to political entities in the absence of a definition of who constitutes a client of a political entity for the purposes of the customer due diligence and record keeping under the AML/CFT Law it is not clear what type of documents political entities are expected to maintain for the purposes of paragraph (6) of Article 17.

2159. Notwithstanding, Article 25 of the AML/CFT Law requires that in filing the bi-annual report required in terms of Article 19 of UNMIK Regulation 2004/11 on the Registration and Operation of Political Parties in Kosovo, the report includes information, and therefore indirectly an obligation to maintain records, on:

- a record of all contributions to the registered political party from a single source if the combined value of contributions from that source has exceeded € one hundred (100) during the period covered by the report which shall indicate:
  - the value of each contribution made to the political party;
  - the date on which each contribution was made; and
  - the full name, address and civil registration, passport or driver's license number of the contributor; and
- a statement identifying each payment made to another person during the period covered by the report, if the total value of all payments to that person during the period exceeds € five thousand (5,000) and indicating the purpose of the payment.

2160. There is therefore a need to clarify who constitutes a client for a political entity for the purposes of the AML/CFT Law and thus the type of identification and transaction records to be maintained for the purposes of Article 17 of the Law.

*Real Estate Agents and Real Estate Brokers*
*Dealers in precious metals and dealers in precious stones*
*Natural or legal persons trading in goods when receiving payment in cash*
*Trust and Company Service Providers*
*Building construction companies*

2161. The AML/CFT Law is silent on any additional obligations for record keeping for the remaining categories of DNFBPs recognised as reporting subjects for the purposes of Article 16 of the Law.

2162. Therefore certain findings in the analysis of Recommendation 10 under Section 3 of this Report and which are not specific for the financial sector are likewise applicable to these categories of DNFBPs.

***Applying Recommendation 11 – Large, complex transactions***

2163. As already established under the analysis in Section 3 of this Report, the requirement under Recommendation 11 for reporting subjects to pay special attention to all complex, unusual, large transactions and all unusual patterns of transactions that may have no apparent economic or visible lawful purpose goes beyond the ongoing due diligence of monitoring customer transactions in relation to the customer business profile. The requirement also goes beyond the cash transaction reporting but heavily supports the suspicious transaction reporting obligation.

2164. Recommendation 11 further requires that the findings are documented and retained to be made available to the relevant competent authorities.

2165. Paragraph (1) of Article 20 of the AML/CFT Law requires all reporting subjects to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

2166. Moreover, further to the limitations that appear to be imposed by paragraph (1) of Article 26 on the identification and verification procedures for "covered professionals" there may be legal

ambiguity and hence legal interpretation on the application of paragraph (7) of Article 21 for "covered professionals" as there is no reference to it in paragraph (1) of Article 26.

2167. Although those DNFBPs or authorities related to DNFBPs have informed that they do not deal with such types of transactions in their activities it appears that there is no adequate awareness of the requirements and obligations under Recommendation 11. Consequently the assessment team expresses concern as to what extent in practice such DNFBPs are implementing procedures for the purposes of Recommendation 11 as reflected in paragraph (1) of Article 20 of the AML/CFT Law.

2168. Otherwise, all findings identified in the analysis of Recommendation 11 under Section 3 of this Report that are not specific for the financial sector are in principle applicable to DNFBPs and consequently any recommendations made are likewise applicable.

***Effectiveness***

2169. In the analysis of Recommendation 5, Recommendation 6 and Recommendations 8 to 11 under Section 3 of this Report, the assessment team reserves concerns on the findings and consequently their effectiveness on the system for the prevention of ML and FT. Such findings that are not specific for the financial sector, and hence raise concerns on the effectiveness are also applicable for the analysis of the applicability of the same Recommendations for the DNFBPs sectors.

2170. Moreover, the analysis of these Recommendations for the purpose of Recommendation 12 on customer due diligence for DNFBPs has identified additional shortcomings and weaknesses that are specific for DNFBPs. These findings, as highlighted below, heighten the concerns expressed by the assessment team on the effectiveness of the system for the prevention of ML and FT within the DNFBPs sector.

2171. The absence of the KCA and practicing lawyers for discussions during the Cycle 2 on-site visit continue to shed concerns on the effectiveness of the system in this important sector.

### 4.1.2. Recommendations and Comments

2172. The concerns expressed and weaknesses identified in the analysis of Recommendation 5, Recommendation 6 and Recommendations 8-11 under Section 3 are in their majority also applicable to the DNFBPs sector. There are however additional weaknesses and shortcomings identified for DNFBPs although with some exceptions.

2173. In summary, with reference to the application of the relevant due diligence and record keeping Recommendations under Recommendation 12 as analysed above, this Report expresses concerns that:

- there is a need to strengthen awareness of obligations under the AML/CFT Law in most sectors of DNFBPs, in some more than others;
- there is a need to clarify the status of Casino, Gaming House and Licensed Object of Games of Chance for the purposes of the AML/CFT Law and the applicability of obligations thereunder (R.5);
- there is a need to clarify the obligations under the AML/CFT Law as imposed on certified accountants and licensed auditors when undertaking the specified activities reserved for the legal profession (R.5);
- there is a need to clarify whether the threshold of €10,000 established for other traders when payment is in cash equal to or above the threshold is also applicable to dealers in precious metals and dealers in precious stones, when they receive payment in cash (R.5);
- there is a need to clarify whether the term 'political entities' recognised as reporting subjects under Article 16 incorporates both political parties and registered candidates as referred to under Article 25 of the AML/CFT Law (R.5);
- there is a need to clarify the full applicability of the relevant articles of the AML/CFT Law on customer identification and verification to casinos, gaming houses and licensed object of games of chance in the light of the apparent stand-alone provisions of Article 28 (R.5);

- it is not clear from the AML/CFT Law whether there is a requirement for "covered professionals" not to enter into anonymous relationships; for a person to declare whether he is acting as principal or agent; and the application of the obligation to report to the FIU should the "covered professional" not be able to verify the customer identity (R.5);
- ensure notaries apply the customer identification and verification provisions in the AML/CFT Law in addition to those under the Law on Notary (R.5);
- remove legal ambiguities and legal inconsistencies through Article 26 for customer identification and verification procedures for "covered professionals" (R.5);
- legal ambiguities and legal inconsistencies arising through Article 26 for the implementation of customer identification and verification procedures by "covered professionals" (R.5);
- legal ambiguity for the timely application of customer identification and verification procedures by dealers in precious metals and dealers in precious stones (R.5);
- it is not clear who would constitute a customer/client upon whom identification and verification obligations are to be applied within the context of the definition of client in the Law for NGOs and Political Entities (R.5);
- legal ambiguity on the applicability of paragraph (5) of Article 21 of the AML/CFT Law for *licensed objects of games of chance* and *gaming houses* and "covered professionals" (R.6);
- legal ambiguity on the applicability of paragraph (7) of Article 21 of the AML/CFT Law for *licensed objects of games of chance* and *gaming houses* and "covered professionals" (R.8);
- it is unclear whether paragraph (7) of Article 28 is providing any additional obligation for recording keeping for casinos or whether it is a replacement of the provisions of paragraph (6) of Article 17 of the AML/CFT Law (R.10);
- it is not clear whether the provisions of paragraph (10) of Article 26 are applicable to lawyers, notaries, certified accountants, licensed auditors and tax advisors or to lawyers only (R. 10);
- paragraph (10) of Article 26 only requires the retention of documents related to reported suspicious transactions or activities for a five (5) year retention period from the reporting date for "covered professionals" and not for all transactions hence creating uneven level playing field in record keeping (R.10);
- there is a need to clarify who constitutes a client for an NGO and a political entity for the purposes of the AML/CFT Law and thus the type of identification and transaction records to be maintained (R. 10); and
- legal ambiguity and hence legal interpretation on the application of paragraph (7) of Article 21 for "covered professionals" as there is no reference to it in paragraph (1) of Article 26 (R. 11).

2174. To this effect the Report makes various proposals and recommendations for addressing the shortcomings identified. Although these recommendations are grouped hereunder, it is recommended that these are read within the analysis of the specific Recommendations as applied for the purposes of Recommendation 12 taking account of the deeper analysis of each Recommendation under Section 3 of this Report:

- provide enhanced awareness of obligations under the AML/CFT Law through training, guidance and discussions;
- remove all instances of legal ambiguity identified for various provisions of the AML/CFT Law;
- ensure more awareness of DNFBPs on their obligations under the AML/CFT Law;
- ensure a level playing field in the application of the provisions of the AML/CFT Law;
- ensure the provisions and obligations of the AML/CFT Law are not over-ridden through sector specific legislation, such as the Law on Notary.

### 4.1.3. Rating for Recommendation 12

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.12** | **NC** | • most weaknesses identified for the financial sector under R.5, R.6 and R.8 – R11 apply;<br>• need to strengthen awareness of obligations under the Law;<br>• legal ambiguities in the AML/CFT Law on the application of the relevant Recommendations;<br>• lack of clarity on who constitutes a client for certain DNFBPs such as NGOs and Political Entities;<br>• lack of clarity on the status of gaming houses and licensed objects of games of chance as reporting subjects;<br>• scope of AML/CFT measures for the accountancy profession does not appear to cover situations contemplated by the FATF Recommendations;<br>• lack of clarity on the application of additional obligations under the AML/CFT Law for certain DNFBPs;<br>• general lack of awareness of obligations under the AML Law and hence lack of effectiveness; and<br>• effectiveness issues arising therefrom. |

## 4.2. Monitoring of transactions, reporting and other issues (Recommendation 16 - Applying R.13 – R.15 and R.21)

### 4.2.1. Description and Analysis

2175. Recommendation 16 requires that DNFBPs comply with the reporting requirements set out under Recommendation 13 and Special Recommendation IV with the *tipping off* requirements set out under and Recommendation 14 and with the internal control criteria set out under Recommendations 15 and 21 under prescribed situations and established thresholds as follows:

- Casinos - when engaging in financial transactions equal to or above €/$ 3,000;
- Real estate agents - when buying or selling real estate for their clients;
- Dealers in precious metals and dealers in precious stones – when engaged in cash transaction equal to or above €15,000;
- Lawyers, notaries, other independent legal professionals and accountants – when preparing for or carrying out transaction for their clients under the specified activities;
- Trust and company service providers – when involved in the specified activities.

2176. Reference should be made to the general part under the introduction to Section 4 of this Report which comments are also valid and applicable for the analysis of Recommendation 16.

2177. Reference should also be made to the introductory comments on awareness as identified during the meetings with selected DNFBPs in the course of the on-site visit as detailed under Section 4.1.1 of this Report which are also valid and applicable for the purposes of the analysis under Recommendation 16.

2178. The paragraphs that follow will analyse the application of the above mentioned Recommendation to DNFBPs. It should be noted however, that certain concerns raised by the assessment team in the application of the relevant Recommendations on CDD under the analysis of Recommendation 12 are also applicable for the analysis under Recommendation 16.

**Applying Recommendations 13 and Special Recommendation IV – *Reporting obligation*:**

***Requirement to make STRs on ML/FT to FIU – Essential Criterion. 16.1 (applying EC. 13.1 & EC.13.2 and EC SR. IV.1 to DNFBPs)***

2179. According respectively to paragraph (7) of Article 26 and paragraph (8) of Article 21 of the AML/CFT Law, certified accountants and licensed auditors and dealers in precious metals and dealers in precious stones shall report any suspicious act or transaction to the FIU within three (3) working days and prior to taking further action in connection with any such act or transaction.

2180. Paragraph (8) of Article 26 of the AML/CFT Law states that, except cases where information is received from a client or obtained on a client in order to represent him in criminal or judicial proceedings, unless the lawyer reasonably believes that the client is seeking his advice or assistance to commit a criminal offence, lawyers engaged in specified activities shall report any suspicious act or transaction to the FIU within three (3) working days and prior to taking further action in connection with any such act or transaction. The specified activities include:

- assisting or representing a client or clients in:
  - buying and/or selling of immovable property or business organisations;
  - handling of clients' money, securities, or other assets;
  - opening or managing bank, savings or securities accounts;
  - organisation of contributions necessary for the creation, operation or management of companies;
  - creation, operation or management of companies, trusts or similar structures;
- acting on behalf of or for the client in any financial or immovable property rights transaction.

2181. Paragraph (3) of Article 28 of the AML/CFT Law states that Casinos and Licensed Object of Games of Chance shall report to the FIU all suspicious acts, transactions or attempted transactions within twenty four (24) hours of the time the act, transaction, or attempted transaction was identified as suspicious.

2182. In addition, according respectively to paragraph (9) of Article 21and Article 24 of the AML/CFT Law, building construction companies and NGOs shall report any suspicious act or transaction to the FIU within three (3) working days and prior to taking further action in connection with any such action or transaction. It is important to note that the recognition of NGOs and building construction companies as reporting subjects, and hence this reporting requirement, goes beyond the FATF Standards.

2183. Although they are mentioned as reporting subjects in Article 16 of the AML/CFT Law, there is no explicit legal requirement for real estate agents and real estate brokers; traders dealing in goods where payment is received in cash (€10,000 or more); and Trusts and Company Service Providers to submit an STR when they suspect of have reasonable grounds to suspect that funds are the proceeds of a criminal activity.

2184. As already mentioned under Recommendation 13, there is no legal obligation under the AML/CFT Law for reporting situations where information available indicates that a person may be or may have been involved in ML or the FT and reporting transactions or persons suspected to be linked to the FT.

2185. An analysis of the reporting obligations for DNFBPs as per above indicates however some inconsistencies, shortcomings and weaknesses which could have a negative impact on the reporting regime as follows:

- there is an inconsistency in the timing for reporting since whereas the financial sector and casinos are required to report within twenty four (24) hours of identifying the suspicious transaction, all other reporting subjects with a reporting obligation are required to report within three (3) working days of identifying the suspicious transaction;
- within the context of the arguments and analysis of the treatment of Casinos, Gaming Houses and Licensed Objects of Games of Chance in the analysis of Recommendation 12 in this Report, it appears that the reporting obligation under Article 28 of the AML/CFT Law is not extended to gaming houses;

- within the context of the arguments and analysis of the obligations under Article 26 of the AML/CFT Law for lawyers, notaries, certified accountants, licensed auditors and tax advisors (referred to as "covered professionals") under the analysis of Recommendation 12, paragraph (9) of Article 26 of the Law provides an exception to reporting only to lawyers in requiring that a lawyer shall not, without authorisation from the client or by court order, provide information he or she received from a client or obtained on a client in order to represent the client in criminal or judicial proceedings, unless the lawyer reasonably believes that the client is seeking the lawyer's advice or assistance to commit a criminal offence. According to international standards this exception for legal professional privilege or secrecy should be provided to the entire "covered professionals" as defined in the AML/CFT Law under similar circumstances;
- the reporting obligation for dealers in precious metals and precious stones and for building construction companies provided for under Article 21 of the AML/CFT Law which deals with Enhanced Due Diligence could lend itself to interpretation whether such reporting obligations arise only when enhanced due diligence is applied.

2186. Moreover, there is no obligation of continued reporting once an STR has been filed imposed upon DNFBPs similar to the provisions of paragraph (2) of Article 22 of the AML/CFT Law for banks and financial institutions.

2187. Meetings held on-site with representatives of some sectors of DNFBPs indicate lack of awareness on the reporting obligation. For example, while unfortunately no representatives of the KCA attended and hence no conclusions could be made on lawyers, representatives of the KCN insist that the law for the notary professional is the Law on Notary and the first obligation even in reporting and disclosing information is governed by such law. Likewise, representatives of SCAAK while holding that certified accountants and licensed auditors are aware of their AML/CFT obligations, indicate that it appears that professionals in this category refer to SCAAK before reporting. Otherwise, all weaknesses and shortcoming for DNFBPs on obligations under the AML/CFT Law as identified in this Report in the analysis of Recommendation 12 also apply for Recommendation 16.

***Reporting attempted transactions and no reporting threshold for STRs – Essential Criterion. 16.1 (applying EC 13.3 and EC SR.IV.2 to DNFBPs)***

2188. As already mentioned under the analysis for Recommendation 13, according to paragraph (1.35) of Article 2 of the AML/CFT Law, the term "suspicious act or transaction" includes an attempted act or transaction that generates a reasonable suspicion that the property involved in the attempted act or transaction is proceeds of crime.

2189. In addition, the AML/CFT Law requires that all suspicious acts or transactions are to be reported to the FIU without any threshold.

2190. However, and as has already been established under the analysis of Recommendation 13 and Special Recommendation IV under Section 3 of this Report, in the absence of reference to the FT in the definition of "suspicious acts or transactions" in the AML/CFT Law, attempted transactions that could be linked to the FT are legally not reportable although the assessment team has been informed that in practice this is done. Notwithstanding, no statistics are available to confirm this statement.

***Making of ML/FT STRs regardless of possible involvement of Tax Matters - Essential Criterion 16.1 (applying EC 13.4 and EC SR.IV.2 to DNFBPs)***

2191. As already mentioned under Recommendation 13, for the purposes of the CC tax evasion, including the submission of false tax related documents, is a criminal offence and would therefore be captured under the definition of 'suspicious acts or transactions' under the AML/CFT Law.

2192. Notwithstanding, as already detailed in the analysis under Recommendation 13 in Section 3 of this Report, it appears that in practice different interpretations are given to this state of affairs regarding tax evasion and ML. Indeed, whereas the industry, and in particular the financial sector, indicated full awareness of the fact that tax evasion is a criminal offence and hence where there is a suspicious act or transaction that could involve tax matters they would report, unfortunately the situation is quite the opposite with the authorities. Indeed, most authorities, including investigative and prosecutorial authorities, are of the opinion that if there are indications that a reported

suspicious transaction could involve tax matters this is not investigated for ML and/or FT only for tax evasion by the TAK.

2193. Hence, the same strong recommendation that the FIU provides awareness to such authorities for the investigation of suspicious acts or transaction that may involve tax matter also for the purposes of the prosecuting ML and FT made for the purposes of Recommendation 13 becomes likewise applicable for the DNFBPs sector.

***Reporting through Self-Regulatory Organisations – Essential Criterion 16.2***

2194. The AML/CFT Law does not allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations. STRs are to be submitted directly to the FIU.

**Applying Recommendation 14 – Protection and prohibition of disclosure**

***Legal protection - Essential Criterion 16.3 (applying EC 14.1 to DNFBPs)***

2195. Article 35 of the AML/CFT Law states that, notwithstanding any contrary provisions of applicable law, no civil or criminal liability action may be brought nor any professional sanction taken against any person or entity based solely on the good faith transmission of information, submission of reports, or other action taken pursuant to this Law, or the voluntary good faith transmission of any information concerning a suspicious act or transaction, suspected ML or suspected FT activities to the FIU.

2196. As stated in the analysis of Recommendation 14 under Section 3 of this Report, it is difficult to interpret the term "any person or entity" under Article 35 to refer to directors, officers and employees of the reporting subject. Hence the recommendations made under the analysis of Recommendation 14 under Section 3 of this Report for amendments to Article 35 of the AML/CFT Law become also applicable for the purposes of the DNFBPs sector.

***Prohibition against "Tipping-Off" - Essential Criterion 16.3 (applying EC. 14.2 to DNFBPs)***

2197. According to paragraph (13a) of Article 26 of the AML/CFT Law, directors, officers, employees and agents of lawyers, notaries, certified accountants and licensed auditors, or tax advisor who make or transmit STRs shall not provide the report, or communicate any information contained in the report or regarding the report, 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, unless authorised in writing by the FIU, a Prosecutor, or a Court.

2198. Similar provisions are made through the AML/CFT Law for directors, officers, employees and agents of NGOs (paragraph (10) of Article 24) and political parties (paragraph (9) of Article 25).

2199. Notwithstanding, as already commented under the analysis of Recommendation 14 in Section 3 of this Report, while the prohibition ("tipping off") is not in line with the FATF Methodology, such prohibition is not applicable to the entities themselves but only to the mentioned officers.

2200. Although there is a reporting obligation, there is no such 'tipping off' prohibition for directors, officers, employees and agents of Casinos and Licensed Objects of Games of Chance, dealers in precious metal or precious stones and building construction companies.

2201. On the other hand, since there is no reporting obligation, there is no such prohibition for directors, officers, employees and agents of gaming houses, real estate agents and real estate brokers, persons trading in goods where payments is effected in cash (€10,000 or more) and Trust and Company Services Providers.

2202. In the circumstances the conclusions reached for the analysis of EC 14.2 ("tipping off") under the analysis of the criterion under Section 3 of this Report and recommendations made become applicable also for the DNFBPs sector, including a review of the 'tipping off' prohibition for certain DNFBPs.

**Applying Recommendation 15 – Internal controls and training**

***Establish and maintain internal controls to prevent ML/FT - Essential Criterion 16.3 (applying EC. 15.1, 15.1.1 & 15.1.2 to DNFBPS)***

2203. For lawyers, notaries, certified accountants and licensed auditors, and tax advisors, according to paragraph (12) of Article 26 of the AML/CFT Law, the FIU, in consultation with the Kosovo Bar Association, the Kosovo Board on Standards for Financial Reporting and any other relevant professional association of 'covered professionals' shall establish minimum standards, written procedures and controls for the prevention and detection of ML by covered professionals and supervise them. These procedures shall include, but need not be limited to, the following:

- a client identification procedure;
- a procedure for collecting information and maintaining the records pursuant to the AML/CFT Law and for preventing unauthorised access;
- a procedure for reporting to the FIU;
- a detailed list of the indicators of a suspicious act or transaction, taking into account the particular crime problems of Kosovo and Kosovo's legal and business systems;
- measures to be taken by the covered professional from the moment of the detection of a suspicious act or transaction to the submission of the report to the FIU;
- procedures for ensuring the institution and provision of an employee training program on the obligations under present article and the prevention of ML;
- an audit function to test the reporting and identification system.

2204. While the provisions under paragraph (12) of Article 26 call for guidance from the FIU as analysed under Recommendation 25 in Section 3 of this Report, and which guidance has not been provided, paragraph (13) of Article 26 requires that the Kosovo Bar Association, the Kosovo Board on Standards for Financial Reporting and any other relevant professional association of 'covered professionals' shall inform their members of the approved procedures and other obligations and the sanctions of the AML/CFT Law relating to 'covered professionals'.

2205. Notwithstanding there are no obligations for "covered professionals" to develop their own internal programmes, establishing and maintaining internal procedures, policies and controls to prevent ML and the FT and to communicate such internal programmes to their employees accordingly.

2206. On the other hand, regarding Casinos, Gaming Houses and Licensed Object of Games of Chance, the AML/CFT Law through paragraph (6) of Article 28 specifically requires that they shall develop and implement internal policies, procedures and controls, including appropriate compliance regimes, and adequate screening procedures to ensure high standards when hiring employees, conduct ongoing employee training programs, and implement procedures to test compliance with the AML/CFT Law. There is no evidence that such internal procedures have been developed.

2207. There are no such measures and obligations regarding other categories of DNFBPs such as real estate agents, dealers of precious metal and stones and TCSPs.

2208. Consequently, according to the AML/CFT Law, DNFBPs are not required to develop appropriate compliance management arrangements like the designation of an AML/CFT compliance officer at the management level and to ensure that compliance officer and other appropriate staff have timely access to customer identification data and other CDD information, transaction records, and other relevant information.

2209. The treatment of DNFBPs for the purposes of establishing and maintaining internal control programmes for the prevention of ML and FT creates inconsistences not only between the different categories of DNFBPs but, more seriously, with the international requirements under the FATF Methodology.

2210. The assessment team therefore seriously urges the Kosovo authorities to revise the AML/CFT Law accordingly in order to ensure compliance and harmonisation with the international standards.

***Independent audit of internal controls to prevent ML/FT – Essential Criterion. 16.3 (applying EC 15.2 to DNFBPs)***

2211. For lawyers, notaries, certified accountants and licensed auditors, and tax advisors, according to paragraph (12) of Article 26 of the AML/CFT Law, the FIU, in consultation with the Kosovo Bar Association, the Kosovo Board on Standards for Financial Reporting and any other relevant professional association of covered professionals shall establish minimum standards, written procedures and controls for the prevention and detection of ML by covered professionals and supervise them. These procedures shall include an audit function to test the reporting and identification system.

2212. Such guidance has not been issued while there is no obligation under the AML/CFT Law for "covered professionals" to develop their own internal programmes.

2213. Regarding Casinos, Gaming Houses and Licensed Object of Games of Chance, paragraph (6) of Article 28 of the AML/CFT Law states that they shall implement procedures to test compliance with the AML/CFT Law. The assessment team has not been provided with any evidence that such internal procedures have been developed.

2214. There are no such measures and obligations regarding other categories of DNFBPs such as real estate agents, dealers of precious metals and stones and TCSPs.

2215. The assessment team therefore concludes that since, with the exception of Casinos, Licensed Object of Games of Chance and Gaming Houses, there is no obligation on other DNFBPs to establish and maintain their own internal control programmes, the obligation for an internal audit function, even if applied proportionately to the size and complexity of the entity itself, is not in practice applied thus negatively affecting effectiveness of the system.

2216. The assessment team again urges the Kosovo authorities to address this serious weakness with urgency.

***On-going employee training on AML/CFT matters – Essential Criterion 16.3 (applying EC 15.3 to DNFBPs).***

2217. For lawyers, notaries, certified accountants and licensed auditors, and tax advisors, according to paragraph (12) of Article 26 of the AML/CFT Law, the FIU, in consultation with the Kosovo Bar Association, the Kosovo Board on Standards for Financial Reporting and any other relevant professional association of covered professionals shall establish minimum standards, written procedures and controls for the prevention and detection of ML by covered professionals and supervise them. These procedures shall include provision of an employee training program on the obligations under the AML/CFT Law and the prevention of ML.

2218. As already indicated above, such guidance has not been issued while there is no obligation under the AML/CFT Law for "covered professionals" to develop their own internal programmes.

2219. During the on-site visit the KCN informed that in co-operation with the FIU the Chamber organised AML training for notaries in January 2014 focussing on the awareness of the obligations under the AML/CFT Law. The three basic contracts were used as examples: contract of gifts; contract of sale with rate payments (instalments) because one cannot register a property contract with the Cadastre unless settled in full; and the exchange contract. KCN informed it foresees additional training with the FIU during the year.

2220. Unfortunately no information is available on lawyers since representatives of the KCA could not participate during the Cycle 2 on-site visit and no replies have been received to written questions provided to the KCA by the assessment team following the on-site visit. The FIU however informed that it intends to provide training to lawyers later in 2014.

2221. During the meeting with SCAAK in the course of the Cycle 2 on-site visit representatives of SCAAK informed that since SCAAK is also responsible to monitor accountants and auditors in their professional activities, it has a responsibility to provide Continuous Professional Education (CPE) which is mandatory for auditors by law and also to accountants by practice and ethics. CPE also includes training in the prevention of ML and the FT for accountants and auditors. Training is organised by SCAAK but provided by the FIU.

2222. Regarding Casinos, Gaming Houses and Licensed Object of Games of Chance, paragraph (6) of Article 28 of the AML/CFT Law states that they shall conduct ongoing employee training programs.

2223. The assessment team has not been provided with any information or statistics of training provided by these categories of DNFBPs. The FIU has informed that it has held a meeting with the Association of Casinos and Games of Chance to discuss the organisation of training for casinos (TAK informed however that there are no operating casinos currently in Kosovo) and Licensed Object of Games of Chance. The FIU informed that training had been provided in April 2014.

2224. There are no such measures or obligations regarding other categories of DNFBPs such as real estate agents, dealers of precious metal and stones and TCSPs.

2225. It should however be mentioned that the FIU Administrative Directive 001/2013 on training on the prevention of ML and the FT is applicable to all reporting subjects under Article 16 of the AML/CFT Law.

2226. Following the Cycle 1 on-site visit the FIU informed that up to the time of the Cycle 2 on-site visit it had provided training to different categories of DNFBPs as per below:

***Table 23 – Training provided by FIU to DNFBPs up to on-site visit***

| Month | Reporting Subject | Training / Workshop | Subject | Support |
|---|---|---|---|---|
| January | Notary | Workshop | AML/CFT, Legal obligations and minimum standards of reporting, and drafting contracts | Notary Chamber |
| February | NGO | Workshop | AML/CFT, Legal obligations and ways of reporting | B&S Project |
| March | Auditors and Accountants | Workshop | AML/CFT, Legal obligations and minimum standards of reporting | Council for Financial Reporting |
| April | Political Parties | Workshop | AML/CFT, Legal obligations | CEC<br>B&S Project |
| | Casinos | Training | AML/CFT, Legal obligations and ways of reporting | B&S Project<br>TAK |

2227. The FIU further informed that according to its plans it would be providing further training to other categories of DNFBPs as per below:

***Table 24 – Training planned to be provided by FIU to DNFBPs during 2014***

| Month | Reporting Subject | Training / Workshop | Subject | Support |
|---|---|---|---|---|
| June | Real estate Agents | Workshop | AML/CFT, Legal obligations | |
| July | Car dealers | Training | AML/CFT, Legal obligations | |
| September | Lawyers | Workshop | AML/CFT, Legal obligations and minimum standards of reporting | Kosovo Chamber of Advocates |
| October | Construction Companies | Workshop | AML/CFT | |
| November | Sellers of precious metals | Workshop | AML/CFT | |

2228. The FIU informed that during December 2014 it would not be providing any training as it would be carrying out an assessment of training and workshops conducted in 2014 and in assessing the needs for training and workshops for 2015 involving all categories of reporting subjects.

2229. The assessment team concludes that from information available it appears that while training appears to be provided by the FIU there is still a need to ensure that DNFBPs themselves develop their own internal training programmes for all officers and employees as the training provided by the FIU cannot reach out to all employees and hence will only address a few officers.

***Employee screening procedures – Essential Criterion 16.3 (applying EC 15.4 to DNFBPs)***

2230. Regarding Casinos, Gaming Houses and Licensed Object of Games of Chance, paragraph (6) of Article 28 of the AML/CFT Law states that this category of DNFBPs shall develop and implement internal policies, procedures and controls, including appropriate compliance regimes, and adequate screening procedures to ensure high standards when hiring employees. Notwithstanding, as already indicated earlier, it does not appear that such internal procedures have been developed and therefore the assessment team expresses doubt and concern on the actual implementation of this legal obligation in practice, notwithstanding that no casinos are currently operative in Kosovo according to TAK.

2231. There are no such measures or obligations regarding lawyers, notaries, certified accountants and licensed auditors, and tax advisors, real estate agents, dealers of precious metal and stones and TCSPs and other categories of DNFBPs recognised as reporting subjects in terms of Article 16 of the AML/CFT Law.

2232. Discussions held with some categories of DNFBPs during the on-site visit do not indicate adequate implementation of this obligation. Kosovo authorities should therefore address this important element in order to further strengthen the preventive regime for ML and FT for the DNFBPs whole sector.

***Independence of Compliance Officer - Additional Element 16.3 (applying AE 15.5 to DNFBPs)***

2233. As already established above under the analysis of the application of EC 15.1 including its sub-criteria 15.1.1 and 15.1.2, there is no legal obligation under the AML/CFT Law for any category of DNFBP to appoint and maintain a compliance officer as part of the internal control procedures for the prevention of ML and the FT.

2234. It follows therefore that there is no legal obligation under the AML/CFT Law for compliance officers to act independently and to report to senior management above the compliance officer's next reporting level or the board of directors.

**Applying Recommendation 21 – High risk countries**

2235. It should be stated at the outset that the analysis, findings and recommendations identified under the assessment of compliance with Recommendation 21 under Section 3 of this Report for the financial sector are likewise applicable to the DNFBPs sector under Recommendation 16.

***Countries that inadequately apply the FATF Recommendations – Essential Criterion 16.3 (applying EC 21.1 and EC 21.1.1)***

2236. According to paragraph (2) of Article 20 of the AML/CFT Law, reporting subjects (which includes DNFBPs) shall pay special attention to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently apply the relevant international standards to combat ML and FT.

2237. However, Kosovo does not have effective measures in place to ensure that DNFBPs are advised of concerns about weaknesses in the AML/CFT systems of other countries/jurisdictions.

2238. As already explained under the analysis for Recommendation 21, it appears that there is no guidance or indicators for high risk countries issued by the authorities and therefore reporting subjects must adopt their own lists of high risk countries mainly by following the lists issued by the FATF. Notwithstanding, DNFBPs met by the assessment team were not fully aware of such lists.

***Examination of background and purpose of such transactions – Essential Criterion 16.3 (applying EC 21.2)***

2239. According to paragraph (2) of Article 20 of the AML/CFT Law, reporting subjects shall pay special attention to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently apply the relevant international standards to combat ML and FT. According to paragraph (3) of the same Article 20 reporting subjects shall set forth in writing the specific information regarding those transactions and the identity of all parties involved. The report shall be maintained as specified in the AML/CFT Law and shall be made available if requested by the FIU, a supervisory authority and other competent authorities.

2240. As already identified under the analysis of Recommendation 11 and Recommendation 21 under Section 3 of this Report, it is not clear what information should be documented. While the FATF Recommendations refers to the *findings of the analysis* Article 20 of the AML/CFT Law refers to the *specific information regarding those transactions and the identity of all parties involved*. The assessment team does not interpret the reference to "specific information regarding those transactions" as referring to the findings of an assessment but rather to the details of the transaction *per se*.

2241. This interpretation is consistent with that for the analysis of both Recommendation 11 and Recommendation 21 and hence the recommendations made in the analysis under Section 3 are applicable for the DNFBPs sector.

***Countermeasures – Essential Criterion 16.3 (applying EC 21.3)***

2242. Kosovo is not able to apply counter-measures if a country/jurisdiction continues not to apply or insufficiently applies the FATF Recommendations as there are no provisions in any law or regulation empowering authorities to this effect.

2243. Therefore, the recommendation under the analysis of Recommendation 21 under Section 3 of this Report that legislative provisions be made in the AML/CFT Law empowering the relevant competent authorities to take countermeasures in such circumstances and that such legal provisions be accompanied with guidance on the type of counter-measures to be applied is also applicable for the purposes of the DNFBPs sector.

**Additional elements**

***Extension of reporting obligation – Additional Element 16.4***

2244. AE 16.4 seeks to establish whether the reporting requirement is extended to the rest of the activities of accountants including auditing.

2245. As already argued under the introductory part to the analysis of Recommendation 12 in this Section of the Report the assessment team question whether certified accountants and licensed auditors and tax advisers are recognised as reporting subjects under Article 16 of the AML/CFT Law for the specified activities listed for lawyers in accordance with the FATF Methodology.

2246. Notwithstanding, for the purposes of AE 16.4, certified accountants and licensed auditors and tax advisers are clearly recognised as reporting subjects for the purposes of the rest of their professional activities under Article 16 of the AML/CFT Law with a specific reporting obligation under paragraph (7) of Article 26 of the AML/CFT Law and hence in compliance with the AE.

***Reporting where funds are suspected to be proceeds of all criminal acts constituting a predicate offence – Additional Element 16.5***

2247. AE 16.5 requires that the obligation for DNFBPs to report is extended to suspicions or reasonable grounds of suspicion that funds in a transaction are the proceeds of all criminal acts that would constitute a predicate offence for ML domestically.

2248. DNFBPs should report any suspicious act or transaction to the FIU which, according to paragraph (1.35) of Article 2 of the AML/CFT Law, includes proceeds of all crime.

2249. Although the obligation to report under the analysis of EC 16.1 above under the various Articles of the AML/CFT Law as mentioned covers all criminal acts constituting a predicate offence through the definition of 'suspicious acts or transactions', reference should also be made to the analysis of AE 13.5 under the analysis of Recommendation 13 under Section 3 of this Report.

***Effectiveness***

2250. The assessment team was not provided with any statistics of STRs submitted by DNFBPs. It is therefore difficult to assess the effectiveness and the efficiency of the reporting obligation for DNFBPs.

2251. In addition, the shortcomings identified regarding the supervision of DNFBPs do not allow to consider that this recommendation is implemented effectively.

2252. This conclusion has been reinforced during the interviews as the representatives of DNFBPs demonstrated a very low level of awareness of their reporting obligations, as it had been stated that a vast majority did not have AML/CFT internal procedures and that in case of suspicious acts or transaction, they would rather report to and consult with their ordinal organisation rather than to the FIU.

### 4.2.2. Recommendations and Comments

2253. In order to address the identified gaps or weaknesses in the legislation, Kosovo authorities should ensure that:

- remove inconsistency in timing for reporting between all DNFBPs with a reporting obligation (except casinos) and the financial sector;
- real estate agents and real estate brokers, persons trading in goods where payment is received in cash (equal to or above €10,000) and TCSPs be required to submit an STR when they suspect or have reasonable grounds to suspect that funds are the proceeds of a criminal activity;
- DNPBPs be required to report situations where information available indicates that a person may be or may have been involved in ML or the FT;
- DNPBPs be required to report transactions or persons suspected to be linked to the FT;
- Casinos including Gaming Houses and Licensed Object of Games of Chance, real estate agents and real estate brokers, persons trading in goods where payment is received in cash (equal to or above €10,000), TCSPs and dealers in precious metal or precious stones and their directors, officers and employees (temporary or permanent) be prohibited from disclosing the fact that a STR or related information has been or is being reported or provided to the FIU;
- where the prohibition of disclosure is already imposed on directors, officers and employees this be extended to temporary or permanent employees and to the DNFBP entity itself;
- the prohibition from disclosure which currently does not cover information that a report has been filed but the provision of the report itself to a third party be revised and upgraded to reflect the international standard;
- all categories of DNFBPs that are not currently required to do so, be required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees; these procedures, policies and controls should cover, inter alia, CDD, record retention, the detection of unusual and suspicious transactions and the reporting obligation;
- DNFBPs be required to develop appropriate compliance management arrangements including the designation of an AML/CFT compliance officer at the management level and to ensure that the compliance officer and other appropriate staff have timely access to customer identification data and other CDD information, transaction records, and other relevant information;
- with the exception of casinos, gaming houses, and licensed object of games of chance and "covered professionals" who are already legally obliged to do so, all other DNFBPs be required to maintain an adequately resourced and independent audit function to test compliance with AML/CFT Law proportionate to the size and complexity of the business enity;

- DNFBPs be required to establish internal training programmes and to provide ongoing employee training to ensure that all officers and employees are well trained regarding AML/CFT matters;
- lawyers, notaries, certified accountants and licensed auditors, and tax advisors, real estate agents and brokers, dealers of precious metal and stones, persons trading in goods where payment is effected in cash (equal to or above €10,000) and TCSPs be required to put in place screening procedures to ensure high standards when hiring employees;
- In establishing an obligation for all DNFBPs to appoint a Compliance Officer legal provisions should ensure that Compliance Officers are able to act independently and to report to senior management above the compliance officer's next reporting level or the board of directors;
- DNFBPs be advised of concerns about weaknesses in the AML/CFT systems of other countries/jurisdictions;
- an obligation be imposed on all DNFBPs to document and maintain the findings of the analysis of large complex transactions in addition to the information surrounding the transaction; and
- the AML/CFT Law be amended empowering the relevant competent authorities to take counter-measures in circumstances where a country or jurisdiction does not apply or insufficiently applies the FATF Recommendations and that such legal provisions be accompanied with guidance on the type of counter-measures to be applied.

2254. Kosovo authorities should also take measures to ensure that DNFBPs are fully aware of their obligations of monitoring of transactions, reporting and internal organisation and that DNFBPs understand how to comply therewith.

### 4.2.3. Rating for Recommendation 16

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.16** | **NC** | • some DNFBPs are not required to submit an STR when they suspect or have reasonable grounds to suspect that funds are the proceeds of a criminal activity;<br>• DNPBPs are not required to report situations where information available indicates that a person may be or may have been involved in ML or the FT;<br>• DNPBPs are not required to report transactions or persons suspected to be linked to the FT;<br>• directors, officers and employees of some DNFBPs are not prohibited from disclosing the fact that a STR or related information is being reported or provided to the FIU;<br>• the prohibition of disclosure is not imposed on the DNFBPs entities themselves;<br>• inconsistency with international standard on the circumstances for the prohibition of disclosure;<br>• some DNFBPs are not required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees;<br>• DNFBPs are not required to develop appropriate compliance management arrangements;<br>• DNFBPs are not required to appoint a compliance officer and hence there are no provisions for the compliance officer to act independently and to report to senior management above the compliance officer's next reporting level or the board of directors;<br>• some DNFBPs are not required to maintain an adequately resourced and independent audit function;<br>• requirement to establish ongoing employee training programmes is not imposed on all categories of DNFBPs; |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • the majority of DNFBPs are not required to put in place screening procedures to ensure high standards when hiring employees;<br>• DNFBPs are not advised of concerns about weaknesses in the AML/CFT systems of other countries/jurisdictions;<br>• there is no obligation to document the findings of the analysis of large complex transactions;<br>• there are no provisions for relevant competent authorities to take counter-measures in circumstances where a country or jurisdiction does not apply or insufficiently applies the FATF Recommendations; and<br>• Effectiveness issues related to:<br>– extremely low number of STRs submitted;<br>– very low level of awareness from DNFBPs; and<br>– lack of supervision. |

## 4.3. Regulation, supervision and monitoring (R.24 – R25)

### 4.3.1. Description an Analysis

**Recommendation 24**

2255. Recommendation 24 requires that non-financial business and professions be subject to regulatory and supervisory measures. The Recommendation requires that as a minimum casinos should be licensed; there should be procedures to prevent criminals from owning casinos and procedures to ensure that casinos are effectively supervised for compliance with AML/CFT obligations. It further requires that all other DNFBPs are subject to effective systems of monitoring and ensuring compliance with AML/CFT obligations.

2256. The paragraphs that follow will analyse, evaluate and assess the relevant legal and regulatory provisions in this regard together with their effective implementation by both the industry and the authorities in Kosovo.

***Casinos subject to a comprehensive regulatory and supervisory regime – Essential Criterion 24.1***

2257. EC 24.1 requires that countries ensure that casinos (including internet casinos) are subject to a comprehensive regulatory and supervisory regime that ensures that they are effectively implementing the AML/CFT measures required under the FATF Recommendations.

2258. Casinos are governed by Law No. 04/L-080 on Games of Chance of 2012. The Law governs three other types of gaming entities: slot machines; betting places; and bingo in closed environment. The Law provides for the licensing, operations and supervision of casinos and in this respect appoints an authority responsible for licensing and ensuring compliance with the Law for prudential purposes.[187]

2259. Being recognised as reporting subjects under Article 16 of the AML/CFT Law casinos become subject to the obligations under this Law which also appoints an authority responsible to ensure compliance thereto.

187. This Section will focus on casinos only and will not make references to Licensed Objects of Games of Chance and Gaming Houses as referred to in the AML/CFT Law since, as already identified under the analysis of Recommendation 12 these are not clearly recognised as reporting subjects and the arguments brought under Recommendation 12 remain valid for the purposes of Recommendation 24.

***AML/CFT regulatory and supervisory regime for Casinos – Essential Criterion 24.1.1***

2260. EC 24.1.1 requires that a competent authority be appointed with responsibilities to regulate and supervise casinos for the purposes of the prevention of ML and TF.

2261. Article 30 of the AML/CFT Law appoints the FIU as the supervisory competent authority for all reporting subjects recognised as such under Article 16 of the Law – with the exception of building construction companies.[188] Hence, as recognised reporting subjects, casinos would be subject to the supervision of the FIU for AML/CFT purposes. The FIU claims that it practices a risk based approach for its supervisory functions according to its SOP which the assessment team has not viewed and hence cannot conclude according.

2262. The supervisory powers of the FIU in this regard have been discussed under the analysis of Recommendation 29 under Section 3 of this Report. Consequently all findings related to the supervisory powers of the FIU as identified under the analysis of Recommendation 29 impact on the analysis of Recommendation 24.

2263. According to the AML/CFT Law the FIU also has a regulatory remit over the recognised reporting subjects. Indeed, and specifically for the purposes of casinos, paragraph (8) of Article 28 of the AML/CFT Law charges the FIU with the regulatory responsibility: *The FIU shall from time to time, adopt, amend, or repeal sub-legal acts consistent with the policy, objects and purposes of this section of the Law as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this Law.*

2264. Up to the time of the Cycle 2 on-site visit the FIU had not deemed it necessary to issue any sub-legal acts in this regard. Although the assessment team acknowledges that as informed by TAK only one licence for a casino has been issued but this is as yet inoperative it is recommended that the FIU considers such guidance in accordance with the Law.[189]

2265. From a prudential aspect casinos are subject to the supervisory regime of the Authority of Games of Chance within TAK. In the course of the on-site visit the Authority informed the assessment team that casinos (there are currently no operating casinos in Kosovo) are supervised off-site by two teams – one on licensing and one on auditing. From time to time TAK also visits them (including other gaming houses) on-site. The main objectives of the examinations are to ensure compliance and tax purposes. Inspections are done through the regions where every region carries out its checks in close cooperation with officers of the Authority of Games of Chance.

2266. TAK further informed that from a prosecutorial basis the Authority also inspects for AML/CFT purposes because of the seriousness and impact of ML and FT. Notwithstanding, there are no supervisory arrangements between the FIU and TAK in terms of Article 36A of the AML/CFT Law.

2267. In the absence of any casinos operating in Kosovo the assessment team could not evaluate the effectiveness of the supervisory regime of the FIU and the understanding of casinos of their obligations under the AML/CFT Law.

***Casinos licensed by a designated competent authority – Essential Criterion 24.1.2***

2268. Article 24 of the Law No. 04/L-080 establishes the Authority of Games of Chance within TAK as the authority responsible for the implementation of the aforementioned Law. The Law assigns supervisory and regulatory powers to the Authority – refer also to Article 2 of the Law.

2269. According to paragraph (1) of Article 25 of the Law on Games of Chance TAK can issue six types of licences for games of chance, among which is the licence for casinos. According to this paragraph a licence is mandatory and is not permanent: *The License for Casino is required for any person who exercises the activity, manages or displays any type of Casino Games, or who gets directly or indirectly a compensation or a Prize or any percentage or a part of money or property*

188. In accordance with Article 36A of the AML/CFT Law the FIU and the CBK have signed a MoU through which the FIU delegates its supervisory mandate for the financial sector to the CBK – please refer to the analysis of Recommendation 23 and Recommendation 29 under Section 3 of this Report.

189. In the analysis of Recommendation 12 the assessment team highlights the need for legislative or regulatory provisions defining casinos, licensed objects of games of chance and gaming houses.

*which is played in order to keep, manage, or continue a Casino Game. Casino Games and Devices of Casino Games shall be purchased or provided only by the persons approved and licensed by TAK. Any License for a Casino according to this paragraph shall expire in three (3) years from the date of issuance, but it can be renewed upon request.*

2270. Article 31 of the Law on Games of Chance provides for certain conditions upon licences:

- the licence is revocable and non-transferable;
- the licensee has no permanent right for the licence; and
- the licence is conditional on continuous and appropriate qualification and from the clear definition that the same is obliged to provide regulatory, investigative and law enforcement authorities with any help and information necessary to ensure compliance of policies and requirements of this Law.

2271. Article 32 of the Law on Games of Chance further provides that the burden of proof on the applicant's qualification as a recipient of the license, registration, suitability or a permit required by this Law falls on the applicant itself.

2272. According to Article 40 of the Law on Games of Chance any license that is in force, shall be extended by TAK for the successive periods equal to the original period of the license after a request is made for an extension and the payment of the license and taxes required by Law and sub-legal acts are completed. There are no specific provisions for the criteria for an extension of the licence but it appears that an extension is treated as a new licence and hence the provisions of Article 32 would apply.

2273. In August 2013, pursuant to paragraph (4) of Article 81 of Law No. 04/L-080 on Games of Chance, the MoF has issued Administrative Instruction MF No. 3/2013 on implementation of Law No. 04/L-080 on Games of Chance. The Administrative Instruction is of a prudential nature dealing with the licensing and operational procedures of games of chance under Law No. 04/L-080. The Administrative Instruction also covers the structure and internal operations of the Authority for Games of Chance with TAK. With regards to licensing the Administrative Instruction includes an annex with all types of certificates and forms required: License certificates, forms and guidelines for application, registration, findings of suitability ("fit and proper"), types of information, classified positions as key people, payments for initial registration of key employees and their later extensions, tax forms and statements as well as other special permits required.

***Preventing casinos from being owned or managed by criminals – Essential Criterion 24.1.3***

2274. EC 24.1.3 requires that a competent authority should be responsible to take the necessary measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, holding a management function in or being an operator of a casino. The FATF Methodology does not define 'significant interest' and hence this is left at the discretion of the countries.

2275. The Law on Games of Chance establishes the criteria that should be applied by TAK in approving or extending licences for casinos – referred to as 'suitability criteria'. Although paragraph (1) of Article 32 establishes that the burden of proof of the suitability of the applicant rests with the applicant himself, paragraph (2) of the same Article provides certain conditions that must be fulfilled. Of particular interest for the purposes of EC 24.1.3 are the following conditions:

- not convicted of a criminal offence with more than 6 (six) months, in Kosovo or in any other country;
- shall not pose a danger to the public interest of Kosovo.

2276. According to Article 33, among others, these suitability conditions – and others - must be fulfilled by:

- in connection with private companies licensed under this Law, all officers, directors and all shareholders who have more than five percent (5%) interest in such companies;
- in relation to companies traded in the stock market exchange and that are licensed under this Law, all officers, directors and shareholders who have more than ten percent (10%) interest or control over the company.

2277. The Law on Games of Chance does not define what constitutes a significant interest in the shareholding of a legal entity. However, for the purposes for example of financial institutions, the Law on Banks defines a 'significant interest' as *a direct or indirect holding of an interest in a legal entity, alone or in concert with another person, that represents five percent or more of its outstanding voting shares, or, in the opinion of the CBK, based on the facts and circumstances of that holding makes it possible for the holder to exercise control over the legal entity in which such shares are held.*

2278. While it is not clear why the Law on Games of Chance applies different shareholding levels for private companies and companies traded in the stock market exchange, it is recommended that a definition of 'significant interest' on the basis of the said definition in the Law on Banks is included in the Law on Games of Chance and the criteria under Article 33 of the Law as indicated above be harmonised accordingly.

2279. Moreover it is not clear whether the reference to a 'private company' would also incorporate a company that is not quoted on the market exchange but whose shares are transferable, whether domestic or foreign.

***Other categories of DNFBPs subject to effective systems of monitoring – Essential Criterion 24.2***

2280. EC 24.2 requires countries to ensure that all other categories of DNFBPs are subject to effective systems for monitoring on compliance with their AML/CFT obligations based on the risk of ML and FT in that sector. If there is a proven low risk then the monitoring measures applied could be lowered – applying a risk based approach to monitoring.

2281. Notwithstanding that all categories of DNFBPs, with the exception of building construction companies, fall within the supervisory remit of the FIU in terms of Article 30 of the Law, the AML/CFT Law does not provide for the FIU as the supervisory authority to apply a risk based supervisory approach for DNFBPs.

2282. In enquiring why building construction companies are excluded from the supervisory function of the FIU and hence they remain unsupervised for the purposes of the AML/CFT Law the FIU informed that the exemption is the decision of the Kosovo Parliamentary Assembly and the FIU does not question why the Assembly has decided to legislate in this manner. The FIU just follows what is in the Law without questions as it is not the responsibility of the FIU to ensure that the Law provides adequately for the AML/CFT regime.

2283. The assessment team begs to differ from the above conclusion of the FIU in particular as even under the AML/CFT Law itself the FIU is obliged to give advice on the appropriateness of the legislation that is required to prevent ML and FT – paragraph (1.8) of Article 14 which states:

> "compile statistics and records and based thereon make recommendations to the Minister of Economy and Finance, the Minister of Justice, the police, the Kosovo Customs in Kosovo and/or other relevant persons or bodies regarding measures which may be taken and legislation which may be adopted to combat money laundering and the financing of terrorist activities".

2284. The NRA finds that construction business, real estate business and petrol stations are the most vulnerable sectors for ML with a high significance of consequence and an almost certain likelihood. Consequently the NRA recommends immediate action. Indeed, during the on-site visit the assessment team was informed that in the risk assessment of the individual sectors following the NRA, the construction industry will be the first sector to be assessed.

2285. It is therefore not understood how a sector that is identified as one of the highest risk areas for ML and which has been included as a reporting subject is then purposely excluded from being monitored on compliance with the AML/CFT Law and thus not even to be addressed in any regulatory guidance that may be eventually issued for DNFBPs.

2286. The assessment team therefore recommends that as part of the sectorial risk assessment of the construction sector, consideration should be given to either extending the supervisory powers of the FIU to cover also the construction sector or a separate competent authority be appointed for this purpose through arrangements within the provisions of Article 36A of the AML/CFT Law similar to the arrangements with the CBK for the financial sector.

***Designated competent authority for other categories of DNFBPs – Essential Criterion 24.2.1***

2287. EC 24.2.1 while requiring the designation of a competent authority with an AML/CFT regulatory and supervisory remit for the other categories of DNFBPs, further requires that such competent authority should have adequate powers to perform its functions, including power to monitor and sanction, supported by adequate technical and other resources.

2288. Article 30 of the AML/CFT Law appoints the FIU as the supervisory authority for the purposes of the Law to supervise all reporting subjects under the Law with the exception of construction companies. In doing so Article 30 provides for the powers of the FIU to effectively undertake its on-site supervisory tasks. In establishing the parameters within which the authorised officials of the FIU may conduct their inspections including the right of entry, and the right to demand copies of documents, Article 30 further obliges the owner or person in charge of the premises being inspected and every person present in the premises to give the authorised officials all reasonable assistance to enable them to carry out their responsibilities.

2289. In the absence of a supervisory risk based approach and in the light of resources available at the FIU the assessment team questions the capacity of the FIU in effectively monitoring the wide range of reporting subjects that fall within its remit – refer also to the analysis of Recommendation 30 under Section 3 of this Report.

2290. According to the 2011 Annual Report of the FIU during the first quarter of 2011 four cases of compliance inspection were ongoing while a further four were initiated at the same time with two cases remaining open by end of quarter. These inspections were mainly focussed on MFIs as NGOs. While no compliance inspections were undertaken during the second quarter due to lack of personnel in FIU, during the third quarter two compliance inspections were in process and two others were initiated mainly focussed on car dealers and real estate agents.

2291. There are no statistics, data or information on compliance inspections by the FIU for 2012 in its Annual Report for the year. Moreover, while the 2012 Annual Report lists the objectives of the FIU for 2013, no reference is made to its supervisory remit under the AML/CFT Law.

2292. The low number of compliance inspections by the FIU raises concerns on the effectiveness of the monitoring of the system, in particular with regards to the monitoring of DNFBPs.

2293. The FIU should therefore either be provided with the necessary resources to effectively fulfil its supervisory mandate of DNFBPs or, where appropriate, enter into agreements with relevant authorities for specific DNFBPs sectors in accordance with the provisions of Article 36A of the AML/CFT Law. The former would be a more effective solution as the FIU possesses a concentration of knowledge on AML/CFT measures and obligations. However this should be accompanied by legal provisions and effective implementation of a supervisory risk based approach.

2294. The supervisory powers of the FIU for the purposes of DNFBPs are discussed and assessed under the analysis for Recommendation 29 in Section 3 of this Report since the FIU also has a supervisory remit for the financial sector. Consequently all findings related to the supervisory powers of the FIU under Recommendation 29 and all recommendation made thereto are applicable for the purposes of Recommendation 24, EC 24.2.1.

2295. Moreover, as already determined under this Report the AML/CFT Law does not provide for a range of sanctions. Indeed it only provides for administrative sanctions that are of a pecuniary nature – see analysis of Recommendation 17 under Section 3 of this Report.

2296. In summary, findings under Recommendation 29 can be grouped as follows although a full reading of the analysis under Recommendation 29 is highly advisable to put the following in context:

- legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations ((EC 29.2) – EC 24.1 and EC 24.2);
- absence of a mandate for the FIU to undertake off-site examinations ((EC 29.3) – EC 24.1 and EC 24.2.1);
- absence of a range of sanctions ((EC 17.4) – EC 24.2.1);
- no adequate powers of enforcement and sanctions against directors or senior management of DNFBPs for failure to comply with the provisions of the AML/CFT Law ((EC 29.4) – EC 24.1.1 and EC 24.2.1).

***Effectiveness***

2297. In the case of casinos the assessment team could not measure the effectiveness of the system because while the legislation is in principle in place, there are no licenced casinos and hence the supervisory system is not operating. With regards to other types of games of chance it does not appear that any monitoring has been done for the purposes of ensuring compliance with the AML/CFT Law.

2298. With respect to other DNFBPs there are various concerns raised in the analysis which raise doubt whether the system is adequately implemented, there is lack of awareness and low number of on-site examinations and hence negative impact on effectiveness.

**Recommendation 25**

2299. Recommendation 25 requires competent authorities to provide guidance and feedback to financial institutions and DNFBPs to assist them in effectively implementing the national measures for the prevention of ML and FT, particularly in the detection and reporting of suspicious transactions.

2300. Recommendation 25 has consequently been analysed under Section 3 of this Report for both the financial sector and DNFBPs. For analysis, findings, comments and recommendations, including effectiveness, kindly refer to Section 3 of this Report accordingly.

### 4.3.2. Recommendations and Comments

2301. Although the legal supervisory obligations are enacted and the supervisory structure is built within the FIU to a certain degree, there remain some gaps and shortcomings in the system that need to be addressed. These can be grouped as follows, although a full reading of the analysis of Recommendation 24 above is strongly recommended in order for the identified shortcomings to be put in context:

- gaps and weaknesses in the supervisory powers of the FIU identified under the analysis of Recommendation 29 under Section 3 of this Report in general apply also for Recommendation 24 (EC 24.1.1);
- absence of regulatory guidance for casinos by FIU in accordance with Article 28 of AML/CFT Law (EC 24.1.1);
- no definition of what constitutes a 'significant' shareholding (EC 24.1.3);
- inconsistency of shareholding level for the identification of officers, directors and shareholders of private and quoted companies (EC 24.1.3);
- not clear whether the reference to a 'private company' would also incorporate a company that is not quoted on the market exchange but whose shares are transferable, whether domestic or foreign (EC 24.1.3);
- non-application of a risk based supervisory approach (EC 24.2);
- absence of legal powers for the FIU to apply a risk based approach (EC 24.2);
- low number of on-site compliance visits by FIU (EC 24.2.1);
- no supervisory authority appointed for building construction companies as reporting subjects under the AML/CFT Law (EC 24.2 and EC 24.2.1));
- absence of range of sanctions to be applied proportionately to the severity of an offence ((EC 17.4)- EC 24.2.1);
- no adequate powers of enforcement and sanctions against directors or senior management of DNFBPs for failure to comply with the provisions of the AML/CFT Law ((EC 29.4) – EC 24.1.1 and EC 24.2.1)
- legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations ((EC 29.2) – EC 24.1 and EC 24.2);
- absence of a mandate for the FIU to undertake off-site examinations ((EC 29.3) – EC 24.1 and EC 24.2.1); and
- human resources for supervisory authorities are insufficient thus impacting effectiveness ((EC 30.1) - EC 24.2.1).

2302. Within this context and in order to enhance the regulatory and supervisory regime for DNFBPs, this Report makes various recommendations. While the importance of reading the full analysis for Recommendation 24 is highly important, within this context the recommendations can be grouped as follows:

- recommendations for enhancing and strengthening of the supervisory powers of the FIU made under the analysis of Recommendation 29 under Section 3 of this Report in general apply also for Recommendation 24;
- notwithstanding that currently there are no operative casinos in Kosovo, the FIU should consider developing sub-legal acts for casinos as required under Article 28 of the AML/CFT Law;
- a definition of 'significant interest' on the basis of the said definition in the Law on Banks should be included in the Law on Games of Chance and the licensing criteria under Article 33 of the Law should be harmonised accordingly;
- consideration should be given to either extending the supervisory powers of the FIU to cover also the construction sector or a separate competent authority be appointed for this purpose through arrangements with the FIU under Article 36A of the AML/CFT Law;
- either provide the FIU with adequate resources to meet its supervisory mandate or introduce arrangements under Article 36A of the AML/CFT Law similar to those with the CBK for the financial sector; and
- introduce legal and implementing measures for a risk based supervisory approach.

### 4.3.3. Rating for Recommendation 24

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.24** | **NC** | • no definition of what constitutes a 'significant' shareholding;<br>• inconsistency of shareholding level for the identification of officers, directors and shareholders of private and quoted companies;<br>• absence of legal powers for the FIU to apply a risk based supervisory approach and hence non-application of a risk base approach;<br>• low number of on-site compliance visits by FIU;<br>• no supervisory authority appointed for building construction companies as reporting subjects under the AML/CFT Law;<br>• absence of range of sanctions to be applied proportionately to the severity of an offence;<br>• no adequate powers of enforcement and sanctions against directors or senior management of DNFBPs for failure to comply with the provisions of the AML/CFT Law;<br>• legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations; and<br>• absence of a mandate for the FIU to undertake off-site examinations. |

## 4.4. Other businesses and professions and Modern secure transaction techniques (R.20)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010) and as amended through Law No. 04/L-178 of 11 February 2013, hereafter "AML/CFT Law";
- Law on Central Bank of Kosovo (Law No. 03/L-209 of 22 July 2010), hereafter "Law on CBK";
- Law on Payment System (Law No. 04/L-155 of 4 April 2013);
- CBK - Regulation for International Payments of January 2014.

### 4.4.1. Description and Analysis

2303. The objective of Recommendation 20 is twofold. It requires the application of the obligations for the prevention of ML and the FT to other businesses and professions that pose a risk of ML and the FT (EC 20.1) and the development and use of money management techniques to reduce ML and FT vulnerabilities (EC 20.2).

***Application of obligations to other non-financial businesses and professions (other than DNFBPs) – Essential Criterion 20.1***

2304. EC 20.1 requires countries to consider applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions that are not already included under the DNFBPs designated list under the FATF Methodology and that are at risk of being misused for ML or TF.

2305. As indicated in the analysis of Recommendation 12 the list of reporting subjects excluding the financial sector under Article 16 of the AML/CFT Law is broader than the FATF Methodology list. Article 16 includes:

- Non-Governmental Organisations (NGOs);
- Political entities;
- Building construction companies;
- Real estate brokers;
- Natural or legal persons trading in goods when receiving payment in cash in an amount of ten thousand (10,000) Euro or more.

2306. Moreover, Article 16 of the AML/CFT Law appears to recognise certified accountants, licensed auditors and tax advisers as reporting subjects for their entire professional activities.[190]

2307. Therefore, but without prejudice to the concerns expressed in the assessment in this Report on the implementation of the obligations under the AML/CFT Law for some of the recognised non-financial businesses and professions, the Kosovo legislation indicates compliance with EC 20.1.

***Development and use of money management techniques – Essential Criterion 20.2***

2308. EC 20.2 requires countries to take measures to encourage the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to ML. The FATF Methodology provides examples of techniques or measures that could be applied such as: reducing reliance on cash, not issuing very large denomination banknotes and secured automated transfer systems.

2309. Notwithstanding that measures have been taken and further measures are being implemented, the economy in Kosovo remains cash based in its majority.

190. Please refer to analysis under Recommendation 12 with reference to the specified activities.

2310. According to Article 16 of the Law on the CBK the currency of Kosovo shall be determined by Law in accordance with Article 11 of the Constitution. The legal tender currency in Kosovo is currently the euro. All denominations of the euro notes, including the €500 note, are issued in circulation. According to Article 16 only the CBK shall have the right to issue banknotes and coins. To this effect the CBK is responsible for maintaining an appropriate supply of banknotes and coins in Kosovo.

2311. The CBK has provided information on the issue and withdrawal of currency notes by denomination for the period 2003 to 2013. The tables that follow provide this information for the period 2009 to 2013.

2312. The following table provided by the CBK indicates the supply of euro currency notes in circulation:[191]

***Table 25: Currency issued by the CBK (supply of currency in circulation)***

| Denomination/Year | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| **500 €** | 30,200 | 18,000 | 9,000 | 17,000 | 17,000 |
| **200 €** | 500 | 2,000 | 1,000 | 1,000 | 1,000 |
| **100 €** | 299,100 | 319,000 | 302,000 | 473,000 | 492,000 |
| **50 €** | 1,662,500 | 2,273,000 | 2,335,000 | 2,432,000 | 2,016,000 |
| **20 €** | 1,901,400 | 2,207,000 | 2,303,000 | 3,634,000 | 3,364,000 |
| **10 €** | 1,822,400 | 2,086,000 | 2,140,000 | 3,795,000 | 3,563,000 |
| **5 €** | 1,059,000 | 1,140,000 | 1,125,000 | 1,117,000 | 1,025,000 |
| **Total pieces** | **6,775,100** | **8,045,000** | **8,215,000** | **11,469,000** | **10,478,000** |
| **Total amount** | **189,782,000** | **225,650,000** | **224,735,000** | **293,815,000** | **266,735,000** |
| ***of which €500*** | *15,100,000* | *9,000,000* | *4,500,000* | *8,500,000* | *8,500,000* |
| ***Ratio of €500 to total*** | *7.96%* | *3.99%* | *2.00%* | *2.89%* | *3.19%* |

2313. The following table provided by the CBK indicates the withdrawal of euro currency notes from circulation:

***Table 26: Currency deposited at the CBK (withdrawal from circulation)***

| Denomination/Year | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| **500 €** | 317,200 | 342,000 | 425,000 | 360,000 | 316,000 |
| **200 €** | 158,100 | 186,000 | 214,000 | 181,000 | 124,000 |
| **100 €** | 1,334,400 | 1,415,000 | 1,650,000 | 1,759,000 | 1,762,000 |
| **50 €** | 3,875,100 | 4,283,000 | 5,027,000 | 5,078,000 | 5,319,000 |
| **20 €** | 2,553,700 | 2,633,000 | 2,774,000 | 3,579,000 | 3,467,000 |
| **10 €** | 2,447,800 | 2,453,000 | 2,494,000 | 3,536,000 | 3,526,000 |
| **5 €** | 1,246,000 | 1,329,000 | 1,293,000 | 1,388,000 | 1,132,000 |
| **Total pieces** | **11,932,300** | **12,641,000** | **13,877,000** | **15,881,000** | **15,646,000** |
| **Total amount** | **599,197,000** | **647,685,000** | **758,535,000** | **759,880,000** | **735,210,000** |
| ***of which €500*** | *158,600,000* | *171,000,000* | *212,500,000* | *180,000,000* | *158,000,000* |
| ***Ratio of €500 to total*** | *26.47%* | *26.40%* | *28.01%* | *23.69%* | *21.49%* |

2314. Paragraph (1) of Article 22 of the Law on the CBK stipulates that the CBK shall be exclusively responsible for the regulation, licensing, registration and oversight of payment, clearing and securities settlement systems as further specified in the relevant Laws. The CBK is further empowered to impose administrative penalties within the relevant provisions of the Law on the CBK. The CBK is also empowered to regulate and oversee the issuance and quality of payment

191. Since the currency of Kosovo is the euro, the currency in circulation may also be affected by the import and export of the currency by visitors to Kosovo.

instruments. This supervisory remit is further strengthened through the Law No. 04/L-155 on Payment System which was promulgated by Decree No. DL-016-2013 of 24 April 2013.

2315. Within the CBK, the Department of the Payment System supervises the only interbank payment system in Kosovo, Electronic Interbank Clearing System (EICS). This system has provided a technical infrastructure and a secure, fast and efficient mechanism for interbank payments circulation in the country.[192] The CBK has informed that it has approved the Regulation on the scheme of direct debit of the electronic system of inter-bank clearing.

2316. The CBK informed that there is no documented specific policy document to reduce the use of cash. However various measures have already been and are being taken to this effect. Indeed currently there is a planned project for the development of a small amount retail payment system. To this effect products for direct payments will be introduced thus reducing the need to settle payments and bills through cash. It should be however mentioned that in 2009 the CBK had developed a document on its vision of the future national payments system which is being gradually implemented. To this effect a National Payment Council comprising a Project Management Group had been established. The objectives of the terms of reference of the Project Management Group for reducing cash transactions in Kosovo within the National Payments Council (NPC) are twofold.[193] First to prepare a code of conduct and possibly proposals for legislation for actions and measures to be undertaken by the banks, the business community and private individuals for reducing the volume of cash transactions. Second to build consensus among banks in order to sign and implement the code of conduct and possible legislation. The main purpose of these arrangements will be first the reduction of cash transactions by creating disincentives for cash use for all interested parties – banks, businesses and individuals; and second the increase of non-cash transactions by creating processes and infrastructures that incentivise all interested parties to use alternatives to cash.

2317. As a result the use of debit and credit cards is also gathering momentum in Kosovo. As at June 2013 there were 715,827 debit/credit cards issued out of which 702,238 were active.[194] The CBK has provided the following statistics on the use of these cards since 2009.

***Table 27: Number of Debit and Credit cards in use***

| Type | 2009 | 2010 | 2011 | 2012 | 2013* |
|---|---|---|---|---|---|
| **Credit Cards** | 31,508 | 37,922 | 74,873 | 95,942 | 99,339 |
| **Debit Cards** | 507,399 | 480,659 | 548,253 | 599,651 | 602,899 |
| ***Total cards in use*** | **538,907** | **518,581** | **623,126** | **695,593** | **702,238** |

** Up to June 2013*

2318. According to the May 2014 Financial Stability Report of the CBK banking infrastructure continued to have a growth trend in terms of Automated Teller Machines (ATMs) network and Point-of-Sale (POS) equipment which enable customers to make payments at points of sale. The number of ATMs and POSs devices installed by commercial banks marked an annual growth of 4.4% and 17.2%, respectively, in June 2013. The total number of ATMs installed reached 493, while the number of POSs amounted to 9,039.[195]

2319. Also according to the May 2014 Financial Stability Report of the CBK e-banking accounts, through which users can access online banking services through the internet continued to grow. In June 2013, the total number of e-banking accounts reached 113,171 indicating an annual growth of 12.6% compared to June 2012. Regarding the total volume of e-banking transactions, as the number of transactions executed through e-banking accounts increased, also their value increased considerably. The total number of transactions executed through e-banking accounts amounted to 443,053 in June 2013 (243,184 in June 2012), while the total value of transactions through e-banking in the same period amounted to €1.1 billion (€509 million in June 2012).[196]

192. CBK Financial Stability Report No 04 May 2014, p. 66

193. The NPC which was established by the CBK in March 2010 is meant to support the development of a stable and efficient system for clearing and settlement of payments and securities in Kosovo.

194. CBK Financial Stability Report No. 4, May 2014, p. 69

195. *Ibid*, p. 69

196. *Ibid*, p. 69

2320. The Financial Stability Report further addresses systems in which Kosovo is expected to become a member after being integrated in the EU in the future. The Real Time Gross Settlement System (RTGS), which will process mainly large amount payments and urgent payments between banks and governmental institutions in the country, remains in the initial stages of implementation. The review of the national payment system strategy (as part of the payment processing system), includes processing of small amount payments, Automatic Clearing House (ACH) in addition to RTGS. ACH payments system mainly includes small payments realised in the group in different clearing sessions. Under the new system, the operation of the two payment systems, particularly payment settlements on larger amounts and urgent payments will be done simultaneously with the settlement of the small amount payments. This would be accomplished based on international standards ISO and SWIFT, which represent a single standardisation approach to be used by all financial standards initiatives. These standards are used in the unified Single European Payment System (SEPA) as well as in the TARGET system that provides payments between payment systems in the European Union (Trans-European Automated Real-time Gross Settlement Express Transfer).[197]

2321. One of the measures in the use of cash is the percentage of currency in circulation to the GDP. The CBK has informed that for the past five years the ratio has remained relatively stable, standing at 18.8% for 2009; 19.9% for 2010; 18.6% for 2011; 19.2% for 2012 and 19.2% for 2013.

2322. Paragraph (7) of Article 13 of Law No. 03/L-122 on Tax Administration and Procedures stipulates that: *Any transaction in excess of five hundred (500) euro, made between persons involved in economic activity, after 1 January 2009 is required to be made through bank account.*

2323. According to paragraph (1.26) of Article 1 of the Law on Tax Administration, the term 'person' includes a natural person, a legal person, a partnership as well as a grouping or association of persons, including consortiums.

2324. The Law on Tax Administration further defines the term 'economic activity' as: *any activity of producers, traders or persons supplying goods or services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purposes of obtaining income there from on a continuing basis shall in particular be regarded as an economic activity.*

2325. In the course of the on-site visit the TAK informed that it has an updated system through which it can monitor related data for payments in excess of €500. If any breaches of this requirement are noted officials of the TAK visit the business concerned to get more information. The TAK informed it has a risk analysis tool to this effect. Failure to respect these provisions is subject to fines. The TAK has the possibility of requesting and receiving data from all authorities and institutions that could assist it in this process. All entities are obliged to report to the tax authorities every sale or purchase above €500 effected during the previous year by the 31 March of the following year. The way traders report on the settlement of their accounts is regulated in order to have a unified reporting system. Thus the TAK has the possibility to monitor either on the side of the buyer or of the seller.

2326. Moreover TAK has the power to stop delivery trucks and check documents for payments which can later be matched on transactions between buyer and seller. Another main source of checking reporting is through the tax declaration forms and the financial statements of entities concerned.

2327. Although there is no documented strategy with plans to reduce the use of cash, various measures have been or are being taken with this objective. Notwithstanding, information and statistics provided at times are in conflict and do not indicate this objective. The CBK may therefore wish to document its plans for better cash management techniques establishing objectives and milestones.

2328. The statistics provided by the CBK on the withdrawal and supply of currency notes indicate a trend where more currency notes (by number and by value) are being deposited thus reducing circulation than the amount of currency notes that are being issued by the CBK in circulation. Thus for example in 2012 an amount to the value of €293.8 million were issued thus increasing

197. *Ibid*, pp. 66/67

circulation, while an amount to the value of €759.8 million were deposited thus reducing circulation. Although on a diminishing scale, the trend has been maintained in 2013 with values of €266.7 million and €735.2 million respectively.

2329. Moreover, focussing on the €500 currency note the statistics indicate that there is heavy demand for this note. Likewise statistics indicate that more €500 notes are being deposited with the CBK than the amount issued. Thus whereas in 2013 the CBK issued €8.5 million (€8.5 million in 2012) worth in €500 currency notes, an amount of €158 million (€180 million in 2012) were deposited.

2330. Notwithstanding the positive element of a reduction in currency in circulation, these statistics raise certain concerns. First on the difference between the high deposited amounts and the amounts issued. Second on the high use of the €500 note despite the prohibitions in the Law on Tax Administration on the settlement in cash for transactions exceeding €500, in which case, presumably, there would be a higher demand for this high denomination note.

2331. While it is accepted that with the use of the euro as the national currency the currency in circulation may increase with currency coming into Kosovo by *bona fide* travellers, the amounts are too high and raise concern of money coming over the borders and placed in the Kosovo banking system. It is therefore recommended that the CBK co-ordinates and undertakes a study on these statistics to identify the source of these differences with the assistance of other authorities such as KC and TAK.

2332. It should however be mentioned that, notwithstanding the above analysis, statistics for cross-border movements of currency by KC as shown in the table below, while presenting a different picture for movement of currency other than the euro, gives an even worse position for the euro.

***Table 28: Cash reporting movements by Kosovo Customs for 2012 (figures in '000)***

| Currency | Business IN | Personal IN | TOTAL IN | Business OUT | Personal OUT | TOTAL OUT | E/Rate 2012 | EUR IN | EUR OUT |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |
| **ALL (Lekë)** | 202,800 | 837 | 203,637 | | | | **139.41** | 1,461 | |
| **AUD** | | | | 157 | | 157 | **1.28** | | 123 |
| **CAD** | | | | 303 | | 303 | **1.34** | | 226 |
| **CHF** | 1,189 | 7,261 | 8,450 | 437,110 | 444 | 437,554 | **1.23** | 6,870 | 355,735 |
| **DIN** | 4,975,310 | | 4,975,310 | | | | **111.42** | 44,654 | |
| **DKK** | | | | 501 | | 501 | **7.46** | | 67 |
| **EUR** | 33,440 | 5,608 | 39,048 | 648,831 | 6,164 | 654,995 | | 39,048 | 654,995 |
| **GBP** | | | | 10,674 | | 10,674 | **0.86** | | 12,412 |
| **HRK** | | | | 549 | | 549 | **7.59** | | 72 |
| **NOK** | | | | 8,915 | | 8,915 | **7.45** | | 1,197 |
| **RUB** | | | | 2 | | 2 | **40.02** | | |
| **SEK** | | 12 | 12 | 3,274 | | 3,274 | **8.34** | 1 | 393 |
| **USD** | 3,351 | 266 | 3,617 | 33,755 | 321 | 34,076 | **1.31** | 2,761 | 26,012 |
| | | | | | | | | | |
| | | | | | | | ***Euro*** | **94,795** | **1,051,231** |

2333. Looking at the above table for statistics for currency movements cross the border one questions the incoming of CHF 6.8 million against an outgoing of CHF 355.7 million. Similar situations appear for the US Dollar and the UK Sterling. According to the FIU Annual Report 2012 over 90% of declarations in cash shown in monetary value were declared in EUR and CHF currencies. Moreover, during 2012 there was an increase of about 33% of the value of transactions reported by KC over the previous year. This trend continued into 2013 as indicated through statistics presented by KC in the table below.

***Table 29: Cash reporting movements by Kosovo Customs for 2013 (figures in '000)***

| Currency | Business IN | Personal IN | TOTAL IN | Business OUT | Personal OUT | TOTAL OUT | E/Rate 2013 | EUR IN | EUR OUT |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |
| **ALL** | | | | 10,000 | | 10,000 | **139.41** | | 72 |
| **AUD** | | | | 430 | 45 | 475 | **1.54** | | 308 |
| **CAD** | | | | 390 | | 390 | **1.46** | | 267 |
| **CHF** | 482 | 7,310 | 7,792 | 551,081 | 884 | 551,965 | **1.23** | 6,335 | 448,752 |
| **DIN** | 3,248,630 | | 3,248,630 | 70,000 | | 70,000 | **111.42** | 29,157 | 628 |
| **DKK** | | | | 935 | | 935 | **7.46** | | 125 |
| **EUR** | 17,625 | 3,665 | 21,290 | 640,226 | 5,539 | 645,765 | **1.00** | 21,290 | 645,765 |
| **GBP** | | | | 11,604 | | 11,604 | **0.83** | | 13,981 |
| **HRK** | | | | 733 | | 733 | **7.63** | | 96 |
| **NOK** | | 165 | 165 | 45,799 | | 45,799 | **8.36** | 20 | 5,478 |
| **RUB** | 4 | | 4 | 19 | | 19 | **45.32** | | |
| **SEK** | | | | 13,167 | | 13,167 | **8.86** | | 1,486 |
| **USD** | 3,030 | 258 | 3,288 | 25,503 | 127 | 25,630 | **1.38** | 2,383 | 18,572 |
| | | | | | | | | | |
| | | | | | | | ***Euro*** | **59,184** | **1,135,532** |

2334. In the case of the Euro it appears from the above statistics that while €39 million in cash has been imported into Kosovo cross border, an amount of €655 million has been exported cross border in 2012 with €21 million and €645 million respectively for 2013. This adds to the excessive cash in Kosovo which is not only finding itself into the banking system and re-deposited with the CBK thus reducing currency in circulation but huge amounts of Euro cash is moving outside of Kosovo cross border.

2335. This discrepancy in the currency in circulation and the incoming/outgoing cash movements cross border could corroborate information available that the extent of black economy in Kosovo is rather high - *In 2007, the extent of black economy during the period 2004-2006 has been estimated to run up annually more than €300 million in Kosovo. A cash-based economy makes Kosovo vulnerable to money laundering activities and terrorist financing.*[198] *Kosovo's economy, especially the private sector is cash based, therefore the proceeds from criminal activities are more easily laundered through the black market, smuggled goods such as tobacco, jewellery, cafes, alcohol and mobile phones.*[199] *Kosovo does have an active black market for smuggled consumer goods and pirated products.*

2336. It is also recommended that the TAK ensures the effectiveness of the monitoring on the prohibition for cash payments in excess of €500 as statistics on cash availability in Kosovo indicate otherwise.

2337. The statistics on the percentage of currency in circulation against the GDP indicate high positions which need to be further addressed in the light of the high cash based economy in Kosovo.

2338. The efforts of the CBK to introduce a retail payments system and to introduce products for direct payments through the banking system are welcome and indicate a positive move towards the goal of reducing the use of cash. It is important that such products provide for both direct debits and direct credits. Likewise is the increasing trend in the use of debit and credit cards which may be an indication of more use of the banking system.

198. Improved Strategies for Anti-Money Laundering in Kosovo, Capstone project report, November 2010: https://ritdml.rit.edu/

199. *Ibid.* p. 44.

2339. Notwithstanding, in the course of the Cycle 1 on-site visit information was provided that such facilities were not available and to transfer money from one bank to another one had to withdraw the money from one bank and physically deposit it at the other.

***Effectiveness***

2340. The statistics provided by the CBK on the issue of currency in circulation and the statistics provided by KC on the cross border movement of currency raise serious concerns on the effectiveness of the measures being taken by the CBK itself and other authorities such as the TAK and KC on monitoring and reducing the use of cash in a system that is relatively highly cash based and in the movement of currency across borders.

### 4.4.2. Recommendations and comments

2341. With reference to EC 20.1 of Recommendation 20 it appears that Kosovo has in practice given due consideration to extending the AML/CFT obligations to other businesses and professions that could pose a risk for ML and FT.

2342. This is not the case for EC 20.2 where, in summary, this Report expresses concerns that:

- although there is work in progress, the CBK has not developed a documented policy to reduce the use of cash;
- there is extensive high use of high denomination currency notes which indicates a high cash based economy;
- statistics on currency issued and deposited conflict and could indicate possible import of currency across the border;
- statistics on cross border movement of currency, including the Euro, indicate huge movements which are not explained;
- lack of direct debit and credit procedures within the banking system; and
- effectiveness of implementing Article 13 of the Law by TAK.

2343. With the aim of improving the system for better cash management techniques this Report recommends that:

- CBK documents its policy for better cash management techniques with objectives and milestones including the introduction of direct debit and direct credit systems;
- CBK co-ordinates a study on the statistics on currency issued and currency deposited to identify the source of these differences in cooperation with other authorities such as KC and TAK;
- this study should also identify reasons for the high use of the €500 currency note and the huge movements of currency cross border; and
- ensure effectiveness of the implementation of Article 13 of the Law on Tax Administration by TAK.

### 4.4.3. Rating for Recommendation 20

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.20** | **PC** | • no documented policy to reduce the use of cash;<br>• extensive use of high denomination currency notes;<br>• no facilities for direct debits and direct credits through banking system;<br>• conflicts in statistics on currency notes issued and deposited;<br>• huge movements of currency cross border that have no explanation; and<br>• apparent lack of effectiveness in monitoring compliance with the provision of Article 13 of the Law on Tax Administration and analysis of currency movements across the borders. |

# 5. LEGAL PERSONS AND LEGAL ARRANGMENTS AND NON–PROFIT ORGANISATIONS

## 5.1. Legal persons – Access to beneficial ownership and control information (R.33)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010), hereafter "AML/CFT Law";
- Law on Business Organisations (Law No. 02/L-123 of 27 September 2007);
- Law on amending the Law on Business Organisations (Law No. 04/L-006 of 23 June 2011).

### 5.1.1. Description and Analysis

2344. Recommendation 33 requires countries to take measures to prevent the unlawful use of legal persons by money launderers and to ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely manner by the relevant competent authorities, including by financial institutions undertaking the CDD requirements set out in Recommendation 5.

2345. The Law on Business Organisations came into force on 27 September 2007. Upon the coming into force of the Law on Business Organisations, UNMIK Regulation 2001/6 of 8 February 2001 on Business Organisations and UNMIK Administrative Directive 2002/22 of 11 October 2002 on Implementing Regulation 2001/6 on Business Organisations have been repealed.

2346. The Law amending the Law on Business Organisations came into force on 23 June 2011. Upon the coming into force of the amending law UNMIK Regulation No. 2008/26 of 27 May 2008 on the Promulgation of the Law on Business Organisations, UNMIK Regulation No. 2001/6, UNMIK Administrative Order No. 2002/22 and Administrative Directive No. 2003/1 have been abrogated.

2347. No additional information has been provided to the assessment team following the Cycle 1 on-site visit. The following analysis, comments and recommendations will therefore be based on the Law on Business Organisations as amended, the information provided in the replies to the Questionnaire for the first Cycle, and the information and other documents obtained during the Cycle 1 on-site visit in the course of the discussions with the relevant authorities as appropriate.

2348. For a detailed overview of the legal persons framework under the above mentioned laws, including type of legal persons, and registration process including documents required please refer to Section 1.5 of this Report.

***Information on beneficial ownership and control – Essential Criterion 33.1***

2349. EC 33.1 requires countries to take measures to prevent the unlawful use of legal persons in relation to ML and the FT by ensuring that the country's commercial, corporate and other laws require adequate transparency concerning the beneficial ownership and control of legal persons.

2350. The FATF Methodology provides three types of mechanisms that are acceptable for the purposes of EC 33.1 either individually or in combination due to their high degree of complementarities:

- upfront disclosure system through a domestic system that records the required ownership and control details;
- through the retention of the required information by company service providers; or
- through reliance on the investigative powers of law enforcement, regulatory, supervisory or other competent authorities to obtain or have access to this information.

2351. Whatever system is used, EC 33.1 requires three essential elements:

- timely access by competent authorities to beneficial ownership and control information;
- availability of adequate, accurate and timely information; and

- ability of competent authorities to share such information with other relevant domestic or foreign competent authorities.

2352. Kosovo applies an upfront system through the business registration system governed by the Law on Business Organisations.

2353. The KBRA is the competent authority under the Law on Business Organisations that is responsible for the registration of all business entities under the Law.[200] The KBRA is within the MTI and is headed by a senior civil servant designated as the 'Director' who, according to Article 9 of the Law, shall exercise his functions in an independent manner without any political or illicit influence.

2354. According to Article 7 of the Law on Business Organisations the KBRA is mainly responsible to register business organisations and foreign business organisations in accordance with the provisions and requirements of the Law. The Agency however also has the authority and responsibility to perform any other functions that are specifically and explicitly assigned to it by the Law on Business Organisation.

2355. Moreover, Article 11 of the Law requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site all the relevant information or any changes thereto within one month after the registration of such company or any change to such information.

2356. In terms of Article 13 of the Law, every business organisation is under a continuing obligation to ensure that all information set forth in its registered documents is accurate and in compliance with the requirements of the Law on Business Organisations. On the other hand, the Agency is strictly required to formally and officially register a document submitted to it if such document complies with the requirements established by the Law.

2357. The KBRA is under a legal obligation to note the date and time of receipt on every document that is submitted for registration and to provide, on request, a receipt to the person submitting the documents. Article 14 of the Law further obliges the KBRA to formally and officially register such document within three (3) calendar days following the day of receipt if the document received by it satisfies the requirements of the Law.[201]

2358. In terms of Article 15 of the Law on Business Organisations, the fact that a document has been registered is a formal informational and administrative act only. The KBRA is not obliged to verify information contained in any registration document. The Law imposes the responsibility for the accuracy of the information in all documents for registration upon the person signing such document. Indeed, the registration of a document does not constitute any type of legal determination or presumption on the validity of the document or that any information contained therein is accurate or inaccurate.

2359. Original copies of records and documents received or registered are to be maintained in perpetuity both in physical and electronic format.

2360. Article 23 of the Law on Business Organisations requires that every business organisation specifies its physical registered address in Kosovo and the name of its agent, being the person having his principal place of work or residence at that address.

2361. In the case of joint stock companies and limited liability companies the Law requires that any changes in any of the information contained in a registered charter of a JSC or a LLC is reported to the KBRA.

2362. Moreover, Article 42 of the Law obliges every business organisation to submit an annual report to the Director of the KBRA which, in the case of joint stock companies and limited liability companies includes details on the names and addresses of (i) its board of directors and (ii) all its shareholders and (iii) its authorised persons (and any restrictions on authorisation). Non submission of the annual report could lead to deregistration.

200. Previously known as the Kosovo Registry of Business Organisations and Trade Names.

201. As recently amended from the previous ten (10) calendar days.

2363. According to Article 78 of the Law on Business Organisations an ownership interest in a LLC may, but need not, be evidenced by a certificate and may be referred to as a "share". A company's charter or company agreement may provide that ownership interests or shares in the company will be evidenced by certificates issued by the company. Transfer of ownership is strictly regulated by the Law on Business Organisations between the current owners.

2364. On the other hand, according to Article 126 of the Law, the shares in a JSC are the units into which the ownership interests in the company are divided and are the property of the shareholder and may be freely transferred in whole or in part, by the shareholder to any person or organisation. A JSC may have one or more persons, business organisations and/or other organisations as its shareholder or shareholders. The JSC is further required to maintain an updated list of its shareholders.

2365. According to paragraph (5) of Article 141 *A joint stock company shall not have any authority to issue, and shall not issue, bearer shares or other bearer securities. Any shares or securities issued in violation of this Article, and any purported rights or claims arising from such shares or securities, shall be null, void and unenforceable*.

2366. In practice the KBRA aims to provide a 'one stop shop' for business registration. To this effect the Agency operates through 28 Municipal Centres. All Centres scan documents and look at their legal aspects. If all documents are correct they can approve it and give it a registration number. In the near future, in addition to the registration number the Centres will be able to provide the business entity with the tax number and the VAT and KC numbers. All systems are interlinked and therefore the KBRA can provide a 'one stop shop' for business registration. There is one main register for all businesses registered that is available to the public for information.[202]

2367. KBRA has about 16 officers and other staff in the Centres. Each officer has a separate ID Code which is linked to all registrations that he/she does. Thus electronically the Agency can follow the process of registration to the official responsible for registering that business. Staff includes an IT person who is responsible for the IT systems linking the Centres to Head Office. KBRA is of the opinion that the present IT system is adequate and caters well for its operations.

2368. There is no need for intermediaries (lawyers, accountants, etc) to register a business organisation. All forms for registration are available online and registration can be done online by any person.

2369. The registration system for business organisations appears adequate although some weaknesses can be identified mainly in relation to the maintenance and updating of information, and information relating to beneficial ownership.

2370. In the case of JSC and LLC, although the Law requires that any changes in any of the information contained in a registered charter of a JSC or a LLC is reported to the KBRA, and notwithstanding the obligation of JSCs to maintain a list of shareholders, there is no direct obligation to immediately inform KBRA upon changes in shareholders.

2371. Indeed the KBRA informed that in order to try to obtain such information earlier than the annual report, it insists on business organisations to appoint a person with the responsibility to inform the KBRA immediately of any changes that may occur.

2372. The accuracy of the information available is also questioned due to the provisions under the Law on Business Organisations that the registration of a document does not constitute any type of legal determination or presumption on the validity of the document or that any information contained therein is accurate or inaccurate. There is therefore lack of due diligence at least on the founders of a business organisation.

2373. The appointment of an 'agent' representing the company at its registered address does not necessarily mean that a 'shell company' cannot be registered with corporate or trust shareholding.

2374. Moreover, it appears that the system does not provide the possibility for the KBRA or any other person or authority to identify whether a number of business organisations belong to the

202. The Register of Businesses maintained by the KBRA is separate from the Register of NGOs maintained by DRLNGO (Section 5) and the Register of Banks and Financial Institutions maintained by the CBK (Section 3).

same individual. The authorities have however informed that such facility is available to TAK only through the tax registration number.

2375. Furthermore, it also appears that the system does not identify inter-connections between business organisations where, through layers of ownership some companies might own each other.

2376. The above shortcomings can have a negative impact in identifying the beneficial owner through layers of corporate shareholdings.

2377. The Law amending the Law on Business Organisations has reduced the registration period to three (3) calendar days from the previous ten (10). It has also reduced the charter capital for the registration of a JSC from €25,000 to €10,000. Moreover the previous minimum charter capital for a LLC of €1,000 has been removed meaning that basically a LLC may be registered without capital.

2378. Although from an economic perspective the above changes may contribute positively, from an AML/CFT perspective these may raise concerns as they make the registration of business entities easier unless strictly monitored at the registration stage, considering the lack of due diligence.

2379. In the light of the above findings, although no specific recommendations may be made for legislative or other changes, it is highly advisable that the KBRA takes note accordingly and reviews its procedures and powers to take measures to rectify these findings:

- introduce an obligation for immediate reporting of changes to shareholding and directors further to the *ad hoc* appointment of a person responsible to do so;
- introduce procedures and systems for competent authorities and the industry to identify where one person owns more than one business organisation;
- introduce administrative procedure to ascertain to the extent possible the accuracy of documents and integrity of contents – for example by checking founders against the United Nations and other lists of designated persons and entities;
- introduce procedures to identify interconnectivity between registered business organisations;
- introduce stronger measures for the accuracy and validity of applications for registration to cater for the short registration period and the reduced capital required.

***Timely access to information - Essential Criterion 33.2***

2380. EC 33.2 requires that competent authorities are able to obtain or have access in a timely fashion to adequate, accurate and current information on the beneficial owner and control of legal persons.

2381. Article 10 of the Law on Business Organisations provides that all records, documents, filings, forms, rules and other materials required under the Law to be submitted to the KBRA or prepared by the KBRA relating to its operations or procedures or to any business organisation are, without exception, public documents and the KBRA shall have them readily and routinely available to any person, upon such person's request or demand, for review and copying. In this regard the KBRA shall mark any copies requested by any person as 'true copies'.

2382. Moreover, Article 11 of the Law on Business Organisations requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site the following information or any change thereto within one month after the registration of such company or any change to such information:

- the name of the company;
- the type of company (limited liability or joint stock);
- the address of the company's registered office and the name of the company's registered agent at that address;
- a brief description of the business purpose or purposes of the company, which purposes may be described simply as "to engage in any Lawful business activity";
- the name and address of each founder;
- the names of the directors and authorised persons and, if specified in the company's registration documents, any limitations on their authority;

- the duration of the company if it is not perpetual; and
- the charter capital of the company.

2383. Access to this information is available to the public in general through the web-site of the Agency. In order to access such data a person must have information on either of the business registration number, business name, personal ID of authorised person, owners' personal ID, main activity or other activities.

2384. Upon registration of a business organisation the KBRA informs other authorities, such as the TAK, KC, Statistics Office, Municipalities Administration and others. Indeed some authorities such as KP and TAK have confirmed receipt of information and access to information held by the KBRA.

2385. It appears that changes in shareholding are only reported through the annual reporting obligation. Likewise, changes in directors are only communicated to the KBRA through the annual report. Thus there is a time lag when the information available may not be timely and accurate.

2386. Moreover the requirements under Article 11 of the Law on Business Organisations for all registration information or changes thereto may be put on the website 'within one month' raises concerns on the 'timeliness' of the availability of information, although in practice the KBRA claims to take less time.

2387. In the light of the above findings, although no specific recommendations may be made for legislative or other changes, it is highly advisable that the KBRA takes note accordingly and reviews its procedures and powers to take measures to rectify these findings, taking account of the recommendations made above under this Section.

***Legal entities that are able to issue bearer shares – Essential Criterion 33.3***

2388. EC 33.3 requires that countries that have legal persons that can issue bearer shares should take appropriate measures to ensure that such legal persons are not used for ML or the FT. While acknowledging that measures taken may vary from country to country each country should be able to demonstrate the adequacy and effectiveness of the measures that are applied.

2389. The Law on Business Organisations defines a company as incorporating a JSC or a LLC incorporated in Kosovo.

2390. According to Article 78 of the Law on Business Organisations, the nature and ownership of a LLC can be:

> *Paragraph (1)* A limited liability company is a legal person that is legally separate and distinct from its owners. An owner of a limited liability company is not a co-owner of, and has no transferable interest in, the property owned by the limited liability company.
>
> *Paragraph (2)* Ownership interests in a limited liability company are the units into which the ownership of the company is divided.
>
> *Paragraph (3)* An ownership interest in a limited liability company is the personal property of an owner and it may be transferred in whole or in part, subject to applicable restrictions stated in the present Law and any restrictions stated in the company agreement.
>
> *Paragraph (4)* An ownership interest may, but need not, be evidenced by a certificate and may be referred to as a "share". A company's charter or company agreement may provide that ownership interests or shares in the company will be evidenced by certificates issued by the company.

2391. Among other records, Article 87 of the Law on Business Organisations requires a LLC to maintain a list of the names and addresses of each owner and the date on which such owner became an owner and a list describing all transfers and pledges of, and encumbrances placed on, any ownership interest made or permitted by an owner. Moreover Article 95 requires that where there is co-ownership i.e. when an ownership interest is owned by more than one person, each co-owner must provide the company with the co-owner's own name and address to be kept with the company's records.

2392. According to Articles 96 – 98 of the Law on Business Organisations although any owner of an interest in a LLC may transfer such ownership interest, in whole or in part, by sale, pledge, gift,

inheritance or otherwise, transfer of ownership may be subject to conditions imposed by the company agreement in accordance with the provisions of the Law.

2393. As indicated under paragraph (4) of Article 78 of the Law an ownership interest may, but need not, be evidenced by a certificate and may be referred to as a 'share'. There are however no specific requirements that such certificate should be issued in a nominative manner although, notwithstanding, in accordance with Article 87 of the Law on Business Organisations, each LLC would still be required to maintain a record of the names and addresses of each owner.

2394. Thus, even if an ownership certificate is or could be issued in bearer form, the obligation of the LLC to maintain details of the owner would cover the obligations under the EC 33.3 provided that Kosovo can demonstrate the adequacy and effectiveness of the system.

2395. On the other hand, according to Article 126 of the Law on Business Organisations, a JSC is a legal person that is owned by its shareholders but is legally separate and distinct from its shareholders. The shares in a JSC are the units into which the ownership interests in the company are divided. A share in a JSC is the property of the shareholder and, subject to conditions laid down in the Law itself, a share may be freely transferred in whole or in part, by the shareholder to any person or organisation.

2396. According to Article 132 of the Law on Business Organisations a JSC may have one or more persons, business organisations and/or other organisations as its shareholder or shareholders.

2397. Paragraph (5) of Article 141 of the Law specifically prohibits a JSC from issuing shares payable to bearer:

> *Art 141(5)* A joint stock company shall not have any authority to issue, and shall not issue, bearer shares or other bearer securities. Any shares or securities issued in violation of this Article, and any purported rights or claims arising from such shares or securities, shall be null, void and unenforceable.

2398. In the course of the on-site visit representatives of the KBRA informed that the Agency would not register any JSC that, according to the registration documents including its Charter, had the power to issue bearer shares or bearer securities even if at the time of registration no such shares or securities were issued.

2399. Moreover paragraph (1) of Article 143 of the Law on Business Organisations obliges every JSC to keep a list of its shareholders that specifies the name and address of each of its current shareholders and the number of the type and class of shares currently held by such shareholder.

2400. However since according to Article 132 of the Law on Business Organisations a JSC may have one or more persons, business organisations and/or other organisations as its shareholder or shareholders it is not clear whether a foreign business organisation that allows the issue of bearer shares and securities can be a shareholder of a JSC registered in Kosovo.

2401. Another type of business organisation that may be registered in Kosovo under the Law on Business Organisations is the foreign business organisation that may be registered in accordance with the provisions of Article 37 of the Law. Paragraph (8) of Article 37 states:

> "For the avoidance of doubt, a foreign business organisation that is registered in accordance with this Section 37 shall be deemed to have established a branch in Kosovo. Such a branch shall not have any legal identity or personality that is separate or distinct from the foreign business organisation establishing it."

2402. Since the specific prohibition for issuing bearer shares in the Law on Business Organisations is applied only to joint stock companies, and since a foreign business organisation registering in Kosovo can only register a branch which *shall not have any legal identity or personality that is separate or distinct from the foreign business organisation establishing it*, it is not clear in the Law whether a foreign business organisation that is allowed to issue bearer shares can register a branch in Kosovo in terms of the Law on Business Organisations.

2403. This concern is accentuated by the fact that, as argued in the above analysis, the KBRA is not obliged to verify information contained in any registration document.

***Measures to facilitate access by financial institutions – Additional Element 33.4***

2404. AE 33.4 requires that measure be put in place to facilitate access by financial institutions to beneficial owner and control information so as to allow them to more easily verify the customer identification data.

2405. As already detailed above in this section, Article 10 of the Law on Business Organisations provides that all records, documents, filings, forms, rules and other materials required under the Law to be submitted to the KBRA or prepared by the KBRA relating to its operations or procedures or to any business organisation are, without exception, public documents and the KBRA shall have them readily and routinely available to any person, upon such person's request or demand, for review and copying. Moreover, Article 11 requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site the specific information or any change thereto within one month after the registration of such company or any change to such information.

2406. Financial institutions can access this information, which is available to the public in general, through the web-site of the Agency. In order to access such data a person must have information on either of the business registration number, business name, personal ID of authorised person, owners' personal ID, main activity or other activities.

2407. It appears therefore that financial institutions can access data and information on legal persons held by the KBRA either through the physical documents, which can be a laborious task, or through the website of the KBRA which however, may be limited in the information it provides.

***Effectiveness***

2408. The robustness of the company registration regime is negatively affected through identified shortcomings which impact on its effectiveness and beneficial ownership information. In particular are weaknesses in the system related to due diligence on founders and major shareholders and hence accuracy of information and the lack of facilities to identify inter-connectivity of companies and separate ownerships through the same shareholder/s.

### 5.1.2. Recommendations and Comments

2409. Although the legislative framework is to an extent adequate for the registration of business organisations some findings, both of a legislative and procedural/operational nature, impact on the requirements of Recommendation 33 within the context of the analysis in this Report.

2410. With a full reading of the analysis and comments being highly recommended, the following are the main findings:

- no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur;
- concerns over the accuracy of information available;
- concerns over the timeliness of availability of information to competent authorities;
- no procedures for competent authorities except TAK for the identification whether a number of business organisations belong to the same individual;
- no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies might own each other;
- concerns over the easiness of registration;
- legal ambiguity on whether a foreign business organisation that allows the issue of bearer shares and securities can be a shareholder of a JSC registered in Kosovo; and
- legal ambiguity on the registration of foreign business organisations that allow the issue of bearer shares.

2411. In the light of these findings, the Report makes certain recommendations, although not specific to legislative changes. It is however important that recommendations made are read within the context of the analysis and comments for the respective Essential Criteria:

- introduce an obligation for immediate reporting of changes to shareholding and directors further to the *ad hoc* appointment of a person responsible to do so;

- introduce procedures and systems for competent authorities and the industry to identify where a person owns more than one business organisation;
- introduce administrative procedure to ascertain to the extent possible the accuracy of documents and contents by the KBRA in order to ensure that both natural and legal persons establishing companies be checked and monitored with respect to possible criminal records or professional disqualifications, as well as against the United Nations and other lists of designated persons and entities;
- introduce procedures to identify interconnectivity between registered business organisations;
- introduce measure for accuracy and validity of applications for registration to cater for the short registration period; and
- clarify whether and introduce measure to identify if a foreign business organisation that allows the issue of bearer shares can be a shareholder of a JSC in Kosovo or whether it can register as a branch in Kosovo.

### 5.1.3. Rating for Recommendation 33

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.33** | **PC** | • no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur;<br>• concerns over the accuracy and timeliness of information available;<br>• concerns on due diligence on founders and major shareholders;<br>• concerns over the timeliness of availability of information to competent authorities;<br>• no procedures for competent authorities except for TAK for identification whether a number of business organisations belong to the same individual;<br>• no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies may own each other;<br>• concerns over the easiness of registration;<br>• legal ambiguity on foreign business organisation with bearer shares being shareholder in a JSC registered in Kosovo;<br>• legal ambiguity whether a foreign business organisation with bearer shares can register a branch in Kosovo; and<br>• consequent effectiveness issues. |

## 5.2. Legal Arrangements – Access to beneficial ownership and control information (R.34)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010), hereafter "AML/CFT Law";
- Law on Business Organisations (Law No. 02/L-123 of 27 September 2007);
- Law on amending the Law on Business Organisations (Law No. 04/L-006 of 23 June 2011);
- Law on Higher Education (Law No. 04/L-037).

### 5.2.1. Description and Analysis

2412. Recommendation 34 requires countries to take measures to prevent the unlawful use of legal arrangements by money launderers and to ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and the beneficiaries that can be obtained or accessed in a timely manner by the relevant competent authorities, including by financial institutions undertaking the CDD requirements set out in Recommendation 5.

2413. The Glossary to the FATF Methodology specifies that the term "legal arrangement" refers to express trusts or other similar legal arrangements (such as *Treuhand* or *fiducie*) in which context "express trust" means a trust clearly created by the settlor, usually in the form of a document e.g. a written deed of trust (as opposed to "constructive trusts" which come into being through the operation of the law and which do not result from the clear intent or decision of a settlor to create a trust or similar legal arrangements).

2414. Countries where trusts or similar legal arrangements exists usually have, at least in this respect, a common law tradition (as contrasted to continental law) and/or would have ratified or otherwise implemented the Hague Convention on the Law Applicable to Trusts and on their Recognition. There are, however, a number of jurisdictions with a continental law tradition and without having ratified the said Convention yet they stipulate, in their respective national legislation, the establishment and operation of legal arrangements that meet the standards of Recommendation 34 where the main distinctive characteristic is whether or not the legal arrangements concerned foresee a transfer of property between the settlor and the trustee as trusts normally imply such a transfer.

2415. If a jurisdiction does not provide for express trusts or similar legal arrangements or, if the arrangements identified in the respective national legislation fail to meet the characteristics mentioned above, the country cannot be rated for Recommendation 34 and thus the rating will necessarily be N/A (not-applicable).

***Measures to prevent the unlawful use of legal arrangement in relation to money laundering and the financing of terrorism – Essential Criterion 34.1***

2416. Similarly to EC 33.1 discussed above, EC 34.1 requires countries to take measures to prevent the unlawful use of legal arrangements in relation to ML and FT by ensuring that the country's commercial, trust and other laws require adequate transparency concerning the beneficial ownership and control of trusts and other legal arrangements.

2417. As noted in Section 1.5 of this Report, the terms such as "trust", "express trust" or "trustee" are not unknown in the legislation of Kosovo. The assessment team found various pieces of legislation, most notably the AML/CFT Law, that make clear and direct references to such arrangements in a context which implies that these entities are likely to fall under the scope of Recommendation 34 as follows:

- Article 16 paragraph (1.8) of the AML/CFT Law includes "*trust and company service providers*" among the reporting subjects. The services these entities may provide to third parties on a commercial basis includes providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement (paragraph (1.8.3)) as well as acting as, or arranging for another person to act as, a trustee of an express trust (paragraph (1.8.4)).
- Article 17 paragraph (1.2) of the same Law provides that, as part of the CDD measures, all reporting subjects shall identify the beneficial owner and/or a natural person or persons who directly or indirectly control 20% or more of a legal person. Where reporting entities consider that the risk of ML or TF is high, they shall take reasonable measures to verify his or her identity so that the institution or person covered by this law is satisfied that it knows who the beneficial owner is, including, as regards legal persons, *trusts and similar legal arrangements*, taking risk-based and adequate measures to understand the ownership and control structure of the customer.
- Article 26 paragraph (8.1.5) of the same Law requires that lawyers engaged in specified activities, including creation, operation or management of companies, *trusts or similar structures* shall report any suspicious act or transaction to the FIU within three (3) working days and prior to taking further action in connection with any such act or transaction.

- One can find further, although rare examples in other pieces of legislation too, such as the Law on Higher Education (Law No. 04/L-037) where paragraph (1) of Article 12 provides that a private provider of higher education may be founded "by a private company, foundation or *trust* situated in Kosovo and having a registered office in Kosovo".

2418. All these occurrences of terms such as "trust", "express trust" or "trustee" etc. are merely references or cross-references. The same goes for the definition of "beneficial owner" in Article 2 paragraph (1.2) of the AML/CFT Law which makes reference to "effective control over a legal person or arrangement". Such references should normally lead to other pieces of legislation that would provide for the proper definition of such legal arrangements, including the setting up of a detailed and effectively applicable legal framework for the establishment, registration and legal status of such entities and defining the legal relationship between the parties involved (settlor, trustees, principals and beneficiaries) including proprietary rights and responsibilities etc. etc. which appear to be missing not only from the legislation relevant to the establishment and registration of business organisations but from the entire *corpus iuris* of Kosovo.[203] As a result, the aforementioned references in the AML/CFT Law or elsewhere in other laws must necessarily remain pointless and thus inapplicable.

2419. It is unclear why the lawmakers of Kosovo deemed it appropriate to include such false references in the AML/CFT Law. In any case, as it was already noted elsewhere in this Report, one can find significant similarities between the wording of such provisions and that of the respective FATF standards. For example, the definition of "beneficial owner" (with the reference to legal arrangements) was already mentioned to be very close to that found in the Glossary to the FATF Methodology. Another example is paragraph (8.1.5) of Article 26 of the AML/CFT Law as referred above, which is a verbatim transposition of the definition of "trust and company service providers" itself being a part of the definition of "designated non-financial businesses and professions" in the Glossary.

***Timely access to information - Essential Criterion 34.2***

2420. EC 34.2 requires that the relevant competent authorities should be able to obtain or have access in a timely fashion to adequate, accurate and current information on the beneficial ownership and control of legal arrangements, and in particular the settlor, the trustee, and the beneficiaries of express trusts.

2421. Since, as already concluded above, there is no legal framework for the establishment, registration and legal status of such entities (express trusts or other similar legal arrangements) there are no procedures in place as required under EC 34.2.

***Measures to facilitate access by financial institutions – Additional Element 34.3***

2422. AE 34.3 seeks to establish whether measures are in place to facilitate access by financial institutions to beneficial ownership and control information so as to allow them to more easily verify the customer identification data.

2423. In the light that there is no legal framework for the establishment, registration and legal status of such entities (express trusts or other similar legal arrangements) there are no procedures in place as required under AE 34.3.

***Effectiveness***

2424. The circumstances relating to the establishment and registration of trusts and legal arrangements in Kosovo which, as established above, consists of pointless and inapplicable legal provisions could contribute negatively to the efficiency and effectiveness of AML/CFT preventive system due to the legal inconsistency and ambiguity.

203. The research was carried out based on all the laws that can be found on the website of the Assembly of Kosovo http://www.kuvendikosoves.org.

### 5.2.2. Recommendations and Comments

2425. All these characteristics thus leave the impression that the drafting of these legislative provisions as indicated above, and in particular those of the provisions of the AML/CFT Law must have consisted of the verbatim transposition of the respective FATF Standards without paying due attention to the fact that the original text refers to entities such as (express) trusts or other similar legal arrangements that do not actually exist in the law of Kosovo. Such a copy-paste implementation of standards and concepts without even trying to adapt them to the pre-existent legal framework and the legal traditions of the country or the region will unavoidably result in legislative errors like those described above and which could negatively impact the effectiveness of the system.

2426. The assessment team thus concludes that Recommendation 34 is currently not applicable to Kosovo.

2427. Having said that, the assessment team urges the Kosovo authorities to perform a thorough review of the respective legislation (starting with the AML/CFT Law) in order to detect and eliminate all the false and/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 the law of Kosovo.

### 5.2.3. Rating for Recommendation 34

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.34** | **N/A** | |

## 5.3. Non-Profit Organisations[204] (SR.VIII)

***Main Legal Framework***

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010), hereafter "AML/CFT Law";
- Law on Freedom of Association in Non-Government Organisations (Law No. 04-L-057 of 29 August 2011), hereafter "Law on NGOs".

### 5.3.1. Description and Analysis

2428. SR VIII requires countries to review the adequacy of laws and regulations that relate to entities that can be abused for the FT. NPOs (sometimes referred to as NGOs) are particularly vulnerable and countries should take measures to ensure that they cannot be misused or abused for such criminal purposes. Measures that could be implemented are detailed in the Essential Criteria under the FATF Methodology as analysed in the following paragraphs.

2429. To this effect the FATF has published an Interpretative Note to SR VIII complemented by International Best Practices for combating the abuse of NPOs.

2430. According to Article 1 of the Law on NGOs establishing the aims and scope of the Law, the Law on NGOs sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organised as NGOs in Kosovo. The Law however does not apply to political parties, trade unions and unions' organisations and religious centres or temples and other fields regulated by special laws.

204. Since legislation and other documents for Kosovo refer to 'non-government organisations' (NGOs) this term will be used in this section and should be read and construed to be referring to 'non-profit organisations' (NPOs) under the FATF Standards and Methodology.

2431. The Law on NGOs defines a domestic NGO as an association (an organisation that has membership) or foundation (an organisation without membership) established in Kosovo to accomplish the purpose based on the law, either for public benefit or mutual interest.

2432. On the other hand, the Law defines a foreign or international NGO as a legal person established outside of Kosovo under legislation that substantially meets the requirements of Article 4 of the Law on NGOs – which deals with the non-distribution of earnings.

2433. In terms of Article 17 of the Law on NGOs, an NGO registered under the Law may apply for public beneficiary status if it is organised and operated to undertake one or more of the following as its principal activities: humanitarian assistance and relief, support for disabled persons, charity activities, education, health, culture, youth, sport, environmental conservation or protection, economic reconstruction and development, the promotion of human rights, the promotion of democratic practices and civil society, or any other activity that serves the public beneficiary. According to the Law, NGOs with a public beneficiary status shall be entitled to tax and fiscal benefits, except those which are essentially charges for municipal public services.

2434. The DRLNGO, within the MPA is the authority competent to implement the Law on NGOs, including registration.

2435. The Department has 11 employees structured in two divisions, one of which (Division for Registration of NGOs) is responsible for registrations and the other (Division for Reporting and Monitoring) for the review of the reports and financial analysis. DRLNGO believes that currently resources are satisfactory for its legal mandate.

2436. The following analysis, comments and recommendations will therefore be based on the Law on NGOs, the information provided in the replies to the Questionnaire for Cycle 1, and the information and other documents obtained during, in-between and after the two on-site visits in the course of the discussions with the relevant authorities.

***Review of adequacy of domestic laws and regulations for NGOs – Essential Criterion SR.VIII.1***

2437. EC SR VIII.1 requires countries to review the adequacy of laws and regulations that relate to NGOs and assess the vulnerabilities of NGOs that can be abused for the FT

2438. DRLNGO informed that it undertakes its functions in accordance with the Law on NGOs and the issue of competences for registration and liaison has a limited mandate. Since after the war registration of NGOs were for the first time regulated under UNMIK Regulation 1999/22 and later under the first Law on NGOs adopted as Law No. 03/L-134 in 2009. It was later noted that the Law had some shortfalls and needed to be amended. Consequently on 29 August 2011 a new Law on NGOs - Law No. 04/L-057 - was adopted. Since then a Regulation on compliance has been adopted by Government while a Regulation on registration is yet to be issued (it had not been adopted by the time of the Cycle 2 on-site visit).[205] DRLNGO informed that civil society parties were involved in the drafting of the new law. DRLNGO operates only within the provisions of the Law on NGOs and the Regulations. The Law sets forth the procedures for registration including internal structure and the allocation of the public beneficiary status and therefore DRLNGO does not assume any further responsibilities not attributed to it by Law. All NGOs registered are expected to respect the Law on NGOs and other laws applicable to them.

2439. According to DRLNGO amendments to the first law were mainly initiated for lack of dispositions taken against NGOs that failed to report according to their obligations under the Law. This was mainly because of inadequate cross-referencing in the previous law to paragraphs or articles in the law that did not exist or were wrongly referenced.[206]

2440. As per the latest information the assessment team received, there had been 7,909 NGOs registered in Kosovo from 1999 until October 2014 of which 7,401 are domestic and the other 508 international. Up to the time of drafting this Report 102 NGOs were dissolved voluntarily while another 14 have had their activities suspended pending final decision.

205. These documents were not made available to the assessment team.

206. For example Article 19 of the first law referred to paragraph (4) and (5) of Article 20 and which paragraphs did not exist.

2441. DRLNGO is not in a position to indicate the FT risks and vulnerabilities to which NGOs may be exposed to as, according to it, this issue does not fall within its mandate under the Law on NGOs, which mandate is limited to registration. DRLNGO ensures that NGOs report on their financial activities between January and March each year as required by the Law and if they do not report DRLNGO will take measures against them on a graduated sanctioning basis which may include suspension of operations but in accordance with the Law. At the same time the assessment team did not get confirmation from other authorities that NGOs did indeed pose a certain risk as far as TF was concerned.

2442. The provisions on additional obligations for NGOs for the prevention of ML and the FT previously under Section 4 of the UNMIK Regulation 2004/2 of February 2004 on the Deterrence of Money Laundering and related Criminal Offences and which has been repealed by the coming into force of the AML/CFT Law have however been retained and reflected in Article 24 of the AML/CFT Law – see also analysis of Recommendation 17 on Sanctions in Section 3 of this Report. In addition, the latest amendments of the AML/CFT Law (Amending Law No. 04/L-178 of 11 February 2013) through the new paragraph (1.9) of Article 16 now includes NGOs as reporting subjects while paragraph (1) of Article 30 as amended now places supervisory responsibilities for NGOs for the purposes of the AML/CFT Law within the remit of the FIU.

2443. Although the first law on NGOs, Law No. 03/L-134 of 2009, has been reviewed and replaced by the new law, Law No. 04/L-057 of 2011, it does not appear that the review of the law was the result of any study on the adequacy of the laws and regulations related to NGOs in meeting international standards and the same goes for the aforementioned amendments of the AML/CFT Law too.

2444. Moreover, no studies have been carried out on the characteristics of the NGOs in Kosovo to identify those types that could be at risk of being misused for ML or the FT.

2445. Indeed, DRLNGO is of the view that it only has the remit given to it by the Law on NGOs and that is principally to register and de-register NGOs. This could be consequent to the definition of 'Competent Body' under the Law which is defined as "the NGO registration and removal from register". This raises concerns on the overall legislative and regulatory framework for NGOs.

2446. The TAK has informed that since NGOs do not have high tax liabilities they are of a low risk for tax purposes. Hence, while acknowledging the importance to monitor the status of NGOs, TAK considers previous concerns on the sector removed through the coming into force of the respective laws. Hence TAK does not undertake any risk assessments of the sector and, even if it were to do so, this would be in relation to tax purposes only.

2447. The assessment of the adequacy of laws and regulations relating to NGOs as well as assessments on the vulnerabilities of NGOs for being misused for ML or the FT could be addressed through a NRA[207] or directly by DRLNGO or other competent authorities. It should be noted that the NRA carried out during 2013, although making references to meetings of the National Risk Assessment Working Group with the MPA and NGOs as part of the private sector, does not make any specific reference to risks identified in the NGOs sector. The assessment team is informed that the NRA will now be followed by sectorial risk assessments and therefore the assessment team urges the Kosovo authorities to schedule a risk assessment of the NGO sector in the risk assessment action plan.

2448. Within this context, and in the light of the views of DRLNGO that the Law dictates its overall mandate with regard to NGOs, and this in a narrow and limited manner, it is recommended that a new Article 2A be introduced in the Law on NGOs providing for the designation of the Competent Body and its competences under the Law:

207. A national risk assessment is now mandatory under Recommendation 1 of the new FATF Standards 2012. In 2013 Kosovo undertook a NRA but this assessment did not assess individual sectors.

**Article 2A**
**Designation and Competences of the Competent Body**[208]

(1) The Department for the Registration and Liaison with NGOs within the Ministry of Public Administration shall be the Competent Body responsible for the implementation of this Law.

(2) The Competent Body shall be responsible to undertake all functions attributed to it by this Law with respect to the registration, de-registration and regulation of NGOs and to conduct oversight of registered NGOs for compliance with their obligations under this Law and any regulations issued there-under.

(3) In conducting oversight of registered NGOs the Competent Body may apply a risk sensitivity approach with higher oversight conducted for NGOs with significant financial resources under control and NGOs with substantial international activities and which could pose a higher risk. Higher oversight shall include examinations of books, documents and other information conducted at the premises of the NGO and for this purpose and upon proper identification officials of the Competent Body shall have a right of access to the premises of the NGO during official working hours and to demand all documents and information required, including to copy or reproduce documents as may be required and to ask questions and seek clarifications in fulfilling these responsibilities. The Competent Body may apply the foregoing for examinations of NGOs on an off-site premises basis.

(4) The Competent Body shall periodically and as it deems appropriate gather sufficient information to assess the activities, size and other relevant features of the NGO sector to identify risks and vulnerabilities to which the sector may be exposed and shall raise awareness within the sector and make recommendations accordingly for amendments to this Law or any regulations issued there-under. To this effect the Competent Body shall co-operate with any other authorities that possesses information on the sector and shall share information accordingly and at its discretion.

2449. Consequent to the proposed new Article 2A it is further proposed that the definition of 'Competent Body' in paragraph (1.4) of Article 2 be amended to read *the body designated under Article 2A of the Law*.

2450. The oversight responsibility in the proposed Article 2A can be achieved by extending and strengthening the role of the Division within DRLNGO that is responsible for the review of the reports and financial analysis through a remit to examine NGOs on-site and/or off-site. In order to focus on the larger NGOs or those that present a higher risk of being used for criminal activities it is proposed to apply a risk sensitivity approach to the oversight functions which could be developed through the analysis of the financial and activity reporting under the Law on NGOs.

2451. Paragraph (9) of Article 18 of the Law on NGOs already recognises the notion of distinction for larger NGOs within the context of the financial statements submitted with the required annual report.

2452. It is further recommended that Kosovo undertakes without delay an assessment of any of the risks and vulnerabilities of any of the features and types of NGOs in Kosovo that are at risk of being exploited or misused for FT or ML.

2453. Moreover Kosovo should implement the relevant components of the AML/CFT Strategy as soon as possible.

***Outreach to NPO sector – Essential Criterion SR.VIII.2***

2454. EC SR VIII.2 requires countries to undertake outreach to NGOs for awareness to protect the sector from criminal abuses for ML or the FT.

2455. The Law on NGOs does not place any obligations to this effect on the DRLNGO. Likewise Article 24 of the AML/CFT Law on the additional obligations of NGOs.

208. The proposed Article 2A provides for other shortcomings identified in the following sections of the Report. These are all included under one recommendation for the sake of clarity and continuity. References to the proposed Article will be made as appropriate in the relevant Sections.

2456. The AML/CFT Law does not specifically refer to NGOs in establishing the duties and competences of the FIU but in general it requires the FIU to organise and/or conduct training regarding ML, the financing of terrorist activities and the obligations of reporting subjects. Since NGOs are now recognised as reporting subjects (Article 16) for the purposes of the AML/CFT Law the FIU becomes more directly responsible to provide the sector with the necessary AML/CFT training.

2457. Replies to the Questionnaire for Cycle 1 of the assessment indicate that several roundtables and seminars have been organised by the FIU to this effect. The FIU has informed that in October 2007 it had conducted several training sessions for the NGOs regarding their obligations under the AML/CFT Law and regarding compliance inspections.

2458. DRLNGO informed that in debates held with civil society it discusses the obligations of the sector to uphold the laws of Kosovo. In this way DRLNGO ensures that NGOs are protected from criminal activities.

2459. Although not specific for the NGOs sector, it should be noted that in November 2007 the Government of Kosovo signed a Memorandum of Cooperation with the CiviKos Platform. This memorandum represents the first formal document that provides for a mutual commitment and institutional cooperation in genuine partnership between the Government and civil society. CiviKos Platform is an initiative of civil society organisations in Kosovo started in early 2007 and officially registered on 2 September 2007, aiming at creating an enabling environment for cooperation of formal civil society sector and the Government. A joint meeting was held in April 2012 to address topics concerning development of a cooperation strategy between the Government and the civil society.

2460. Except for the general obligation under the AML/CFT Law on the FIU to provide training to reporting subjects, there is no specific legal obligation on any authority to undertake outreach to the NGOs sector within the context of the prevention of ML and the FT.

2461. Notwithstanding the provisions of Article 24 of the AML/CFT Law there is no obligation to undertake outreach to the NGOs sector to make them at least aware of their obligations, although morally and as indicated earlier, this responsibility should be further assumed by the FIU or DRLNGO or jointly with the recognition of NGOs as reporting subjects under the AML/CFT Law.

2462. It is however positively noted that according to information provided some generic awareness is being conducted and the CiviKos Platform should better serve for this purpose.

2463. There is however a definite need to identify responsibilities and to better formalise and structure outreach to the sector to strengthen awareness on vulnerabilities and risks to NGOs posed through the misuse of such organisations.

2464. To this effect there is a need for more cooperation, coordination and information sharing between the relevant authorities, such as the DRLNGO, the FIU, TAK and other authorities who can contribute to the raising of awareness.

2465. Within this context, the assessment team acknowledges the establishment of a joint working group, subsequent to the Cycle 1 on-site visit, under the steering of the KP and the involvement of all the above mentioned institutions to exchange information in this field as well as the meetings the ECID within the KP had with NGOs to raise awareness and encourage information sharing. But, in the absence of detailed information on the outcome, the assessment team questions the framework established for cooperation, coordination and for the exchange of information to create a more robust and effective outreach to the NGOs.

2466. Paragraph (4) of the proposed new Article 2A as recommended under the analysis of EC SR VIII.1 above is meant to partly provide accordingly under the responsibility of DRLNGO in cooperation with other authorities in particular the FIU within the context of its general legal obligation to provide training.

2467. Consequently it is still important that DRLNGO in cooperation with the FIU undertakes an urgent outreach programme to the NGO sector with a view to protecting the sector from TF or ML. This should include the production of freely available publications on legal compliance and good practice and policies on NGOs and terrorism and NGOs operating internationally. To this effect DRLNGO and the FIU should further implement TF and prevention of ML awareness training starting with promulgating the FATF typologies of ML and TF abuse of the NPO sector.

***Effective supervision or monitoring – Essential Criterion SR.VIII.3***

2468. EC SR VIII.3 requires the promotion of an effective supervision or monitoring regime of those NGOs that account for a significant portion of the financial resources under control of the sector and those that account to a substantial share of the international activities of the sector.
2469. In accordance with the Law on Banks an NGO may also seek to be registered as a MFI with the CBK and still retain its status of NGO. In such instances the institution, referred to in the Law as an 'NGO MFI' would be required to respect certain provisions of the Law on Banks that apply to MFIs. Moreover according to Article 111 of the Law on Banks, and subject to the therein established procedures, an NGO MFI can convert to a JSC MFI. Article 116 of the Law on Banks provides that *After the application is submitted and registration is completed under this Law with CBK, NGO Microfinance Institutions will no longer be regulated by the Ministry of Public Administration.* It is worth noting that during the Cycle 1 on-site visit DRLNGO expressed certain reservations on this procedure in the Law on Banks.[209]

2470. Article 18 of the Law on NGOs imposes various financial and activity reporting obligations on NGOs with a public beneficiary status. To this effect such organisations must file each year an annual report with the Competent Body with respect to its operations and activities within Kosovo. This reporting includes the financial statements prepared in accordance with the requirements of the Competent Body and other information as established by the Law. Non submission of the annual report is subject to sanctions by the Competent Body in accordance with the Law.

2471. Moreover the Law on NGOs provides for regulatory measures that the DRLNGO can undertake where an NGO fails to meet any of its reporting obligations under the Law, including the suspension or removal of the public beneficiary status of the NGO or its removal from the Register.

2472. In its replies to the Cycle 1 Questionnaire, DRLNGO claims that according to the provisions of the Law on NGOs, monitoring or supervision is not a competence of DRLNGO and that this should be done by other bodies that are more competent for these purposes.

2473. With regards to the provisions of Article 24 of the AML/CFT Law on additional obligations for NGOs DRLNGO is further of the opinion that it does not have the capacity or the remit to monitor accordingly within its mandate under the Law on NGOs to register such organisations.

2474. Notwithstanding, the MoU for the Exchange of Information signed between the FIU and DRLNGO on 16 December 2011 in accordance with the then applicable UNMIK Regulations, includes provisions for participation in inspections of NGOs by both parties:[210]

> *Clause 5.1* The FIC may in its discretion and if it considers advantageous, invite the MPA/DRLNGO to designate a Department official to accompany FIC officials during the conduct of an on-site inspection of any NGO.
>
> *Clause 5.2* The MPS/DRLNGO may in its discretion and if it considers advantageous invite the FIC to designate an official to accompany MPS/DRLNGO officials during the conduct of an on-site inspection of any NGO.

2475. Within the context of reservations expressed during the on-site visit on the lack of oversight of the NGOs sector being used for criminal purposes, TAK informed that the oversight it undertakes is related to tax matters (such as tax at source and social security contributions of their employees) although for this purpose it may examine the activities of an NGO. TAK informed that there were cases where it examined NGOs. Through these examinations the TAK identified

209. On 24 December 2012 the Constitutional Court took a decision on interim measures (Case KO 97/12 - Ombudsperson) for a period up to 31 January 2013 to immediately suspend the implementation of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093 of 12 April 2012, for the same duration. Article 90 deals with the definition of NGO Microfinance Institution; Article 95(1.6) prohibiting an NGO Microfinance Institution from selling or transferring business, merging, divesting or otherwise change structure; Article 110 on treatment of donated and surplus capital; Article 111 on procedures to convert to joint stock company and Article 116 on transitional provision and regulation of NGO Microfinance Institutions. On 30 January 2013 the Court extended the interim measures by a further 3 months to 30 April 2013. On 12 April 2013 the Constitutional Court has finally decided (No.AGJ403/13) to declare Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012 as incompatible with Articles 10, 44 and 46 of the Constitution and therefore to hold them as null and void.

210. References to the FIC should be read as referring to the FIU.

irregularities as through these examinations the inspectors of the TAK can access all accounts, records and information available at the NGO under examination. Other examinations involve the annual reports filed according to the Law on NGOs on their financial position, operations and activities. The scope of the examinations remains however for tax purposes. TAK informed that most of the irregularities identified in the course of the examinations related to documentation not being in accordance with tax requirements.

2476. In practice adequate supervision or monitoring of any category of NGOs is absent although the latest amendments to the AML/CFT Law which now recognises NGOs as reporting subjects, vests the AML/CFT supervisory responsibility upon the FIU.

2477. The TAK undertakes examinations of the sector only for the purposes of tax liabilities which, according to the TAK, are low. DRLNGO claims it has no monitoring mandate under the Law on NGOs and hence it does not undertake oversight of the sector, including for prudential purposes, which, it further claims, should be within the remit of other competent authorities – notwithstanding that the Law provides the DRLNGO with adequate powers to take corrective measures and impose administrative sanctions such as the suspension or withdrawal of the public beneficiary status.

2478. As noted above, NGOs were recently added to the list of reporting subjects under paragraph (1.9) of Article 16 of the AML/CFT Law as amended and, through the amendments to Article 30 of the AML/CFT Law the FIU was given a supervisory responsibility mandate to monitor NGOs, among others, even for the purposes of Article 24 of the AML/CFT Law – notwithstanding that paragraph (4) of Article 24 of the AML/CFT Law requires NGOs to make available to the FIU and DRLNGO for inspection any documents retained in terms of the said paragraph of the Law. Consequently, the amended AML/CFT Law thus removed the ambiguity in Article 24 and in Article 30 of the AML/CFT Law on the supervisory remit for monitoring NGOs for the purpose of the AML/CFT Law. Nonetheless the amendments should have explicitly provided for co-operation between the FIU and DRLNGO in this respect within the context of paragraph (1.5) of Article 14 of the AML/CFT Law. Notwithstanding, the assessment team was not made aware of any programmatic or systematic, if any, monitoring activities in this field.

2479. Moreover the AML/CFT Law gives the authority to DRLNGO to suspend or revoke the registration of an NGO for violation of any provision of Article 24 of the AML/CFT Law pursuant to Article 21 of the Law on NGOs, yet it does not provide mechanisms how this can be done in the absence of a supervisory mandate for DRLNGO – the latter claiming it has no such monitoring powers under the Law on NGOs.

2480. The lack of effective monitoring or supervision of NGOs manifests itself in situations where a non-government institution has a status of an "NGO MFI" which remains under the governance of the DRLNGO until it loses its "NGO" status when it would fall within the remit of the CBK in terms of the Law on Banks.[211]

2481. Notwithstanding the joint working group under the steering of the KP mentioned earlier in this Section, the assessment team still sees a need for effective cooperation between the relevant authorities who have a supervisory responsibility in the monitoring of NGOs – the FIU for AML/CFT purposes, DRLNGO for prudential purposes and the TAK for tax purposes – within the context of the provisions of paragraph (1.5) of Article 14 of the AML/CFT Law as their supervisory findings could contribute for an overall risk assessment of the sector for AML/CFT purposes by the FIU as the main supervisor.

2482. DRLNGO claims it has no prudential monitoring mandate under the Law on NGOs. This Report begs to differ. DRLNGO has an obligation under the Law on NGOs to monitor NGOs at least on an off-site basis through the submission of the statements required under Article 12 of the Law and the Annual Reports in accordance with Article 18 of the Law on NGOs – but not for AML/CFT purposes. Indeed, as explained, DRLNGO is composed of two divisions – one for registration and the other for the review of the reports and financial analysis. According to the web-site of the Ministry for Public Administration, and more precisely that for DRLNGO, the Division within DRLNGO responsible for 'Reporting and Monitoring' performs the following activities:

- accepts and analysis annual reports with financial presentation of NGOs;

211. This without prejudice to the recent decision of the Constitutional Court with respect to the suspension of certain relevant articles of the Law on Banks.

- monitors the activities of NGOs in order to find out how much do they respect their status and other obliged laws and it recommends needed advancements;
- it cooperates with other institutions;
- it takes decisions in compliance with the law; and
- registers NGOs, it provides public beneficiary status (PBS), takes decisions for suspension of PBS, revoking and deregistration of NGO.

It therefore follows either that DRLNGO does in fact assume prudential monitoring responsibilities under the Law on NGOs or else that the activities it performs according to the Ministry web-site are not correct.

2483. Moreover, one questions the current validity of the provisions under Article 5 of the MoU between DRLNGO and the FIU for participation in inspections if both Parties to the agreement, at the time of the signing of the MoU did not have a legal supervisory mandate. In the circumstances the anomaly in Article 5 of the Agreement can only become legally valid with a proper clear prudential supervisory mandate to DRLNGO as the FIU is now legally responsible to supervise NGOs for the purposes of the AML/CFT Law.

2484. Within this context, the recommendations made under the analysis for EC SR VIII.1 for the introduction of a new Article 2A, and in particular paragraphs (2) and (3), of this Report complemented with the recent changes to the AML/CFT Law in providing a supervisory remit to the FIU for NGOs for the purposes of the Law, should provide to rectify these identified weaknesses.

2485. Finally, as part of its supervisory regime, DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector's international activities. This assessment should be shared with the FIU.

***Maintenance of governance information – Essential Criterion SR VIII.3.1***

2486. EC SR VIII.3.1 requires NGOs to maintain information on the purpose and objectives of their stated activities and on the identity of the person or persons who own, control or direct the activities. The latter would include senior officers, board members and trustees.

2487. Article 12 of the Law on NGOs obliges the Competent Body to maintain a register of NGOs that *shall contain the name, address, organisational form and purposes, establishers of each NGO, name and other contact information of its authorised representative and shall also indicate if an NGO has public benefit status.*

2488. While the Competent Body is obliged to keep the public register updated, Article 12 further obliges domestic, foreign and international NGOs to submit an annual statement to the Competent Body either confirming that the information required to be retained in the register is still valid, or that changes have occurred. Failure to submit the annual statement can lead to the removal of the NGO from the Register.

2489. Article 18 of the Law on NGOs further requires NGOs with a public beneficiary status to file an annual report with the Competent Body with respect to their operations and activities within Kosovo. Reports must be filed by the end of March for the reporting year ending 31 December of the previous year. The Report includes three sections on management and administration, activities and achievements, and financial statements. Within the context of EC SR VIII.3.1 it is worth noting that the management and administration section includes details on the name, acronym, address, telephone number, fax number and e- mail address of the organisation; the name of the chief executive officer (e.g. the manager or Executive Director), and the names of the members of the governing body, including the names and titles of all officers in senior positions. Also within this context, the section on activities and achievements further includes a statement of the mission and public benefit purpose of the reporting NGO.

2490. There are no reporting requirements on NGOs that do not enjoy the public beneficiary status.

2491. The obligation on NGOs to provide DRLNGO with an annual statement for updating the Register and the information submitted with the Annual Report under the Law provides most of the information that is required under EC SR VIII 3.1.

2492. Moreover, since NGOs are required to report it follows that they have to maintain this information. Paragraph (11) of Article 9 of the Law on NGOs requires NGOs to report changes to their Statute within 30 days that these occur. However it does not appear that this obligation covers the names of officials indicated under paragraphs (4.2) and (4.3) of Article 18 of the Law on NGOs

2493. Furthermore, there is no obligation to maintain or report information on the owner(s) of an NGO if these are different from the founders since, notwithstanding the references to "owners" in the FATF EC SR VIII.3.1 the Kosovo authorities have informed that NGOs have no "owners" separate from the founders.

2494. Notwithstanding the obligation for continuous reporting under paragraph (11) of Article 9 of the Law on NGOs, it is recommended to amend this paragraph by adding the words *and the information required under paragraph (4.2) and paragraph (4.3) of Article 18 of this Law* after the current words "and paragraph 5 of this Article".

***Appropriate measures to sanction violations – Essential Criterion SR VIII.3.2***

2495. EC SR VIII.3.2 requires the availability of appropriate measures to sanction violations of oversight measures or rules either by the NPO or by persons acting on their behalf. Such sanctions should not preclude parallel civil, administrative or criminal proceedings against the NPO or persons acting on their behalf where appropriate.

2496. The Law on NGOs does not envisage any sanctions for violations of oversight measures except the removal of the NGO from the Register (Article 21) and the suspension or revocation of the 'public beneficiary status' (Article 19).

2497. The Competent Body can remove an NGO from the Register as a sanction for violation of the Law only if for three (3) years the NGO fails to file the annual statement foreseen under paragraph (5) of Article 12 of the Law on NGOs dealing with the information retained by the Competent Body in the Public Register. The Law on NGOs does not specify that the removal of an NGO from the Register is without prejudice to any civil, criminal or administrative procedures with respect to the organisation itself or persons acting on its behalf.

2498. Article 19 of the Law on NGOs empowers the Competent Body to suspend or revoke the 'public beneficiary status' and all benefits thereof under procedures established by the Law when:

- an NGO fails to submit a complete annual report in accordance with Article 18 of the Law on NGOs within the stipulated time;
- after review of an annual report submitted by a NGO the Competent Body determines that the NGO no longer meets the requirements for public beneficiary status foreseen under Article 17 of the Law.

2499. The Law on NGOs does not specify that the suspension or revocation of the 'public beneficiary status' is without prejudice to any civil, criminal or administrative procedures with respect to the organisation itself or persons acting on its behalf

2500. Article 24 of the AML/CFT Law establishes additional obligations for NGOs. Its paragraph (8) requires the Competent Body to *suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organisations (No. 03/L-134). The imposition of such sanction shall be without prejudice to any criminal proceedings.*

2501. For the purposes of breaches of obligations related to ML or the FT, since NGOs are now recognised as reporting subjects under Article 16 of the AML/CFT Law, then the full sanctions for administrative and criminal offences under the Law are applicable to NGOs.

2502. Moreover, and for prudential purposes, an NGO that is also authorised by the CBK to operate as an NGO MFI is subject to the penalties and remedial measures contemplated by Article

105 and Article 106 of the Law on Banks for breaches and offences that are of a prudential nature.[212]

2503. In general, the above provisions to a large extent cover the requirement of EC SR VIII.3.2 with sanctions for oversight measures for the prevention of ML and FT being now covered through the AML/CFT Law.

2504. However, the Law on NGOs does not provide for prudential sanctions in two instances:

- breaches of obligations under Article 4 prohibiting the distribution of earnings;
- breaches of paragraph (11) of Article 9 for non-reporting of changes to the registration documents within the stipulated period.

2505. The Kosovo authorities may wish to consider introducing administrative measures and/or sanctions in this regard.

2506. Moreover, it is noted that while paragraph (5) of Article 24 of the AML/CFT Law refers to the powers of the Competent Body under the Law on NGOs to *suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organisations*, Article 21 of the Law on NGOs only empowers the Competent Body to remove the NGO from the Register.

2507. Therefore, while the provisions in Article 24 of the AML/CFT Law and those in Article 21 of the Law on NGOs need to be harmonised, it is recommended to create a link in the Law on NGOs with the provisions of Article 24 of the AML/CFT Law. To this effect it is recommended that a new paragraph (1.3) be added to Article 21 of the Law on NGOs:[213]

> *Article 21 (paragraph (1.3)):* if the NGO manifestly does not comply with its general obligations, including the added obligations under Article 24, of the Law on the Prevention of Money Laundering and the Terrorism Financing (Law No. 03/L-196 of 30 September 2010).

***Licensing or registration of non-government organisations – Essential Criterion SR VIII.3.3***

2508. EC SR VIII.3.3 requires that NGOs are either licensed or registered by competent authorities.

2509. DRLNGO within the MPA is the authority competent to implement the Law on NGOs, including registration.

2510. The Law on NGOs provides for the registration and de-registration process. According to information provided by DRLNGO an NGO is first registered as an NGO under the Law on NGOs and then considered as a legal person. There is no further registration under the Law on Business Organisations as there are two separate registers under the two laws. Notwithstanding, there could be instances where the KBRA could require information on an NGO that is registered with DRLNGO under the Law on NGOs.

2511. Since a domestic NGO can be in the form of an association or a foundation, Article 6 of the Law on NGOs clearly articulates the requirements to establish either type.

2512. The Law on NGOs provides that every person is eligible to register an NGO under the terms and conditions of the Law. On the other hand, no person needs to register the NGO to exercise the right on freedom of association. However, once registered an NGO must comply with the provisions of the Law on NGOs. In this respect, Article 9 of the Law on NGOs articulates the procedures for registration. The Law on NGOs further provides for deregistration of NGOs under circumstances prescribed by the Law itself under Article 21.

212. Without prejudice to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012 and subsequent.

213. Unless Article 24 of the AML/CFT Law should actually refer to Article 19 of the Law on NGOs in which case the proposed paragraph (1.3) should be considered for inclusion accordingly but would become limited to NGOs with a public beneficiary status only.

2513. It should however be noted that, from information provided by DRLNGO in the course of the Cycle 1 on-site visit, in the registration process, DRLNGO does not undertake or apply any due diligence measures to ensure that the NGO is not being set up for illegal purposes. Indeed DRLNGO has informed that it does not even check the names of the founders against lists of designated persons issued by the United Nations, the United States or the European Union – in fact DRLNGO informed it does not even have or receive copies of such lists.

2514. The assessment team welcomes the information that the Kosovo authorities provided during the Cycle 2 on-site visit that DRLNGO had already implemented during 2013 the recommendation of the Cycle 1 Report to check the founders against the lists of designated persons and entities. It was not clear however from the representatives of DRLNGO whether and how such designated lists are now being received by the Department. To this effect, the FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR designated individuals and organisations should be extended to DRLNGO immediately

2515. As detailed under the above analysis of EC SR VIII.3 of this Report, in accordance with the Law on Banks an NGO may also seek to be registered as a MFI with the CBK and still retain its status of an NGO.[214]

2516. Once registered with DRLNGO under the Law on NGOs, an NGO is further required to register with the TAK for tax purposes.

2517. The designation of DRLNGO as the competent body to register NGOs, together with the registration requirements and procedures under the Law on NGOs cover the requirement of EC SR VIII.3.3 to a large extent.

***Record keeping – Essential Criterion SR VIII.3.4***

2518. EC SR VIII.3.4 requires that NGOs maintain for five years minimum and make available to relevant authorities, records of domestic and international transaction that are sufficiently detailed to verify the use of funds consistent with the purpose and objective of the organisation.

2519. Although in its replies to the Questionnaire to Cycle 1 of this assessment DRLNGO claims that NGOs *are obliged to keep the above cited records in their archives*, the Law on NGOs does not appear to impose any obligations on the maintenance of any type of records by an NGO, even for prudential purposes.

2520. Moreover, in their replies to the Questionnaire to Cycle 1 of this assessment the SPO and the TAK both claim that NGOs are required to maintain records in accordance with the AML/CFT Law and the Law on Tax Administration.

2521. Since the coming into force of the amendments to the AML/CFT Law in February 2013 and therefore consequent to NGOs being considered as reporting subjects under Article 16 for the purposes of the AML/CFT Law, it follows that NGOs become subject to the record keeping obligations under paragraph (6) of Article 17 of the AML/CFT Law while the amending law did not affect paragraph (4) of Article 24. There is however no guidance for NGOs for record keeping except for what was is provided in Article 24 of the AML/CFT Law.

2522. Moreover, since NGOs are now considered as reporting subjects under the AML/CFT Law, shortcomings in record keeping identified in the analysis of Recommendation 10 in Section 3 of this Report and the analysis of the application of Recommendation 10 under Recommendation 12 for DNFBPs in Section 4 of this Report become, in their majority, applicable for NGOs.

2523. Paragraph (4) of Article 24 of the AML/CFT Law dealing with additional obligations of NGOs imposes an obligation on NGOs to maintain accounts that document all income and disbursements. The accounts shall identify income by source, amount, and manner of payment, such as currency or payment order, and identify disbursements by recipient, intended use of funds, and manner of payment. The Law requires that account documents be maintained for five (5) years and shall be available for inspection upon demand by the FIU and the Competent Body under the Law on NGOs.

214. Please refer to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012.

2524. Paragraph (2.1) of Article 13 of the Law on Tax Administration, referred to by the SPO and the TAK, stipulates that a person who is required to create records under the Law on Tax Administration is further required to retain those records for a period of at least six years after the end of the tax period in which the tax liability to which they relate arose.

2525. There are no legal obligations under the Law on NGOs to maintain records of domestic and international transactions.

2526. The record keeping obligations, both in type and retention period, under paragraph (4) of Article 24 of the AML/CFT Law to a large extent cover the requirements of EC SR VIII.3.4. Article 24 however does not establish the initiation timing for the retention period, but perhaps this can be inferred from paragraph (6) of Article 17 with the recognition of NGOs as reporting subjects. This is where they differ from the general record keeping obligations under paragraph (6) of Article 17 which, however, as indicated, appear to be equally applicable to NGOs by virtue of the above mentioned Article 16 paragraph (1.9). Notwithstanding, the assessment team is of the opinion that specific provisions should be included in the AML/CFT Law for the purposes of paragraph (4) of Article 24 of the AML/CFT Law.

2527. For this purpose, it is therefore being recommended to amend paragraph (4) of Article 24 of the AML/CFT Law as follows for better harmonisation with EC SR VIII.3.4:[215]

> *Article 24 (paragraph (4)):* ***In addition to the obligations of maintaining records as provided for under paragraph (6) of Article 17 of this Law***, NGOs shall maintain accounts that document all income and disbursements. The accounts shall identify income by source, amount, and manner of payment, such as currency or payment order, and identify disbursements by recipient, intended use of funds, and manner of payment. ***For the purposes of this Law***, account documents shall be maintained for five (5) years ***following the execution of the transaction*** and shall be ***maintained in a manner such that the relevant competent authorities would be able to verify that transactions undertaken are consistent with the purpose and objectives of the NGO. To this effect, account documents shall be made*** available for inspection ***or for any other lawful purpose in accordance with this Law*** upon demand by the FIU, ~~***and***~~ the competent body under ***the*** Law on Freedom of Association in Non-Governmental Organisations ***(~~No 03/L-134~~) (No 04/L 057) and any other relevant competent authority for the purposes of fulfilling its legal obligations under any other law in relation to this Law***.

2528. The proposed amendment to paragraph (4) of Article 24 of the AML/CFT Law sets the initiation time for the retention period; ensures the manner in which documents are retained; and ensures availability upon demand to all relevant competent authorities who have to fulfil legal obligations in relation to NGOs, consistent with but not overriding the provisions of paragraph (6) of Article 17 of the AML/CFT Law.

***Investigations and gathering of information – Essential Criterion SR.VIII.4***

2529. EC SR VIII.4 requires a country to implement measures to ensure the effective investigation and gathering of information on NGOs.

2530. Article 12 of the Law on NGOs requires the Competent Body to maintain a Register of NGOs with details on the name, address, organisational form and purposes, founders of the NGO, name and other contact information of its authorised representative and an indication if a NGO has a public beneficiary status. Article 12 requires that all NGOs submit an annual statement to the Competent Body indicating changes. Moreover the register is available to the public subject to data protection.[216]

2531. Article 18 of the Law on NGOs also requires all NGOs that have been granted a public beneficiary status to file an annual report with the Competent Body. The annual report shall necessarily consist of three sections dealing with Management and Administration; Activities and

215. It should be ensured that the proposed amendment to Article 24 would not eventually conflict with any changes in the status of NGOs under the AML/CFT Law as proposed to be amended by the draft Amending Law.

216. Refer to the analysis for EC SR VIII.3.1 of this Report for further information and analysis.

Achievements, and Financial Statements. These reports are eventually made available to the public.

2532. Notwithstanding that the Reports filed by NGOs with the Competent Body (DRLNGO) are available to the public, paragraph (9) of Article 24 of the AML/CFT Law requires that such Reports are to be made available to the FIU upon request.

2533. Paragraph (4) of Article 24 of the AML/CFT Law also requires that information and documents relating to the maintenance of accounts that document all income and disbursements are made available upon request to the FIU and the Competent Body.[217]

2534. The Law on NGOs and the AML/CFT Law therefore place obligations on NGOs to report and provide information on their administration, operations and financial situation to the Competent Body and to the FIU while at the same time such information is made public.

2535. There are however no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require – probably, although not specified, with the exception of clarifications on reports submitted in accordance with Article 18 – with the exception of documents retained by NGOs for the purposes of paragraph (4) of Article 24 of the AML/CFT Law.

2536. To this effect, the proposed paragraph (3) and (4) of the recommended new Article 2A to the Law on NGOs – see the analysis for EC SR VIII.1 in this Report – shall provide the necessary legal mandate and empowerment to DRLNGO.

2537. Likewise, and notwithstanding that NGOs are obliged to report any suspicious acts or transactions to the FIU, Article 24 of the AML/CFT Law does not empower the FIU to demand any information from NGOs except for the Annual Reports drawn up under Article 18 of the Law on NGOs and the records maintained under paragraph (4) of Article 24 of the AML/CFT Law.

2538. The proposed new paragraph (1.2A) to Article 14 of the AML/CFT Law,[218] empowering the FIU to demand information, data or documents from reporting subjects for the purposes of fulfilling its obligations under the Law, should likewise therefore become applicable for the purposes of Article 24 by removing any uncertainty that may arise.

***Co-operation, co-ordination and information sharing – Essential Criterion SR VIII.4.1***

2539. EC SR VIII.4.1 requires the establishment of effective systems of domestic co-operation, co-ordination and information sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NGOs of potential ML or FT concern.

2540. There are no provisions for the sharing of information by DRLNGO in the Law on NGOs as all reports filed with DRLNGO under Article 12 and Article 18 of the Law are made public. DRLNGO however may be in possession of other information on NGOs that is not made public and hence this information would not be shared.

2541. Paragraph (1.5) of Article 14 of the AML/CFT Law requires the FIU and other bodies and institutions in Kosovo to mutually cooperate and assist one another in performing their duties and to coordinate activates within their competence, consistent with the applicable laws. This statement is generic and could therefore be applied within the context of the provisions of Article 24 of the AML/CFT Law on the additional obligations of NGOs.

2542. The FIU informed that on 16 December 2011 it entered into a co-operation agreement with DRLNGO for the exchange of information. The MoU establishes the procedures, conditions and criteria for the exchange of information and the obligations of each party on the treatment of information exchanged. Through the Agreement the FIU can request information from DRLNGO and the latter shall comply *for the purposes of financial analysis and other activities within the authority of the FIC.* However, while the Agreement binds both parties with conditions on information

217. See proposed amendments to paragraph (4) of Article 24 of the AML/CFT Law under the analysis of EC SR VIII.3.4 of this Report.

218. Refer to the "Recommendations and Comments" in the analysis of FATF Rec. 26 in Section 2 of this Report.

exchange, the Agreement does not empower DRLNGO to request information from the FIU – Article 4.

2543. The FIU further informed, and DRLNGO confirmed, that consequent to the co-operation agreement, the Unit has established direct connection/access to the database of DRLNGO. Another connection is to exchange information with the officials of the DRLNGO through the goAML message board which is a secure internal way of exchanging information.

2544. In its replies to the Questionnaire for Cycle 1 of this assessment, TAK informed that, depending on requests from competent bodies, it will provide all information available to it about NGOs.

2545. Paragraph (1.5) of Article 14 of the AML/CFT Law imposes an obligation on all relevant competent authorities to mutually cooperate and assist each other. It does not however set any mechanisms to bring this obligation into effect. Indeed as already mentioned above such mechanisms now assume higher importance for example because of the AML/CFT supervisory powers of the FIU and the proposed enhancement of the prudential supervisory powers of DRLNGO.

2546. In the case of authorities holding information on NGOs sharing of information is done through co-operation agreements and on the basis of direct requests – with the FIU having direct access to the DRLNGO database.

2547. Therefore, whereas some basis for co-operating and sharing of information may exist, its effectiveness in practice could not be measured.

2548. It is consequently recommended that the appropriate authorities with information on NGOs either form part of a wider co-ordination group for the prevention of ML and the FT in this sector in terms of the obligation under paragraph (1.5) of Article 14 of the AML/CFT Law or else ensure that they periodically meet to discuss relevant issues and document the outcome of such meetings.

***Access to information for investigation purposes – Essential Criterion SR VIII.4.2***

2549. Essential Criterion SR VIII.4.2 requires that authorities have full access to information on the administration and management of an NGO in the course of an investigation.

2550. As detailed under the analysis for EC SR VIII.4 above, the Law on NGOs and the AML/CFT Law place obligations on NGOs to report and provide information on their administration, operations and financial situation to the Competent Body and to the FIU. Such information is made public.

2551. In accordance with Article 18 of the Law on NGOs all NGOs that have been granted a public beneficiary status are required to file an annual report with the Competent Body. The annual report shall necessarily consist of three sections dealing with Management and Administration; Activities and Achievements, and Financial Statements.

2552. Moreover, the provisions of the MoU between the FIU and DRLNGO enable the FIU to demand and obtain any information it requires to fulfil its responsibilities under the Law from DRLNGO. Through this agreement, the FIU further has direct access to the databases of DRLNGO.

2553. Furthermore, Article 119 of the Prov. CPC gives the Prosecutor the right to obtain all documentary evidence including financial records. Moreover, Articles 70-73[219] of the new CPC gives the law enforcement agencies the powers to collect information to investigate crime at the initial investigative phase.

2554. Notwithstanding the submission of the Annual Reports the powers of the FIU and DRLNGO to demand information appears to be limited. To this effect the analysis and recommendations made above in relation to EC SR VIII.4 apply.

2555. The provisions of the CPC with regards to the SPO and the LEAs however positively contribute to compliance with EC SR VIII.4.2.

219. Article 201 of the Prov. CPC – General powers of the police to investigate.

***Investigative expertise and capability – Essential Criterion SR VIII.4.3***

2556. EC SR VIII.4.3 requires countries to develop and implement mechanisms for the prompt sharing of information among all relevant competent authorities in order to take preventive or investigative action when there is suspicion or reasonable grounds to suspect that a particular NPO (NGO) is being exploited for TF purposes or is a front organisation for terrorist fund raising.

2557. If an NGO were to be investigated (and there are no statistics to suggest they ever have been) then the normal investigative processes and criminal sanctions described elsewhere would apply. (Article 200 of the Prov.CPC, i.e. Chapter IX of the new CPC).[220]

2558. As indicated earlier in this Section in registering NGOs DRLNGO has now introduced mechanisms for due diligence procedures on the founders but it does not follow any changes through a due diligence process. Moreover, DRLNGO holds that it is not in its legal remit to examine whether an NGO is being established for criminal activities except to the extent of the prohibitions in the Law on NGOs for establishing NGOs i.e prohibition under paragraph (1.4) of Article 10, although this is implied through the mechanisms for due diligence of the founders.

2559. Moreover, the position taken by DRLNGO that it has no supervisory mandate under the Law on NGOs, and hence no supervisory mandate for the purposes of Article 24 of the AML/CFT Law on the additional obligations of NGOs under the Law, it is difficult for DRLNGO or any other authority to identify whether a particular NGO is being exploited for TF purposes and hence to investigate.

2560. Hence, notwithstanding that as indicated above if an NGO were to be investigated then the normal investigative procedures and criminal sanctions described elsewhere in this Report would apply, there could be problems if NGOs that should be investigated cannot be identified.

2561. Consequently the recommendations made in this Section of the Report for the prudential supervisory powers of the DRLNGO and the application of due diligence measures on founders assume even higher importance.

***Points of contact and procedures for international requests – Essential Criterion SR.VIII.5***

2562. EC SR VIII.5 requires countries to have appropriate points of contact and procedures to respond to international requests for information regarding particular NGOs that are suspected of TF and other forms of terrorist support.

2563. The Law on NGOs is silent on the sharing of information with other authorities but, as already indicated earlier, all reports filed by NGOs in accordance with the Law on NGOs are made public.

2564. Paragraph (1.7) of Article 14 of the AML/CFT Law empowers the FIU to, spontaneously or upon request, share information with any foreign counterpart agency that performs similar functions and is subject to similar confidentiality obligations, regardless of the nature of the agency, subject to reciprocity

2565. On the basis of these provisions the FIU enters into MoUs with its foreign counterparts through which points of contact and procedures are established for the sharing of information and other assistance.

2566. Notwithstanding, in its replies to the Questionnaire for Cycle 1 of this assessment regarding Recommendation 26 the FIU has informed that given that it has not yet managed to achieve Egmont membership, it does not take into account the Egmont Group '*Principles for Information Exchange between Financial Intelligence Units for Money Laundering cases*'.

2567. Moreover, any international co-operation or requests for information sought or given and that is not directly between FIU to FIU will be routed through the ILECU within the Ministry of the Interior and the Department for International Legal Co-operation within the MoJ. There is no evidence this has yet happened in relation to NGOs.

220. FATF SR VIII.4.

2568. To an extent it appears that Kosovo has in place appropriate points of contact and procedures to respond to international requests. Although such procedures have not been established specifically to cater for NGOs, yet the procedures in place can be applied in such eventualities.

2569. Notwithstanding, it is advisable that, irrespective of not having yet achieved Egmont membership, the FIU should take account of the Egmont Principles for Information Sharing in establishing procedures under MoUs with other foreign FIUs.

2570. However, concerns expressed under the analysis for EC SR VIII.4.3 of this Section with respect to the identification of NGOs that may be exploited or founded for illegal purposes, such as the FT, would negatively impact on the effective sharing of information in responding to foreign requests.

2571. Hence recommendations made thereto become even more important within this context.

***Effectiveness***

2572. This Report expresses serious concerns on the effectiveness of the NGO regime. Although there is a registration process, there is little due diligence procedures. Moreover, it appears that the process stops at the registration stage as DRLNGO maintains that registration and deregistration is the only mandate it has under the Law on NGOs.

2573. There is no outreach to the sector. Monitoring of the sector, which is now vested within the supervisory remit of the FIU under the AML/CFT Law, is in practice completely absent except by the Tax Authorities for tax purposes and this is very limited because of the low tax liabilities of NGOs, and there are conflicts between the AML/CFT Law and the Law on NGOs.

2574. Concerns on effectiveness of the regime are further accentuated by the fact that an NGO can seek a financial institution status under the Law on Banks.[221]

### 5.3.2. Recommendations and Comments

2575. Although Kosovo has developed an adequate system for the registration of NGOs and the AML/CFT Law has imposed obligations on them including the reporting of suspicious acts or transactions through their recognition as reporting subjects for the purposes of Article 16, various weaknesses in relation to their registration, oversight and record keeping have been identified. Moreover the lack of oversight in practice and effectiveness issues on co-operation and sharing of information impact negatively on the implementation of a large part of the requirements under SR VIII.

2576. Some provisions under the EC for the preventive measures for SR VIII may be found in the applicable legislation or in practice. However a number of shortcomings have also been identified dealing with various aspects for the NGOs regime.

2577. While it is strongly recommended that the full analysis and comments to the respective EC are read, the following indicate the major weaknesses identified:

- no assessment of laws and regulations and on risks and vulnerabilities has been carried out as no authority assumes this responsibility (EC SR VIII.1);
- no outreach and no legal obligation for authorities to outreach to the NGOs sector and hence no authority assumes this responsibility (EC SR VIII.2);
- prudential supervisory oversight or monitoring of any category of NGOs is absent (EC SR VIII.3);
- inconsistency in supervisory powers in Article 5 of the MoU between the FIU and DRLNGO (EC SR VIII.3);
- no obligation on NGOs to maintain governance information on a continuous basis in all instances (EC SR VIII.3.1);

221. Without prejudice to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012 and subsequent.

- Law on NGOs does not provide for prudential sanctions for breaches under Article 4 and paragraph (11) of Article 9 of the Law on NGOs (EC SR VIII.3.2);
- there is a conflict between paragraph (8) of Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body (EC SR VIII.3.2);
- no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require (EC SR VIII.4);
- Article 24 of the AML/CFT Law does not empower the FIU to demand further information from NGOs (EC SR VIII.4);
- effectiveness issues in sharing of information and coordination between authorities with relevant information on NGOs (EC SR VIII.4.1);
- concern on possibility to investigate NGOs that are either being exploited for FT or have been established for terrorism fundraising (EC SR VIII.4.3); and
- effectiveness issues consequent to the narrow views of DRLNGO on its responsibilities under the Law on NGOs and the sharing of information.

2578. Having identified weaknesses or shortcomings, the Report makes concrete recommendations to rectify them. It is therefore highly recommended that the full analysis and recommendations made in this Section dealing with SR VIII are read to put the following recommendations within context:

- insert a new Article 2A on the 'Designation and Competences of the Competent Body' in the Law on NGOs establishing the competencies of the Competent Body with regards to designation; functions and responsibilities under the Law; oversight of NGOs; and periodic risk assessment including sharing of information;
- amend definition of 'Competent Body' in Article 2 of the Law on NGOs accordingly;
- amend paragraph (11) of Article 9 of the Law on NGOs requiring NGOs also to report changes in relation to paragraphs (4.2) and (4.3) of Article 18 of the Law on NGO;
- consider introducing prudential sanctions for breaches of Article 4 and paragraph (11) of Article 9 of the Law on NGOs;
- harmonise Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body;
- insert a new paragraph (1.3) to Article 21 of the Law on NGOs providing a link to Article 24 of the AML/CFT Law on removal of registration for non-compliance with Article 24 of the AML/CFT Law;
- amend paragraph (4) of Article 24 of the AML/CFT Law to provide for the maintenance of transaction records and their availability to competent authorities without prejudice to the provisions of paragraph (6) of Article 17 of the AML/CFT Law;
- establish practical mechanisms for co-operation and sharing of information between authorities relevant to the NGOs sector, including supervisory matters and findings;
- undertake an assessment of risks and vulnerabilities to which NGOs may be exposed or be exploited for FT and implement an outreach programme for NGOs to create more awareness of such risks and vulnerabilities including training awareness sessions;
- DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector's international activities. This assessment should be shared with the FIU;
- extend FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR on designated individuals and organisations to DRLNGO; and
- implement the relevant components of the AML/CFT Strategy with immediate effect.

2579. Most of the recommendations listed above are proposals for amending the Law on NGOs. To this effect, at a workshop held in Pristina on 30 October 2013 (inbetween the two on-site visits) DRLNGO informed that certain amendments to the Law on NGOs were being drafted but were still at their initial stage. Although DRLNGO then had the intention to include the proposed amendments in the Legislative Plan of the MoJ for the following year, no draft legislation had been elaborated by the time of the Cycle 2 on-site visit, when the assessment team was only provided with a Concept Paper on proposed amendments and supplements to the Law on NGOs that had been produced by the DRLNGO together with the Legal Department of the same Ministry on 11th April 2014 i.e. approximately one week before the on-site visit.

2580. This document, which serves but as a conceptual basis for drafting a future amendment to the Law, underlines as the main deficiency of the current legislation that the Ministry, and specifically the DRLNGO, has very limited responsibilities in the registration and supervision of NGOs and particularly in the cooperation and sharing of information with other authorities dealing with the NGOs' activity. As for the registration procedure, the Concept Paper suggests vesting the DRLNGO with authority to thoroughly analyse the founders including the validity of their identity documents (although with no specific reference to United Nations and other lists of designated persons and entities). Further deficiencies the DRLNGO identified in this Concept Paper are based on the findings of the assessment team (which had then already been articulated in the Cycle 1 Assessment Report) such as:

- the lack of periodic evaluation by competent institutions for NGOs that could potentially pose risk to the country and the lack of supervision or monitoring of any categories of NGOs;
- the lack of obligations for NGOs to maintain transaction records and to keep information, on an ongoing basis, on their governance;
- the need to harmonise Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body; and
- the lack of an appropriate sanctioning regime for the NGOs that violate Article 4 and paragraph (11) of Article 9 of the Law on NGOs.

2581. The Concept Paper, by which the responsible Kosovo authorities thus endorsed the findings and recommendations of the assessment team in the Cycle 1 assessment, had already been publicly debated with the involvement of numerous NGOs shortly before the Cycle 2 on-site visit and was due to be submitted to the Government to be taken into account, as mentioned above, in the current Legislative Plan.

2582. Finally the assessment team recommends that in drafting amendments to the Law on NGOs consideration should be given to the fact that NGOs are now considered as reporting subjects under Article 16 of the AML/CFT Law and are therefore already subject to the AML/CFT obligations and the supervision of the FIU.

### 5.3.3. Rating for Special Recommendation VIII

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.VIII** | **NC** | • no risk assessment of sector carried out;<br>• no outreach and no legal obligation for authorities to outreach to the NGOs sector;<br>• absence of prudential supervisory oversight;<br>• hence absence of AML/CFT supervisory oversight;<br>• no obligation to maintain governance information on a continuous basis in all instances;<br>• prudential sanctions not available for all breaches under the Law on NGOs;<br>• conflicts between AML/CFT Law and Law on NGOs;<br>• no empowering provisions for DRLNGO to demand any other information it may require;<br>• concerns over identification of NGOs that should be investigated and hence possibility of investigations; and<br>• effectiveness issues consequent to narrow views on its responsibilities by DRLNGO and in sharing of information. |

# 6. NATIONAL AND INTERNATIONAL COOPERATION

## 6.1. National co-operation and coordination (R.31)

2583. Recommendation 31 requires countries to ensure that policy makers, the FIU, law enforcement and supervisors have effective mechanisms in place which enable them to co-operate and where appropriate co-ordinate domestically with each other in matters concerning the development and implementations of policies and activities to combat ML and TF.

### 6.1.1. Description and Analysis

***High-level cooperation – Essential Criterion 31.1***

2584. While the roles of the different authorities that have an AML/CFT function have been clarified to some extent in different parts of the legislation, there is a lot to be done in order to ensure the full functionality of the chain, starting from intelligence gathering and ending with judgment. In this regard the successful implementation of a unified AML/CFT strategy is essential for Kosovo.

2585. At the policy level the most important development is that of an AML/CFT strategy, that was adopted in January 2014 abrogating the previous strategy that had been adopted in September 2012. There is a cross-agency working Group on its implementation. When and if completed, this will have a major impact on Kosovo's ability to organise and inform itself to better tackle the threats from ML, economic crime and TF.

2586. The September 2012 strategy laid out a roadmap to:

- create and staff the National Office for Economic Crimes Enforcement;
- rewrite or significantly amend the existing AML/CFT Law to be fully compliant with the FATF 40 and the EU *Acquis;*
- finalise a risk assessment for AML/CFT in Kosovo;
- obtain membership in the Egmont Group of FIUs;
- sign intergovernmental agreements with the neighbouring FIU's and with the countries that Kosovo cooperates with;
- build and maintain the enforcement community's capacity to fulfill their obligations;
- create a National Economic Crimes Institute responsible for all types of AML/CFT training and awareness raising efforts;
- continuously identify training needs and develop and deliver courses as required;
- maintain communication within the enforcement community through print and electronic media;
- establish communication with private stakeholders and civil society, especially NGOs;
- incorporate management practices focused on preventing and prosecuting ML and TF offences;
- track investigations and prosecutions with a view towards significantly increasing arrests, convictions, seizures and confiscations;
- expand the responsibility for ML investigations to all enforcement agencies where proceeds of crime are generated;
- maintain communication and cooperation within the enforcement community through regular meetings of the Economic Crimes Working Group;
- conduct at least one well-resourced, financial intelligence-led task force investigation of inexplicable wealth; and
- ensure that Kosovo has a meaningful financial intelligence-led analysis program for combating the FT.

2587. The goals, objectives and actions of the National Strategy and the Action Plan 2014-2018 are based on the NRA 2013. The policy documents constitute a mechanism of managing risks in the informal economy, ML, FT and other economic and financial crimes in Kosovo. The primary goal

of the National Strategy and the Action Plan 2014-2018 is to provide support in achieving the following objectives of the programme of the Government of Kosovo:[222]

- Sustainable economic development;
- Good governance and strengthening the Rule of Law;
- Human capital development; and
- Social welfare.

2588. The Government has approved the strategic objectives of the National Strategy 2014-2018. They are implemented through the Action Plan. The strategic objectives are as follows:[223]

- raising awareness on the impacts and on the prevention of informal economy and financial crimes;
- strengthening the prevention and fight against informal economy and financial crimes by enhancing transparency, accountability, good governance and societal partnership;
- promoting intelligence, investigation, prosecution, court and enforcement proceedings on ML, TF and other financial crimes;
- strengthening the capacity of the relevant institutions;
- developing and applying a proactive approach to the international cooperation on prevention of ML, TF and other financial crimes; and
- developing national legislation to comply with international standards and ensuring its efficient implementation.

2589. The Kosovo Authorities stated that, at the end of June 2014, the institutions responsible for the implementation of the Action Plan have finalised 7 and initiated 20 out of altogether 51 actions. The implementation process of 24 actions has not been initiated yet.

2590. The assessment team acknowledges Kosovo authorities' willingness to implement the Action Plan. However, the assessment team was unfortunately not provided with detailed information on the way the actions were being implemented, preventing the assessment team to understand what exactly have been done in order to reach each objective.

2591. The paragraphs that follow address the implementation of some of the above mentioned objectives of the Strategy that, either directly or indirectly, might have an impact on domestic co-operation.

2592. The NCCEC is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF. The National Office was established with a Prosecutor being appointed as the National Coordinator in January 2014 (referred to as: The National Coordinator for Fight against Economic Crime). The establishment and operations of the National Co-ordinator are governed by the KPC Regulation of December 2013 on the establishment and functioning of the National Coordinator with the aim of increasing the efficiency in prosecution of crimes, sequestration and confiscation of material benefits deriving from crimes

2593. In February 2013 extensive amendment to the AML/CFT Law came in force which further harmonised the AML/CFT regime in Kosovo with the international standards although various shortcomings, some of which more serious than others, as identified in this Report, remain, including provisions affecting co-operation.

2594. In November 2013 the Government of Kosovo published a document[224] on the NRA (National ML and TF Risk Assessment of Kosovo 2013). The document is complemented by two Annexes: Annex 1 providing an analysis and evaluation matrix for individual identified risks and Annex 2 providing an Action Plan for the treatment measures to be applied for the risk assessment. The document is part of the EU funded project for support to Kosovo institutions in combating

222. Refer to National Strategy 2014-2018 page 28.

223. Refer to National Strategy 2014-2018 page 29.

224. In September 2013, the Minister of Finance issued Administrative Instruction No. 04/2003 on National Money Laundering and Terrorist Financing Risk Assessment that tasked the FIU with its implementation in cooperation with concerned institutions and reporting entities.

financial and economic crime.[225] The NRA document was endorsed by the Government in December 2013.

2595. The document identifies threats and vulnerabilities to which Kosovo is exposed while analysing and evaluating them to provide mitigating measures to be applied accordingly. The results indicate that ML, TF and other financial and economic crimes are considered to be mostly hidden crimes. The NRA identifies a series of vulnerabilities in the preventive mechanisms. It is not clear whether the FIU remains responsible to ensure co-operation and co-ordination in the implementation of the Action Plan although it appears that the FIU is leading this exercise.

2596. In January 2014 the NRA document was followed by the National Strategy of Kosovo and its Action Plan for the prevention of and fight against the informal economy, ML, TF and other economic and financial crimes for the period 2014-2018.

2597. While positively acknowledging that Kosovo has established an Action Plan to address these findings, the assessment team expresses concerns in particular over the main findings on the effectiveness of the prevention and detection of ML and the FT. Some of these findings are separately addressed in this Report in the respective FATF Recommendations.

2598. In 2013, with the sponsorship of the FIU of Slovenia, Finland and Senegal the Kosovo FIU reapplied for Egmont Group membership. The assessment team has been informed that officials of the Egmont Group undertook an on-site assessment of the FIU prior to considering membership recommendation to the Plenary. It is understood that, notwithstanding the on-site assessment following even the implementation of the amendments to the AML/CFT Law, no formal decision was taken during the 2014 Egmont Plenary Meeting in Lima.

2599. During the Cycle 1 on-site visit the assessment team was informed that the KPC had recently developed a Strategic Plan for Inter-Institutional Cooperation in the Fight against Organised Crime and Corruption for 2013-2015. It was not clear whether this document has been adopted, or whether the implementing Action Plan, as envisaged has been developed. This document is aimed at improving interagency cooperation and information exchange on cases of corruption and organised crime.

2600. The purposes of the strategy include the improvement and standardisation of interagency cooperation, as well of information on the detection, investigation, prosecution and court decisions about specific types of criminal cases, which *includes* ML as one of the objectives. The strategy also aims to *improve the identification of material benefits of criminal offences and increase confiscation of material benefits of criminal offences*. The objectives also list the increased *prevention* of ML, improvement of quality of information and statistical data available, *inter alia* with regard to ML offences. Among its main activities the strategy lists: signing of interagency MoUs, joint training, standardisation of the criminal report form, harmonisation of statistical information held by various government institutions. It also envisages the nomination (by Chief State Prosecutor and Head of SPRK) of Prosecutor Experts, who will *de facto* be responsible for providing full support in implementing all aspects of the strategy.

2601. If effectively implemented, the measures it sets out would come a significant way to mitigating the deficiencies identified in this assessment report, as they pertain to inter-institutional cooperation and harmonisation and systemisation of statistical data. In the view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action Plan of the Strategy.

2602. It is clear that the KPC and AML/Economic Crime strategies cover a number of the same issues. This leads to a concern as to how the KPC and AML strategies will correlate in terms of practical implementation. The AML Strategy will be coordinated by the MoF, whereas the KPC document – naturally by the SPO. It is important that there is high-level strategic cooperation ensured at the level of these institutions and whatever bodies responsible for the implementation and monitoring of the two strategies and Action Plans. At the moment it seems that such cooperation is lacking, particularly as the list of institutions consulted in the course of preparing the KPC Strategy did not include the FIU, or the MoF.

225. The project is managed by the EU office in Kosovo and implemented by B&S Europe.

2603. At the Governmental level there is a "Joint Rule of Law Co-ordination Board" which co-ordinates national policies and initiatives between Government Departments. This Board is co-chaired by the Deputy Prime Minister and the European Union Special Representative (EUSR) in Kosovo. The Board discusses issues across the whole range encompassed within the rule of law from the Corrections Service, the law on asset confiscation, witness protection, ML etc. The Board meets quarterly. This Board should also be kept informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan in order to ensure coordination and complementarity with other issues being discussed on its agenda.

2604. The CBK, as the delegated supervisory authority for the entire financial sector for the purposes of the AML/CFT Law has informed that through the MoU that it has entered into with the FIU there are provisions for the implementation of measures to the effective cooperation between the two authorities on matters relating to the prevention of ML and the FT. The CBK does not have any similar arrangements with any other domestic authority.

2605. The assessment team is of the opinion that the office of the NCCEC should be the lead authority in domestic cooperation which, up to the establishment of the Office, seems to be sporadic and lacks adequate organisation with the involvement of all relevant authorities in order to avoid duplication and to ensure that there is effective cooperation.

***Operational cooperation and coordination – Additional Element 31.2***

2606. AE 31.2 seeks to establish whether mechanisms are in place for consultation between competent authorities, the financial sector and other sectors, including DNFBPs that are subject to AML/CFT Laws, regulations, guidelines or other measures.

2607. Operational cooperation between various authorities has been described in detail in various sections of this Report (see for example Sections 2.6 - 2.8). In general it is clear that LEAs are still at the initial stage of creating proper and systemic mechanisms for interagency information exchange and cooperation. The KP, KC, FIU, and SPO have signed a number of MoUs to this effect, however several key arrangements, such as FIU-Prosecutors MoU have not yet been considered. Neither are they properly followed by the participating agencies, as for example feedback between the CBK and FIU seemed to be an issue (both ways), even with an effective MoU in place although the authorites claim that this has improved since the new MoU between the CBK/FIU delegating a supervisory remit for the financial sector to the CBK through which even inspection reports are forwarded by the CBK to the FIU.

2608. Some MoUs that exist between the various agencies only cover exchange of information on demand or for specific data such as CTR from KC to the FIU.

2609. In November 2013, a MoU was signed between KPC, KJC, MoJ, MoF, MIA, CBK, KAA and KIA in order to establish the NCCEC, which was eventually established in January 2014. His mandate is to promote, coordinate, monitor, evaluate and report activities of all public and private institutions who are concerned with prevention, detection, investigation, prosecution and adjudication of crime that generate material benefits by protecting Kosovo citizens and their financial systems from the risk of ML, FT, and tax evasion in accordance with the applicable legislation.

2610. In 2014, a SOP for selection of targets of serous crimes and multiagency investigation teams was drafted between the NCCEC, KPC, KP, KC, KTA, FIU and KAA in order to coordinate the investigations of several offences commited by the same persons or group of persons in different parts of Kosovo and which under normal circumstances would have been investigated, prosecuted and tried separately.

2611. Moreover, in the light of the MoU signed between the CBK and the FIU whereby the latter delegated a regulatory and supervisory remit to the former for the entire financial sector, the assessment team sees a need for the two authorities to establish channels of effective co-operation and co-ordination particularly in matters relating to the regulation of the sector in order to ensure that any directives, instructions or other rules issued in terms of the AML/CFT Law are not in conflict. Effective co-ordination and co-operation should also be applied in resolving issues identified in the course of both on-site and off-site examinations.

2612. On the other hand, the representatives of the financial sector and DNFBPs associations that the assessment team met with during the on-site visits confirmed that they are consulted by both

the FIU and the CBK on matters concerning amendments to the AML/CFT Law and the issue of Directives, Instructions or other rules and regulations that impact on their effective implementation of their obligations in compliance with the AML/CFT Law. The assessment team notes this positive co-operation which should contribute to the better effectiveness of the system.

***Effectiveness***

2613. Overall the AML regime, as a multi-level interagency system has been capable of producing an extremely low number of sporadic, inconsequential outputs. Even though it may be incorrect to consider these minor results accidental, overall they confirm rather than deny the general inability of the institutional AML/CFT value chain to function in a proper integrated way with the involvement of all of its components: reporting - intelligence/analysis – investigation – prosecution - conviction/confiscation. This is caused by a number of cross-cutting factors, including the lack of effective cooperation/coordination mechanisms and feedback across *all* segments, as well as a lack of necessary resources in *most*.

2614. The analysis of various components, undertaken in this Report also produced an extensive list of specific factors at the level of individual institutions which also negatively impact the system as a whole, the most important of them being:

- the low effectiveness on the preventative side and lack of proper effective supervision, in particular on the DNFBP sector, and enforcement/sanctioning regime. This means the preventative system is, in general, significantly failing in its main two functions: barring criminal proceeds from entering the financial system and ensuring that competent authorities are informed when such facts do take place;
- insufficient institutional standing of the FIU, which reflects on its capacities to enhance cooperation with other domestic authorities, access information and improve the quality of analysis;
- reluctance, lack of understanding and capacity of law enforcement/prosecutors to pursue ML investigations/prosecutions and the seizure/confiscation of criminal proceeds;
- lack of capacities in the judiciary and its reluctance in taking a proactive approach in issues of seizure/confiscation of criminal proceeds.

2615. Even though, as indicated above, the establishment of the office of the NCCEC seems to be a proper forum to undertake an organised effort to coordinate the various government actors, it is too early to assess its achievements and to consider it as effective.

### 6.1.2. Recommendations and Comments

2616. With the KPC and AML strategies, the government has demonstrated that there is an understanding of the significant interagency problems that exist; otherwise an adoption of a strategy solely targeted at inter-institutional cooperation (by the KPC) would not have been required. However, this policy step will demand significant efforts and resources in order to be effectively implemented, given the severe shortcomings in the system.

2617. In order to rectify the deficiencies in the area of interagency cooperation, authorities in Kosovo should make it a priority to implement the AML/Economic Crime and KPC Strategies. This however should be done in a coordinated fashion, given the number of cross-cutting issues among the two documents.

2618. In the view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action Plan of the Strategy.

2619. The Joint Rule of Law Coordination Board should be kept informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan on Inter-Institutional Cooperation - in order to ensure coordination and complementarity with other issues being discussed on its agenda.

2620. Following the signing of the supervisory delegation agreement between the FIU and the CBK for the financial sector it is important that the two authorities establish effective practical channels of co-operation on both regulatory and supervisory matters for the financial sector.

### 6.1.3. Rating for Recommendation 31

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.31** | **PC** | • effective feedback, information-sharing and coordination among authorities are too recent to have an impact on the overall ineffectiveness of the AML regime;<br>• lack of coordination at the strategic planning and policy making level between key institutions (KPC and MoF);<br>• the National Strategy has not yet been properly implemented and the office of the NCCEC is too recent to be considered as effective; and<br>• channels of cooperation on regulatory and supervisory matters are too recent to be considered as really effective. |

## 6.2. The Conventions and United Nations Special Resolutions (R.35 and SR.1)

### 6.2.1. Description and Analysis

**Recommendation 35**

2621. Recommendation 35 requires countries to take the necessary steps specifically to become party to and implement the Vienna Convention, the Palermo Convention and the 1999 UN International Convention for the Suppression of the Financing of Terrorism. The Recommendation moreover encourages countries to ratify and implement other relevant international conventions such as the 1990 CoE Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime[226] and the 2002 Inter-American Convention against Terrorism.

2622. Recommendation 35 which sets requirements for the signing and ratification of relevant UN instruments has been excluded from the assessment due to its inapplicability in the case of Kosovo, which due to its legal status in line with UNSCR 1244 cannot become a party to these instruments.

**Special Recommendation I**

2623. Special Recommendation I requires countries to take immediate steps specifically to ratify and implement the 1999 UN International Convention for the Suppression of the Financing of Terrorism. It further requires countries to immediately implement the UN Resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly through UNSCR 1373.

2624. The statement made above in relation to Recommendation 35 also refers to Special Recommendation I considering that it requires, inter alia, the signing and ratification of the UN Terrorist Financing Convention.

2625. The implementation of the relevant UNSCRs, as required by EC SR.I.2 could in principle be assessed here, but no Recommendation or Special Recommendation can be accepted as "partially applicable" for the purposes of an evaluation and therefore SR.I must entirely be excluded from this assessment. (On the other hand, the implementation of the said UNSCRs has already been assessed under SR.III).

226. The 1990 CoE Convention was replaced in May 2005 by the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – CETS 198. Some parts of this Report assess comliance by Kosovo to some elements of the Convention.

***Effectiveness***

2626. In the light of the above mentioned circumstances the assessment team could not conclude the implications, if any, on effectiveness of the AML/CFT system arising out of the non-implementation of the mentioned international instruments.

### 6.2.2. Recommendations and Comments

2627. In the circumstances the assessment team cannot make any recommendations.

### 6.2.3. Rating for Recommendation 35 and Special Recommendation I

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.35** | **N/A** | |
| **SR.I** | **N/A** | |

## 6.3. Mutual legal assistance (R.36, R.37, R.38 and SR.V)

### 6.3.1. Description and Analysis

***Treaty based MLA obligations***

2628. Although Kosovo has appropriate domestic legislation by which it could accede to international treaties (Law No. 04/L-052 (2011) on International Agreements) its special position as a subject of international law (with regard to its partial recognition as a sovereign state) has so far prevented it from concluding multilateral (European or regional) conventions on international legal cooperation. While Kosovo does not have multilateral obligations deriving from treaties related to legal assistance on criminal matters, it has nevertheless signed numerous bilateral agreements in this field, as is illustrated in the table below with the status of agreements being indicated as was the position at the time of the Cycle 2 on-site visit in April 2014.

***Table 30: Bilateral agreements signed by Kosovo***

| **Scope of agreements:** / **Status:** | **Extradition** | **MLA (or judicial cooperation) in** | | **Mutual recognition and/or execution of judicial criminal decisions** | **Transfer of convicted persons** |
|---|---|---|---|---|---|
| | | **Criminal matters** | **Civil/commercial matters** | | |
| **Ratified agreements:** | Albania, Austria*, Turkey, "the former Yugoslav Republic of Macedonia", Belgium | Albania, Croatia, Austria*, Turkey, the Czech Republic*, "the former Yugoslav Republic of Macedonia", Belgium | Belgium | Austria* | Albania, Turkey, the Czech Republic*, "the former Yugoslav Republic of Macedonia", Belgium, Switzerland |
| **Signed agreements (2013):** | Italy | Italy | | | |
| **Agreements to be signed:** | | Germany | | | |

| Scope of agreements: / Status: | Extradition | MLA (or judicial cooperation) in | | Mutual recognition and/or execution of judicial criminal decisions | Transfer of convicted persons |
|---|---|---|---|---|---|
| | | Criminal matters | Civil/commercial matters | | |
| **Agreements under process:** | Montenegro | Montenegro, Hungary | Albania and "the former Yugoslav Republic of Macedonia" (civil matters) | Croatia, Montenegro | Italy |
| **Intended upcoming negotiations:** | Slovenia, Bulgaria | | | | |

** by succession*

**Recommendation 36**

2629. The objective of Recommendation 36 is threefold. First it requires that countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance (MLA) in relation to ML and TF investigations, prosecutions and related proceedings. Second it requires countries to ensure that domestic investigative powers are also available to use in response to requests for MLA and third in giving consideration to devising and applying mechanisms for best venue for prosecution of defendants

***Widest possible range of mutual assistance in a timely, constructive and effective manner - Essential Criterion R.36.1***

2630. EC 36.1 provides six instances where the widest possible range of MLA can be provided in a timely, constructive and effective manner: (a) production, search and seizure of information, documents and evidence, including from financial institutions; (b) taking of evidence or statements from the public; (c) providing original or copies of documents; (d) effecting service of judicial documents; (e) facilitating the provision of information or testimony; and (f) identification, freezing, seizure, or confiscation of assets laundered or intended to be laundered.

2631. Provision of MLA by Kosovo is regulated by Law No. 04/L-213 (2013) on International Legal Cooperation in Criminal Matters (hereafter "MLA Law") being in force since September 2013. It replaced Law No. 04/L-031 (2011) on International Cooperation in Criminal Matters (hereafter "old MLA Law") that had been in force since October 2011 (before that, the respective rules were to be found in the Prov.CPC). The MLA Law and the old MLA Law show significant similarities in most of the matters discussed in this respect, for which reasons references to the old MLA Law will only be given in case of remarkable differences between the two legislations.

2632. In the absence of an international agreement between Kosovo and a foreign country, international legal assistance is to be administered on the basis of the principles of reciprocity (paragraph (2) of Article 1 of the MLA Law).

2633. The possible forms of international cooperation cover a wide range including procedural legal assistance in criminal matters in general (Chapter VI sub-chapters II to V) extradition (Chapters II sub-chapter I) transfer of proceedings (Chapters III sub-chapter I) or the recognition and enforcement of judgments (Chapter V sub-chapter I).

2634. Turning to the procedural legal assistance in criminal matters, the foreign requests for international legal assistance shall be filed via the MoJ. Within the Ministry it is the Department for International Legal Cooperation (DILC)[227] which examines, on the basis of formal requirements (legal basis/reciprocity) the admissibility of the foreign request then forwards it to the respective national judicial authority (paragraph (1) of Article 3 of the MLA Law). The national judicial authority might theoretically be either the courts or the prosecutor's offices (paragraph (1.6) of

227. Requests coming from countries that have not recognised Kosovo as a state are processed through the International Legal Department of the EULEX Unit which operates within the MoJ DILC.

Article 2 of the MLA Law) but for the purposes of MLA it must always be a prosecutor's office which executes the letter rogatory in direct manner and in accordance with the national law (e.g. if a court order is required by the domestic legislation to carry out the respective measure, the competent prosecutor would submit the necessary request to the court).

2635. According to paragraph (1) of Article 84 of the MLA Law the national judicial authority to execute a foreign letter rogatory must always be a basic prosecutor's office with territorial competence for executing the foreign request (with regard to the residence of the person or the location of the object, etc.) except if the foreign request relates to ongoing criminal proceedings in Kosovo, in which case the prosecutor in charge of the domestic proceedings will be the competent body. Having said that, the MoJ specified that, in practice, this provision is interpreted so as to be in line with the Law on the SPRK that grants exclusive jurisdiction to the Special Prosecutor's Office (SPRK) in specific subject matters such as ML or TF. As a consequence, the Ministry interprets paragraph (1) of Article 84 of the MLA Law in a way that all requests related to ML or TF would have to be transmitted to the SPRK for execution.

2636. The MLA Law does not allow for Kosovo judicial authorities to enter into a direct cooperation with their foreign counterparts as regards mutual assistance in criminal matters. Paragraph (2) of Article 4 of the MLA Law however provides that in urgent cases national judicial authorities may provide assistance even if the foreign request is received directly (through INTERPOL or in any other form that produces a written record) on condition that the requesting State guarantees to send the request and original documents through the MoJ within 30 days (the same deadline was only 18 days in paragraph (2) of Article 3 of the old MLA Law). It is not stipulated precisely by the Law but it appears implied that in such cases, the Ministry would subsequently exercise its authority to confirm the permissibility of the letter rogatory. Furthermore, paragraph (4) of Article 4 authorises the Minister of Justice to allow direct cooperation between national and foreign judicial authorities "*as deemed appropriate*" although no such ministerial decision has yet been brought in this field.

2637. Direct communication between local and foreign judicial authorities is only foreseen in case of spontaneous exchange of information pursuant to Article 92 of the MLA Law where Kosovo authorities may, without a previous request, forward to the competent authority of a foreign country information collected during their investigations, if they consider that the disclosure of such information may assist the receiving country to initiate or to take over investigations or criminal proceedings, or it may lead to a petition for mutual international legal assistance filed by the receiving country. This communication is, however, beyond the scope of FATF Recommendation 36.

2638. The range of procedural activities that can be executed upon a request by a foreign country is generally not specified by the MLA Law. Considering however that paragraph (4) of Article 1 of the MLA Law provides that international legal assistance procedures shall be provided for with provisions of the criminal procedures (meaning the CPC of Kosovo) unless otherwise provided for by the MLA Law, it is apparent that all investigative measures available in the CPC being in force are equally available for the purposes of execution of letters rogatory. Specific forms of procedural activities provided by the MLA Law include the hearing of witnesses or experts by a video conference (Article 89) or the formation of joint investigative teams with one or more foreign states (Article 98).

***Provision of assistance not prohibited or conditioned - Essential Criterion 36.2***

2639. According to EC 36.2 the provision of MLA should not be prohibited or made subject to unreasonable, disproportionate or unduly restrictive conditions.

2640. The legal grounds for refusal are provided in paragraph (1) of Article 85 of the MLA Law (roughly in line with paragraph (1) of Article 74 of the old MLA Law) according to which assistance may be refused if the request is related to a political offence or if its execution would prejudice sovereignty, security, public order or other essential interests of Kosovo. The third legal ground, first introduced by the new Law, relates to cases when the request is contrary to the legal system of Kosovo.

2641. "Political offences" are addressed by Article 14 of the MLA Law which can be found in Chapter II sub-chapter I dealing with extradition requests while the provisions related to the execution of letters rogatory can be found in a different part of the Law. Nonetheless, the definition appears to be applicable to the entire MLA Law as it is formulated pursuant to paragraph (2) of

Article 14 to provide a general definition "for the purposes of this Law" (and not only for extradition cases).

2642. According to paragraph (2) of Article 14 of the MLA Law the notion of political offence does not include a number of violent criminal offences of political character, namely the (attempted) murder of the head of state or his/her family members as well as the genocide, crimes against humanity, war crimes and terrorism (being unclear whether the latter is meant to cover FT as well). It is worth to note that the corresponding provision of the old MLA Law (paragraph (2) of Article 12) contained a broader range of such exceptional offences (including murder, severe body injury, abduction, rape, etc.) which are not mentioned in the new MLA Law, probably as they had no actual relevance as "political offences".

2643. Despite its recent enlargement, the list in paragraph (1) of Article 85 of the MLA Law is considerably short as compared to the respective regulations of other jurisdictions. It is silent on whether and to what extent double jeopardy (*ne bis in idem*) can be an obstacle to providing MLA as this issue is only regulated by Article 11 for extradition cases. There is no specific basis, apart from the rather vague reference to requests "contrary to the legal system of Kosovo" in paragraph (1.3) of Article 85 to refuse the execution of requests where there are grounds for discrimination of the suspect on the basis of race, religion, citizenship etc. or if the suspect would not be punishable, for any reasons, according to the domestic law of Kosovo.

2644. Certainly, these features of the legislation are generally not to be criticised as the apparent lack of more detailed regulation would obviously support the provision of legal assistance to a greater extent and eventually the more effective implementation of FATF Recommendation 36. On the other hand, the example of other jurisdictions shows that lack of more specific provisions (for cases such as a foreign letter rogatory related to a criminal offence that has already been subject to a court verdict in Kosovo) may easily lead to the discretionary and extensive application of the generic grounds of refusal as provided in paragraph (1) of Article 85 (legal system, sovereignty, security, public order etc.)

***Mutual legal assistance should be rendered in the absence of dual criminality – Essential Criterion 37.1***

2645. EC 37.1 requires that, to the widest extent possible, MLA should be rendered in the absence of dual criminality, in particular, for the less intrusive and non-compulsory measures.

2646. As for the applicability of the principle of dual criminality, it is only provided by Article 90 of the MLA Law regarding foreign requests for search, seizure and confiscation of property in which case the offence on which the request is based should be punishable by the law of the requesting country as well as by Kosovo law (see more in detail under Recommendation 38).

2647. Beyond the scope of the aforementioned coercive measures, no dual criminality standard applies in MLA in criminal cases. To date, Kosovo has not refused any case to offer MLA due to extremely strict interpretation of the principle of reciprocity or double incrimination or due to any other unreasonable cause.

***Clear and efficient processes – Essential Criterion 36.3***

2648. EC 36.3 requires that there should be a clear and efficient process for the execution of MLA requests in a timely way and without undue delays.

2649. As regards clear and efficient processes for the execution of MLA requests in a timely way and without undue delays, neither the MLA Law nor the CPC nor any other piece of legislation provides procedural deadlines (as opposed to the extradition procedure discussed below under Recommendation 39). At the time of the Cycle 1 on-site visit, however, the MoJ had been drafting secondary legislation (an administrative instruction) for the implementation of the old MLA Law then in force in order to clarify procedures and to define time limits in provision of international legal assistance. Nonetheless, the old MLA Law has since been repealed by the new one and probably this is the reason why the assessment team has not yet been made aware of any further details in this respect (not even a draft was mentioned during the Cycle 2 on-site visit).

2650. In any case, the MoJ indicated that special attention is paid by all competent authorities to foreign requests for MLA to which priority should be given over other procedures. In line with this, the new MLA Law provides that national judicial authorities shall give priority to the execution of

requests for MLA and take into account any procedural deadlines and any other terms indicated by the requesting state (paragraph (4) of Article 80).

2651. Time limits for executing a letter rogatory are dependent on the content of the respective requests. In this context, the average time the execution requires was said to be 2 to 3 months. The assessment team was not informed by any other states on any negative experiences, including undue delays in executing MLA requests, in the cooperation with Kosovo.

***Provision of assistance regardless of possible involvement of fiscal matters or of existence of secrecy and confidentiality laws – Essential Criterion 36.4 and Essential Criterion 36.5***

2652. While EC 36.4 requires that MLA requests should not be refused on the grounds of involvement of tax matters, EC 36.5 requires that likewise laws that impose secrecy or confidentiality on financial institutions and DNFBPs should not be grounds for refusal unless the relevant information was obtained under conditions of legal professional privilege or legal professional secrecy.

2653. No ground for refusal for offences involving fiscal matters is regulated in the law of Kosovo. Similarly, neither piece of applicable legislation allows for the refusal of MLA requests on the grounds of secrecy or confidentiality requirements. In the law of Kosovo, no financial institution secrecy law appears to inhibit the implementation of the FATF Recommendations and this general approach must also be followed when executing foreign letters rogatory. The assessment team has no information on any restrictive practice in this field.

2654. Article 37 of the AML/CFT Law provides that professional secrecy, including financial secrecy, may not be invoked as a ground for refusal to provide information that is sought by either the FIU or the KP in connection with an investigation that relates to ML. The only exemption made in this respect is for information that is subject to lawyer-client privilege pursuant to paragraph (3.2) of Article 30 of the AML/CFT Law.

***Availability of powers of competent authorities – Essential Criterion 36.6 and Additional Element 36.8 (applying FATF R.28)***

2655. While EC 36.6 requires that the investigative powers of the relevant competent authorities be made available for use in response to requests for MLA, AE 36.8 enquires whether such investigative powers can also be made available for use when there is a direct request from foreign judicial or law enforcement authorities to their domestic counterparts.

2656. Pursuant to the direct applicability of the rules of the CPC being in force, the powers of competent authorities are available for use in response to requests for MLA. Within the limits of the letter rogatory to be executed, the prosecuting authorities possess the same procedural powers compared to a national criminal investigation.

2657. As discussed above, all foreign MLA requests must be either submitted or received through the central authority (MoJ) for which reason there is no legal possibility for domestic local judicial authorities to receive and execute direct requests from their foreign counterparts.

***Avoiding conflicts of jurisdiction - Essential Criterion 36.7***

2658. In order to avoid conflicts of jurisdiction, EC 36.7 invites countries to consider devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

2659. There is no specific legislation in Kosovo to provide for mechanism for communication and coordination with other states to determine the best venue for prosecution of defendants in cases that are subject to prosecution in more than one country in order to avoid conflicts of jurisdiction, apart from the application of transfer of criminal proceedings to or from another state which can also be considered, to a certain extent, as a measure serving this purpose.

***Effectiveness and statistics***

2660. As for the general turnover of international cooperation, the MoJ provided cumulated statistics of incoming foreign requests for the period from 01 January 2010 to 25 December 2013 in which it can be seen that while the vast majority of the cases mentioned there by the MoJ consisted of servicing of documents, there were hundreds of letters rogatory (in which respect the categories of "legal assistance of various natures" and "rogatory-letter (act-petition)" may overlap to some extent) about which, however, the assessment team did not receive appreciable information.

2661. Between 1 January 2010 and 25 December 2013 the MoJ DILC received a total of 10,274 new requests. They break down as follows:

***Table 31: New Requests for Assistance***

| Number of Requests | Type of Requests |
|---|---|
| 7,488 | Requests for document service |
| 489 | Requests for legal assistance of different nature |
| 1,169 | Requests for rogatory letters - letter (petitions) |
| 512 | Requests for verification of documents |
| 57 | Extradition requests |
| 114 | Requests for the transfer of judicial proceedings |
| 178 | Requests for execution of court decisions |
| 18 | Requests on international child kidnapping |
| 43 | Requests for transfer of convicted persons |
| 13 | Requests on war crimes |
| 193 | Requests for issuance of international wanted notices |

2662. The assessment team was informed that at least one of these requests was with regard to the seizure of the proceeds of crime, where approximately €400,000 was detained (based on a request from Germany).[228] At the same time comprehensive statistics with a breakdown of these MLA and particularly those indicating ML, predicate offences and TF were not provided to the assessment team.

2663. Further, although apparently unrelated and incompatible, statistics were provided during the Cycle 2 on-site visit focusing on 2013 and 2014 as follows:

***Table 32: Requests and replies within open cases***

| Year | New criminal requests within open cases | Criminal replies within open cases | Criminal requests and replies (old database) |
|---|---|---|---|
| 2013 | 109 | 111 | 1,021 |
| 2014 | 1,140 | 575 | The new database is operational as from 2014 |

*Legend:* 2013 – only new criminal cases: 341
2014 – from January 2014 to 30 June 2014 (only new criminal cases: 471)

228. Kosovo authorities have informed that there are a couple of ongoing cases involving froozen and seized assets in relation to received requests for MLA from different countries (such as *inter alia* Italy, Switzerland, Belgium, Germany, Netherlands, Sweden).

***Table 33: Rogatory letters for 2014***

| Number of rogatory letters | Type of requests |
|---|---|
| **153** | New Rogatory letters |
| **213** | Rogatory letters within open cases |

***Table 34: Foreign requests related specifically to ML (2014)***

| Type of case | Sub-type of case | Subcategory | No of cases | Category |
|---|---|---|---|---|
| MLA | Control & freezing, interviews and statements, documents | Drug trafficking, ML | 1 | New cases 2014 |
| MLA | Controlled delivery, documents | Drug trafficking, Organised crime, ML | 1 | Requests within open cases |
| MLA | Documents | Other, Criminal offences against economy, Organised crime, ML, Fraud, counterfeiting and piracy of products | 2 | Answers within open cases |
| MLA | Controlled delivery, documents | Drug trafficking, Organised crime, ML | 1 | Updates |

2664. The figures in the statistical tables above do not seem compatible (e.g. the total number of foreign requests in the second table under Table 32 is significantly lower than either of the figures in the respective line of the preceding table) and therefore the assessment team has serious concerns about their overall reliability. It can be concluded, however, that Kosovo has been, and is capable to provide MLA in a number of various cases (including at least 4 ML-related MLA cases in 2014) which is unconditionally appreciated.

2665. Kosovo states that co-operation is conducted in a reasonable time and is constructive and effective in its implementation which is supported by the fact that, according to the MoJ, no foreign MLA requests were reported to be rejected so far. There are, however, no statistics available to show 'turnaround' times for international requests. While the Kosovo authorities claimed that processing an answer to a foreign letter rogatory should normally take 10 to 15 days, the assessment team was also informed on-site that there appeared to be lengthy delays and long backlogs of proceedings that go through the Courts. If a request requires some form of Judicial Order there is no indication of how long this would take. At the same time Kosovo states it prioritises requests for MLA over other procedures. In this respect, the elaboration and issuance of the aforementioned Administrative Instruction to implement the MLA Law for the purpose of clarification of procedures and time limits in providing international legal assistance would be highly appreciable.

***Essential Criteria 36.1 to 36.7 applicable to obligations under SR.V – Essential Criterion SR.V.1***

2666. As far as FT and terrorism related offences are concerned, there is no exception provided for the application of the above mentioned rules. That is, the normal MLA rules would generally apply to requests of foreign states.

2667. In the apparent lack of dual criminality requirements, the potential technical problems explained in respect of the competing domestic offences that cover FT (Article 138 of the CC and Article 36B of the AML/CFT Law) are not likely to limit mutual assistance.

**Recommendation 37**

2668. Recommendation 37 specifically requires that, to the greatest extent possible, countries should render MLA notwithstanding the absence of dual criminality. To this effect the Recommendations requires that where dual criminality is required for MLA or extradition it should not be essential that both countries place the offence within the same category of offences or denominate the offence by the same terminology provided that both countries criminalise the conduct underlying the offence.

***Mutual legal assistance should be rendered in the absence of dual criminality – Essential Criterion 37.1***

2669. Since EC 37.1 requires that, to the widest extent possible, MLA should be rendered in the absence of dual criminality, in particular, for the less intrusive and non-compulsory measures, please refer to the analysis of this criterion under the analysis of EC 36.2 for FATF Recommendation 36 above.

***Where dual criminality is required there should be no legal or practical impediments to render assistance – Essential Criterion 37.2***

2670. EC 37.2 requires that for extradition and those forms of MLA where dual criminality is required it should be sufficient that both countries criminalise the conduct underlying the offence. Thus technical differences of terminology, denomination or categorisation of the offence should not pose an impediment to the provision of MLA.

2671. Within this context please refer to the analysis under this section for Recommendation 38 (provision of MLA) in this Section of the Report and the analysis for Recommendation 39 (extradition) under Section 6.4 below.

**Recommendation 38**

2672. Recommendation 38 requires the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from ML or predicate offences, instrumentalities used or intended for use in the commission of the offence or of property of corresponding value. Such authority should include arrangements for coordinating action for seizure or confiscation with the possibility of the sharing of confiscated assets.

***Appropriate laws and procedures to provide effective and timely response to mutual legal assistance for identification, freezing, seizure or confiscation – Essential Criterion 38.1 and Essential Criterion 38.2, and***
***Where dual criminality is required there should be no legal or practical impediments to render assistance – Essential Criterion 37.2***

2673. EC 38.1 requires that there should be appropriate laws and procedures to provide an effective and timely response to MLA requests by foreign countries related to the identification, freezing, seizure, or confiscation of laundered property or proceeds from, as well as instrumentalities used or intended for use in the commission of any ML, TF or other predicate offences. According to EC 38.2, these requirements should also be met where the request relates to property of corresponding value.

2674. Moreover, EC 37.2 requires that for those forms of MLA where dual criminality is required it should be sufficient that both countries criminalise the conduct underlying the offence. Thus technical differences of terminology, denomination or categorisation of the offence should not pose an impediment to the provision of MLA.

2675. As far as foreign requests for search, seizure and confiscation of property are concerned, Article 90 of the MLA Law provides that these may be executed upon two conditions: the offence on which the request is based has to meet the standard of dual criminality (it must be punishable under both the national law and that of the requesting country) and the execution of the request must be carried out in consistency with the national law.

2676. In the area of rendering MLA to foreign states, this is the only instance where double criminality principle must be met. The MLA Law nonetheless remains silent whether and to what extent the interpretation of dual criminality is flexible enough so as to overcome the potential legal or practical impediments to rendering assistance where both countries criminalise the conduct underlying the offence but there are differences between the competing laws, particularly in the manner in which each country categorises or denominates the offence.

2677. During the on-site visit, the representatives of the MoJ claimed that the judicial authorities of Kosovo would interpret the dual criminality principle, in all its aspects, widely enough so that different denomination, formulation or categorisation of the competing offences cannot pose an impediment to rendering MLA related to search, seizure and confiscation of property. Unfortunately, no concrete cases were reported to support this statement although, as noted above, no MLA cases had yet been refused because of the strict interpretation of the principle of double incrimination.

2678. The requirement to apply the respective national legislation, that is, the rules of the CPC for seizure and confiscation measures executed upon the request of a foreign state means that the statements the assessment team made earlier in relation to Recommendation 3 in this Report are likewise relevant in the context of Recommendation 38. It particularly refers to the technical deficiencies identified in this field such as the potential inapplicability of the confiscation regime to instrumentalities intended for the use in a criminal offence and the discrepancy between the rules of criminal substantive and procedural legislation related to third party confiscation.

2679. Notwithstanding all these, the domestic legislation appears to be an adequate basis for providing an effective and timely response to foreign requests related to the identification, freezing, seizure or confiscation of laundered property, proceeds from or instrumentalities used in the commission of any ML, FT or other predicate offences (EC 38.1 except for intended instrumentalities in EC 38.1.d). Since value confiscation is provided by the criminal legislation of Kosovo, this requirement is also met where the request relates to property of corresponding value (EC 38.2).

2680. Apart from Chapter VI on rendering MLA there is another part of the MLA Law that deals with the execution of foreign requests for confiscation. Chapter V sub-chapter I on the recognition and enforcement of foreign judgments in Kosovo contains provisions on the enforcement of punishments consisting of confiscation (Article 74). If a request for enforcement of confiscation of a sum of money has been accepted, the competent Kosovo court converts the amount into the currency in circulation in Kosovo. The confiscation of a particular item may only be ordered if the national law permits confiscation for the respective criminal offence (it probably does as confiscation is regulated in the Special Part of the CC) and if confiscation of a particular item is not possible, the court may instead decide to confiscate the monetary amount equal to the value of that item if the requesting state agrees (so EC 38.2 is met also in this respect).

2681. It is thus unclear whether a foreign request for confiscation would be dealt with as an ordinary letter rogatory pursuant to Article 90 or as a judgment to be recognised and enforced pursuant to Article 74. The MLA Law appears to allow room for both procedures but only one of them can be applied in a single case as the competence of national judicial authorities is different: while the MoJ forwards letters rogatory to basic prosecutors' offices, foreign judgments subject to recognition and enforcement are directly sent to the competent basic court (paragraph (3) of Article 71). It is therefore up to the Ministry which option to choose, although the execution of the confiscation would likely be the same in both cases.

***Arrangements for co-ordinating seizure and confiscation actions – Essential Criterion 38.3***

2682. EC 38.3 on having arrangements for coordinating seizure and confiscation actions with other countries does not appear to have been formally addressed.

***Consideration for establishing an asset forfeiture fund – Essential Criterion 38.4***

2683. EC 38.4 requires that countries consider establishing an asset forfeiture fund into which all or a portion of confiscated property will be deposited and will be used for law enforcement, health, education or other appropriate purposes.

2684. As noted earlier in this Report under the analysis for Recommendation 3 an Agency for the Management of Sequestrated and Confiscated Assets (AMSCA) was established in Kosovo with responsibility to store and manage assets referred to it by the Prosecutor, and to dispose of or sell assets once final confiscation is ordered by a Court. Nonetheless, Article 75 of the MLA Law provides that confiscated property or the value thereof, as a main rule, accrues to the state budget and the assessment team has no information on any consideration given to the establishment of a separate asset forfeiture fund in the sense of EC 38.4.

***Sharing of confiscated assets – Essential Criterion 38.5***

2685. EC 38.5 provides that countries should consider authorising the sharing of confiscated assets between them when confiscation is directly or indirectly a result of coordinated law enforcement actions.

2686. Mechanisms for sharing confiscated assets with other countries when confiscation is a result of coordinated law enforcement actions are not expressly provided for by Kosovo legislation. Paragraph (1) of Article 75 of the MLA Law only provides that revenues from the collection of confiscations shall be paid to the state budget unless otherwise agreed with the requesting state and without prejudicing the rights of third parties, that is, there is a theoretical opportunity for entering into an asset sharing agreement with the other state. In addition, paragraph (2) of Article 75 provides that confiscated property (meaning property items) which is of a special interest to the requesting state may be returned to it if it so requires. Neither of these provisions has so far been applied in practice, though.

***Essential Criteria 38.1 to 38.5 applicable to obligations under SR.V – Essential Criterion SR.V.3***

2687. As noted above, no exception is foreseen in the MLA Law or elsewhere in the law of Kosovo for FT and terrorism related offences and therefore the rules described above would likewise apply to requests related to such offences.

2688. To the extent dual criminality is observed, however, the problems explained in respect of the current domestic FT offences (e.g. the deficient and/or incomplete criminalisation of financing of an individual terrorist) might potentially limit the mutual assistance that Kosovo can provide in such cases.

**Special Recommendation V**

2689. The objective of SR V is twofold. First it requires that, on the basis of effective mechanisms, countries should afford each-other the greatest possible measures of assistance in connection with criminal, civil enforcements, and administrative investigations, inquiries and proceedings related to the FT, terrorist acts and other terrorist organisations. Second it requires that countries take all possible measures not to provide safe haven for individuals charged with FT, terrorist acts or terrorist organisations with procedures to extradite such persons.

***Application of R.36 Essential Criteria 36.1 to 36.7 – Essential Criterion SR.V.1***

2690. Since EC SR.V.1 requires countries to ensure that EC 36.1 to 36.7 also apply to the obligations under SR V, please refer to the analysis of Recommendation 36 earlier in this section of the Report.

***Application of R.37 Essential Criteria 37.1 to 37.2 – Essential Criterion SR.V.2***

2691. Since EC SR.V.2 requires countries to ensure that EC 37.1 to 37.2 also apply to the obligations under SR V, please refer to the analysis of Recommendation 37 earlier in this section of the Report with reference to the analysis of the same Recommendation 37 under Recommendations 36, 38 and the analysis of Recommendation 39 under Section 6.4 of this Report.

***Application of R.38 Essential Criteria 38.1 to 38.5 – Essential Criterion SR.V.3***

2692. Since EC SR.V.3 requires countries to ensure that EC 38.1 to 38.5 also apply to the obligations under SR V, please refer to the analysis of Recommendation 38 earlier in this section of this Report.

***Application of R.39 Essential Criteria 39.1 to 39.4 – Essential Criterion SR.V.4***

2693. Since EC SR.V.4 requires countries to ensure that EC 39.1 to 39.4 also apply to the extradition proceedings related to terrorist acts and FT under SR V, please refer to the analysis of Recommendation 39 under Section 6.4 of this Report.

***Application of R.40 Essential Criteria 40.1 to 40.9 – Essential Criterion SR.V.5***

2694. Since EC SR.V.5 requires countries to ensure that EC 40.1 to 40.9 also apply to the obligations under SR V, please refer to the analysis of Recommendation 40 under Section 6.5 of this Report.

### 6.3.2. Recommendations and Comments

**Recommendation 36**

2695. Kosovo authorities should introduce clear service standards on turnaround times for foreign MLA requests.

2696. The MoJ should expedite the Administrative Instruction to implement the AML Law for the purpose of clarification of procedures and time limits in the provision of international legal assistance.

2697. Kosovo authorities should keep complete, detailed and precise statistics on MLA with reference to offences involved and turnaround times required as well as requests on seizure and confiscation of proceeds.

**Recommendation 38**

2698. Considering that foreign requests for confiscation can theoretically be dealt with in two alternative regimes (either as letters rogatory executed by the prosecutor or as foreign judgments to be recognised and enforced by the court) the Kosovo legislation should be amended so as to provide clear rules and standards to avoid legal uncertainty in such cases.

2699. Arrangements for coordinating seizure and confiscation action with other countries should be established. Consideration should also be given to establishment of an asset forfeiture fund as well as to sharing of confiscated assets with other countries when confiscation is a result of coordinated law enforcement action.

### 6.3.3. Rating for Recommendation 36, Recommendation 37, Recommendation 38 and Special Recommendation V

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.36** | **PC** | • there are no service standards on turnaround times of foreign requests which could impede effectiveness of the system;<br>• effectiveness and timeliness could not be demonstrated due to the absence of comprehensive and meaningful statistics on MLA requests relating to ML, predicate offences and TF; and<br>• lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced. |

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.37** | **C** | |
| **R.38** | **PC** | • Kosovo has not considered establishing an asset forfeiture fund in the sense of EC 38.4;<br>• there are no arrangements for coordinating seizure or confiscating actions with other countries;<br>• Kosovo has not considered authorising the sharing of confiscated assets with other countries when confiscation is a result of coordinated law enforcement action; and<br>• in the absence of relevant statistics, it is not possible to determine whether and to what extent Kosovo provides effective and timely response to foreign requests concerning freezing, seizure or confiscation. |
| **SR.V** | **LC** | • the definitional problems with the competing FT offences (e.g. the deficient and/or incomplete criminalisation of financing of an individual terrorist) might potentially limit MLA based on dual criminality. |

## 6.4. Extradition (R.39)

2700. The main principle of Recommendation 39 is that countries should recognise ML as an extraditable offence. Each country should extradite its own nationals and where a country does not do so there should be measures in place for that country to submit the case without undue delay to its own competent authorities for the purpose of prosecution of the offences set forth in the extradition request. Subject to their legal framework countries may consider ways of simplifying extradition.

### 6.4.1. Description and analysis

2701. The domestic legislation to provide for regulation and conditions of extradition from Kosovo is the above mentioned MLA Law, in which extradition rules are regulated in Chapter II where sub-chapter I provides for extradition from Kosovo to other countries. According to paragraph (1) of Article 6, a person sought by another state for the purpose of criminal proceedings or for the enforcement of a sentence may be extradited from Kosovo to that state under certain conditions stipulated by the MLA Law as detailed in the paragraph that follow.

2702. According to the MLA Law, extradition for the purpose of criminal proceedings shall only be permitted for criminal offences punishable under both the Kosovo law and the law of the requesting state by a prison sentence for a maximum period of at least one year or by a more severe punishment (paragraph (1) Article 10). If the request concerns extradition for the purpose of enforcement of a sentence, it may be granted if the duration of the sentence or the remaining part thereof, exceeds the period of 4 months of imprisonment (the same deadline being 6 months in the old MLA Law according to paragraph (2) of Article 8). Exceptionally, extradition may also be granted in cases where the conditions concerning the duration of penalty are not met: if the request for extradition covers several separate criminal offences out of which some fail to meet these conditions, extradition may nevertheless be permitted with respect to all offences (paragraph (3) of Article 10).

2703. The MLA Law provides for a number of reasons that render extradition inadmissible, including the extradition of own nationals, persons with political asylum and foreigners enjoying immunity (paragraph (2) of Article 6 - see below under EC 39.2, 39.3 and SR.V.4) as well as the lack of double criminality (see below under EC 37.2 and SR.V.2).

2704. The other grounds for refusal are the following:

- expiry of statutory limitation period (Article 11) where the expiration has to be examined according to both the national law and that of the other jurisdictions;
- *ne bis in idem* (Article 13) as far as final judgments passed by the judicial authorities of Kosovo or a third state are concerned:

  - Kosovo judgments: exemption for cases where the domestic authority decided not to commence or to terminate proceedings for the same offence (paragraph (2) of Article 13);
  - third state judgments: only if provided by an international agreement on mutual recognition and enforcement of criminal judgments between Kosovo and the third state (paragraph (2) Article 13);
- the offence, for which the extradition is claimed, had been committed in the territory of Kosovo or against a citizen of Kosovo outside of its territory (Article 8)
  - Kosovo territory: refusal is optional if the offence was only partially committed in the territory of Kosovo (paragraph (1) of Article 8);
  - Kosovo citizen out of Kosovo territory: in case the Kosovo authorities do not commence or terminate criminal proceedings for the same offence;
- political offences as discussed under Recommendation.36 in more detail (Article 14) and criminal offences under military law (Article 15);
- offences punishable by death penalty or lifelong imprisonment under the law of the requesting country (Article 16)
- in case the non-discrimination clause and human rights standards are not met (Article 17) including cases where:
  - the request was made for the purpose of prosecuting or punishing the person because of his/her race, religion, gender etc. (paragraph (1) of Article 17);
  - the person may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment (paragraph (2) of Article 17);
  - the person will not be provided with the minimum guarantees for a fair trial as provided for by the Constitution of Kosovo (paragraph (3) of Article 17);
  - enforcement of a sentence imposed by a judgment rendered *in absentia* unless the proceedings respected the recognised minimum rights of defence or the requesting country gives sufficient guarantee for the right to a retrial (paragraph (4) of Article 17) etc.;
- and Article 12 which does not allow for extradition in case there is no sufficient evidence to support a reasonable suspicion that the person has committed the criminal offence for which extradition is requested or if there is an enforceable judgment thereof.

***Money laundering should be an extraditable offence – Essential Criterion 39.1***

2705. EC 39.1 requires that ML should be an extraditable offence and consequently there should be laws and procedures in place to extradite individuals charged with a ML offence.

2706. Apart from political offences and those regulated by military law, extradition is generally applicable to any criminal offences in Kosovo, including all fiscal offences, provided the offence is punishable by a prison sentence for a maximum period of at least one year. The core ML offence in paragraph (2) of Article 32 of the AML/CFT Law is punishable by a term of imprisonment of up to 10 years and can under no circumstances be considered a political or a military offence therefore EC 39.1 is to be accepted as met.

***Essential Criterion 39.1 applicable to terrorist acts and FT – Essential Criterion V.4***

2707. As discussed under Recommendation 36 in more detail, whereas extradition is not permitted if the offence upon which the request is based is, or is connected to a political offence, the MLA Law stipulates a number of offences that shall not be deemed to be "political offences" in this context, including the offence of "terrorism" in Article 14 paragraph (2.2).

2708. While there is no such a criminal offence as "terrorism" in the legislation of Kosovo, one can find "Commission of the offence of terrorism" in Article 136 of the CC which is likely to be meant under paragraph (2.2) above. Furthermore, paragraph (1) of Article 135 of the CC provides for a considerably broad definition of "Terrorism, act of terrorism or terrorist offence" that extends to a range of other offences committed with a specific purpose. Although the current formulation of terrorism and the related offences suffers from inconsistency and redundancy in terminology and the coverage of Article 136 is incomplete and deficient at certain points, it is beyond doubt that EC 39.1 is generally applicable to terrorist acts. Notwithstanding, the shortcomings of the

criminalisation must be taken into account when examining dual criminality issues for EC 37.2 (see below).

2709. It is more doubtful whether the aforementioned exemption in Article 14 paragraph (2.2) also refers to FT offences, that is, whether or not the term "terrorism" extends to all terrorism-related offences including the "Facilitation of the commission of terrorism" in Article 138 of the CC and/or the recently introduced "Terrorist Financing Criminal Offence" in Article 36B of the AML/CFT Law. On the face of it, such a broad interpretation cannot be inferred from the text of the law and therefore the practitioners seem to be left without any statutory or other guidance in this matter. FT is typically an offence with political character and motivation, for which reason more attention should have been paid to the sufficiently broad formulation of this provision.

***Extradition of own nationals – Essential Criterion 39.2 and Essential Criterion 39.3***

2710. According to EC 39.2 countries should either extradite their own nationals or, where this is not possible on the grounds of nationality, and at the request of the country seeking extradition, countries should submit the case immediately to its competent authorities for the purpose of prosecuting the offences set forth in the extradition request. In the latter case, EC 39.3 requires countries to cooperate with each other, particularly on procedural and evidentiary aspects, to ensure the efficiency of the prosecution.

2711. As a general rule, the Constitution of Kosovo precludes the extradition of nationals, prescribing that "citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements" (paragraph (4) of Article 35). Accordingly, paragraph (2.1) of Article 6 of the MLA Law provides that Kosovo citizens cannot be extradited against their will, unless otherwise provided by an international agreement between Kosovo and the requesting state or by international law.

2712. The extradition of own nationals is thus only possible on the following conditions:

- the person gives consent to his/her extradition (it has already happened in concrete cases); or
- the extradition is rendered admissible by international law; or
- by an international agreement between Kosovo and the requesting state (which may be concluded specifically for the purpose of extraditing an individual, pursuant to paragraph (2.1) of Article 6).

2713. Persons who have been granted political asylum in Kosovo as well as foreigners who enjoy immunity of jurisdiction (within the limits of international obligations assumed by Kosovo) are generally exempt from extradition even in circumstances under which own nationals may be extradited, as the conditions listed above only apply to Kosovo citizens. (As a result, refugees seem to have more rights in this respect than Kosovo citizens have.)

2714. EC 39.2(b) requires that a country that does not extradite its own nationals solely on the grounds of nationality should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offences set forth in the request. In line with this requirement, Article 31 of the MLA Law provides as follows:

> "If the extradition has been refused, the competent Prosecution Office may initiate criminal proceedings against the person in the Republic of Kosovo."

2715. Although it is not explicit in the law, it seems obvious that these criminal proceedings shall be initiated for the same criminal offences for which extradition had been requested (as it was still precisely stipulated in the predecessor legislation - Article 28 of the old MLA Law).

2716. Article 28 of the old MLA Law still required that the requesting state submitted a petition for the initiation of the criminal proceedings in Kosovo. This requirement is abandoned in the new MLA Law as a result of which Kosovo judicial authorities may launch a domestic prosecution even without the request of the country seeking extradition and thereby Kosovo legislation goes beyond the requirements of EC 39.2.

2717. EC 39.3 on the procedural and evidentiary aspects of taking over criminal proceedings appears to be adequately met by paragraph (1) of Article 48 of the MLA Law that recognises each investigative action previously undertaken by a foreign judicial authority pursuant to its respective law as equal to a corresponding investigative action pursuant to the law of Kosovo: "*Any act*

*pertaining to the transferred proceedings taken in the requesting state in accordance with its law and regulations shall have the same validity in the Republic of Kosovo as if it had been taken by national authorities, provided that the act is in compliance with national law*." It is also stipulated that any act which interrupts the statute of limitations period and which has been carried out in a valid manner in the requesting state shall have the same effects in Kosovo (paragraph (2) of Article 48).

***For extradition where dual criminality is required there should be no legal or practical impediments to render assistance – Essential Criterion 37.2***

2718. Extradition may only take place if, as a general rule, the act constituting the offence meets dual criminality requirements, as it is stipulated by Article 9 of the MLA Law:

> "Extradition shall be permitted only for criminal offences punishable by both the national law and by the law of the requesting state."

2719. Apart from this, the MLA Law appears silent whether and to what extent the interpretation of double criminality is flexible to overcome technical or legal impediments to rendering assistance if the conduct is criminalised by both countries but there are differences between the laws and particularly in the categorisation or denomination of the respective offence (EC 37.2). As noted above under Recommendation.38, the representatives of the MoJ expressed that the national judicial authorities would interpret the dual criminality principle widely enough so that such differences cannot pose an impediment to extradition. Unfortunately, no concrete extradition cases were reported to support this statement and the statistics available to the assessment team are not detailed enough to decide whether the lack of dual criminality has ever caused the refusal of a foreign request for extradition.

***Essential Criterion 37.2 applicable to obligations under SR.V – Essential Criterion SR.V.2***

2720. As noted above, no exception is foreseen in the MLA Law or elsewhere in the law of Kosovo for FT and terrorism related offences and therefore the rules described above would likewise apply to requests related to such offences. Considering that dual criminality applies to extradition cases, however, the problems explained in respect of the current domestic FT offences (e.g. the deficient and/or incomplete criminalisation of financing of an individual terrorist) might potentially limit the extradition capacities of Kosovo.

***Measures or procedures to expedite extradition requests relating to money laundering – Essential Criterion 39.4***

2721. According to EC 39.4, consistent with the principles of domestic law, countries should adopt measures or procedures that will allow extradition requests and proceeding relating to ML to be handled without undue delay.

2722. To avoid undue delays and in line with EC 39.4, time limits are envisaged at each stage of the procedure. Relevant provisions can be found in the following Articles of the MLA Law:

- after receiving the request for extradition from the MoJ, the competent basic prosecutor's office is required, first, to take immediate action to identify and locate the person and, once the person is identified and located, to submit the request to the competent basic court without delay but no later than in 3 days (paragraphs (2) and (3) of Article 20);
- the aforementioned basic court then examines the request and immediately decides upon circumstances by which the person, if detained, must be released (paragraph (2) of Article 21);
- deadlines for provisional arrest pending receipt of a formal request for extradition are specified in Article 22;
- deadlines for the judicial procedure on extradition (for holding and adjourning the hearing and for requesting additional information) are stipulated in Article 23 while the deadline for appeal in Article 26.

2723. While the deadlines and, in general terms, the precisely formulated procedural rules undoubtedly contribute to the timeliness of the decision making upon foreign extradition requests, it is worth to note that extradition is only permitted by Article 12, as mentioned above, when there

is sufficient evidence to support the reasonable suspicion. The language of this provision implies that the competent national judicial authority shall, at least to some extent, weigh the available evidence before deciding on the admissibility of the extradition as the law requires a decision on whether or not the evidence, supposedly provided by the requesting state, is sufficient. While the law does not require that foreign requests for extradition be supported by any pieces of evidence, this requirement remains somewhat unclear, considering that the law does not specify what sort of evidence may be necessary and exactly what procedure for deliberation would be carried out in the timeframe available.

2724. The only area where the assessment team could actually see a legal and practical impediment to handle extradition requests and proceedings without undue delay is the regime of appeals. The person sought for extradition has the right to appeal against the court decision on the permissibility of the extradition within 3 days from the service of the decision (Article 26). The first instance decision of the competent basic court can thus be appealed to the Court of Appeal which decides thereupon without any deadline specified (Article 28). Once the court decision on extradition becomes final, the basic court submits it to the MoJ (Article 29) who may either grant or refuse the extradition, again without any specific deadline (Article 30).

2725. Despite the lack of more specific deadlines, these rules are not uncommon as similar extradition regimes can be found in a number of other countries. What is unique, however, is paragraph (6) of Article 30 of the MLA Law which provides that even if the decision of the Minister is to be considered final, there can be another, exceptional way of appeal as follows: "*The decision of the Minister is final and an administrative conflict may be initiated against it.*" In other words, while there is a judicial appeal against the decision of the first instance court, the administrative decision of the Minister can also be challenged by an administrative sort of appeal.

2726. Law No. 03/L-202 (2010) on Administrative Conflicts provides that natural and legal persons have the right to start an administrative conflict if they consider that by the final administrative act issued in an administrative procedure their rights or legal interests had been violated (Article 10) in which context the Minister's decision on granting someone's extradition is to be considered a final administrative act. The procedure is initiated by an indictment submitted to the competent court for administrative matters within 30 days from the day of delivering the final administrative act. The decision of this court can be appealed to the competent court for administrative matters of second instance while the decision of the latter is already final, although the party has the right to submit a request for extraordinary review of the legal decision to the Supreme Court of Kosovo in case the violation of the respective substantive or procedural legislation might have influence on the issue. (Articles 23 to 25).

***Criterion 39.2 to 39.4 applicable to terrorist acts and FT – Essental Criterion V.4***

2727. Essential Criteria 39.2, 39.3 as well as 39.4 are equally applicable to extradition proceedings related to terrorist acts and FT.

***Simplified procedures of extradition - Additional Element 39.5***

2728. AE 39.5 seeks to establish whether simplified procedures of extradition are in place. Such procedures include direct transmission of extradition requests between appropriate ministries; extradition based only on warrants of arrests or judgements; extradition of consenting persons who waive formal extradition proceedings.

2729. In compliance with the AE 39.5, the MLA Law provides for a simplified procedure of extradition of consenting persons who waive formal extradition proceedings. Pursuant to Article 24 the person can be extradited even without requiring the submission of a formal extradition request and its supporting attachments (including any pieces of evidence) from the other country instead of which a limited range of the most substantial pieces of information is sufficient as defined by paragraph (5) of the said Article 24. The precondition of a simplified extradition procedure is that the person sought for extradition consents to it and that the requesting state accepts extradition through this procedure.

***Effectiveness***

2730. The Kosovo authorities provided the following data concerning statistics on foreign extradition requests:

***Table 35: Extradition***

| Year | Number of extradition Requests | Characteristics of the respective cases (country, criminal offence) |
|---|---|---|
| 2013 | 2 | France / organised crime<br>Montenegro / aggravated theft |
| 2014 | 4 | No data on countries / aggravated murder; aggravated theft; criminal offences against economy (no further specification) |

** until June 2014*

2731. The relatively low number of foreign extradition requests received by Kosovo authorities for execution does not allow for drawing thorough conclusions. In the period subject to assessment, 6 persons were extradited from Kosovo to various countries. Neither of these cases had been related to ML or FT offences.

2732. To date, the assessment team has not been informed of any case where a Kosovo citizen was either extradited to a foreign country (under the exceptional conditions mentioned above) or prosecuted domestically upon refusal of the extradition, pursuant to Article 31 of the AML Law. Generally speaking, the MoJ confirmed that no foreign extradition requests have ever been refused by Kosovo.

2733. The basic statistical figures in the table above were only provided in relation to foreign extradition requests that had already been executed successfully. The assessment team, however, could not obtain accurate and reliable information on either the turnaround times required for the execution of these requests or the number and character of pending extradition cases. Notwithstanding, as it was noted above under Recommendation 36 the MoJ reported that they had received 57 extradition requests from 01 January 2010 to 25 December 2013 which figure is significantly higher than the number of requests reported to be successfully executed in 2013-2014 (that is 6 cases) which raises some concerns that there might be numerous extradition cases pending in Kosovo.

2734. Lack of information on pending cases and turnaround times reinforces the concerns of the assessment team about the potential impacts coming from introducing the possibility of an administrative conflict (as an extraordinary appeal) against the final decision of the Minister. As it was described above, this is a complicated and cumbersome procedure that is likely to prolong the actual time frame of the extradition procedure to extreme length. Nonetheless, Kosovo authorities could not provide statistical or any other sort of meaningful information on how many of the final decisions, by which extradition had been granted by the Minister was challenged by an administrative conflict, how many of these cases had already been finished or were still pending and, for the cases where the administrative conflict had already been sorted out, what was the outcome of such cases and how long it took to reach a final and valid decision in those cases.

2735. During the Cycle 2 on-site visit, this extraordinary appeal procedure was mentioned as an outstanding problem in extradition cases that had already caused a lot of difficulties. The vast majority of the persons subject to extradition allegedly use this opportunity to play for time and to be eventually released from detention during the proceedings. With one exception (a Kosovo citizen who voluntarily agreed to his extradition to Sweden) all the persons whose extradition had been granted by the Minister choose to submit an indictment upon an administrative conflict.

2736. While it is not expressly stipulated by law that the initiation of an administrative conflict has any impact on the execution of the Minister's decision, it is so understood by the Kosovo authorities and therefore neither of the appellants could be extradited during the maximum period of detention (Article 32 of the MLA Law provides that the Minister shall immediately notify the requesting state of the decision, from which date the person must be taken over within 30+15 days or else he/she has to be released). As a result, the extradition regime has practically been paralysed by the introduction of this exceptional forum of appeal against the ministerial decision which impedes the effective implementation of the MLA Law (in which context the imbalance between the 57 extradition requests in 2010-2013 and the 6 extraditions actually executed in 2013-2014 should also be reiterated).

### 6.4.2. Recommendations and Comments

**Recommendation 39**

2737. Kosovo authorities should urgently find a legislative solution for the paralysis of the extradition regime that had reportedly been caused by the introduction of the administrative conflict procedure against the final ministerial decision in extradition cases. Without prejudice to the legitimate right to appeal, the lawmakers should exclude the possibilities where appeal rights can be abused of.

2738. Complete, detailed and precise statistics on extradition cases should be kept by Kosovo authorities with reference to the nature of the final decision, the offences involved and turnaround times including, if applicable, the time required by the administrative conflict procedure.

### 6.4.3. Rating for Recommendation 39[229]

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.39** | **PC** | • the introduction of administrative conflict procedure against the final decision of the Minister of Justice causes lengthy and cumbersome procedures and ineffective functioning of the extradition regime; and<br>• apart from that, in the absence of proper statistics it is not possible to determine whether extradition requests are handled without undue delay. |

## 6.5. Other forms of International Co-operation (R.40).

### 6.5.1. Description and analysis

2739. In accordance with the provisions of Recommendation 40 countries should ensure that their competent authorities provide the widest possible range of international cooperation to their foreign counterparts. To this effect there should be clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both ML and the underlying predicate offence. Exchange should be permitted without unduly restrictive conditions. Moreover procedures should be in place to obtain information requested when this is not within the mandate of the requested counterparty. Finally information exchanged between counterparts is to be used only in an authorised manner consistent with their obligations concerning privacy and data protection.

***Widest range of international cooperation – Essential Criterion 40.1 including EC 40.1.1***

2740. EC 40.1 requires countries to ensure that their competent authorities are able to provide the widest range of international cooperation to their foreign counterparts.

2741. In accordance with Article 36 of the AML/CFT Law Kosovo authorities must afford the widest possible measure of cooperation to the authorities of foreign jurisdictions for purposes of information exchange, investigations and court proceedings, in relation to temporary measures for securing property and orders for confiscation relating to instrumentalities of ML and proceeds of crime, and for purposes of prosecution of the perpetrators of ML and terrorist activity.

2742. While EC 40.1.1 requires that such assistance should be provided in a rapid, constructive and effective manner the AML/CFT Law is silent and Article 36 only provides that the *procedures for affording cooperation under paragraph 1 of this Article are set forth in this Chapter and in such other relevant provisions of the applicable law as do not conflict with it*. To this effect a recent

229. For rating of Recommendation 37 and Special Recommendation V, please refer to Section 6.3.3 of this Report.

addition to Article 36 states that a request under Article 36 shall be sent through diplomatic channels pursuant to laws and agreements in force, who shall forward it to the Office of International Legal Cooperation or other competent authority. The assessment team is not able to judge compliance with this criterion as it has not been provided with request turnaround times.

***Prompt and constructive exchange of information – Essential Criterion 40.2***

2743. EC 40.2 requires clear and effective gateways, mechanisms or channels that will facilitate and allow for prompt and constructive exchanges of information directly between counterparts.

2744. Non-MLA international cooperation in the AML/CFT area is carried out by the FIU and KP.[230] Statistics provided by the FIU as shown in the tables below (see section on Statistics and Effectiveness below) indicate that this is happening through the FIU. Unfortunately no such statistics have been provided by the KP and hence the assessment team cannot ascertain that this is also happening through the KP.

2745. However the assessment team has not been provided with information on the request turnaround time applied by the FIU in entertaining such requests and hence the assessment team cannot ascertain the effectiveness of the system.

2746. Notwithstanding that the FIU can legally share information spontaneously or upon request, the FIU has entered into various MoUs with neighbouring countries for establishing procedures for the sharing of information.

2747. Moreover, the CBK has informed that it has entered into a number of MoUs with its foreign counterparts. However it appears that these MoUs are more of a prudential nature with the exchange of information having to be linked to supervisory matter. Notwithstanding, and within this context, it cannot be excluded that the CBK can exchange AML/CFT related information if this is linked to the supervisory process.

***Exchange of information – Essential Criterion 40.3***

2748. EC 40.3 requires that the exchange of information should be possible both spontaneously and upon request and in relation to both ML and the underlying predicate offence.

2749. Paragraph (1.7) of Article 14 of the AML/CFT Law allows the FIU to spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and which are subject to similar obligations in terms of preservation of confidentiality, regardless of the nature of agency, subject to reciprocity. The information provided shall only be used upon approval by the FIU and solely for purposes of combating ML, and related criminal offences and TF.

2750. Moreover, the new paragraph (1a) to Article 15 of the AML/CFT Law empowers the FIU to exchange, domestically as well as internationally, all information accessible or obtainable directly or indirectly by it.

***Conducting of enquiries on behalf of foreign counterparts – Essential Criterion 40.4***

2751. According to EC 40.4 competent authorities should be authorised to conduct enquires on behalf of foreign counterparts. Moreover, according to EC 40.4.1 the FIU should in particular be authorised to search its own databases including information related to STRs and to search other databases to which the FIU has direct or indirect access.

2752. The FIU is able to make enquiries on behalf of foreign counterparts of publically available information and its own databases (STR related information). The FIU is entitled to request and receive from public or governmental bodies, or international bodies or organisations or intergovernmental organisations (in Kosovo), data, information, documents related to a person, entity, property or transaction, and may spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and that is subject to similar obligations for protection of confidentiality, regardless of the nature of the agency which is subject

230. See analysis of international cooperation carried out by KC in Section 2.8 of this Report.

to reciprocity.[231] At the same time, the AML/CFT Law does not allow the FIU to make enquiries to financial institutions for information, based on a request from a foreign FIU (see also analysis in section 2.6).

2753. As the FIU is not a member of the Egmont Group it does not have access to the Egmont Secure Web. The FIU is able to use the secure messaging facilities within the goAML system. It has made such a direct link for information exchange with FIU Albania and where possible will seek to do the same with other FIU's. The FIU has also applied to join the EU's FIU.NET system but this has not yet materialised.

***Conducting investigations on behalf of foreign counterparts – Essential Criterion 40.5***

2754. EC 40.5 requires that countries ensure that law enforcement authorities, and where permitted by domestic law, other competent authorities are authorised to conduct investigations on behalf of their foreign counterparts.

2755. Since 2011 the KP have created an International Law Enforcement Co-operation Unit (ILECU) within the framework of a regional project aimed at facilitating international information exchange between law enforcement authorities. There are ILECU's in Albania, "the former Yugoslav Republic of Macedonia", Serbia, Bosnia and Herzegovina (BiH), Croatia and Slovenia. With the exception of BiH and Serbia information with these countries is exchanged directly. For Serbia/BiH and other countries, information exchange is channelled through Interpol within UNMIK/EULEX. KC are also represented within ILECU.

***Disproportionate or unduly restrictive conditions– Essential Criterion 40.6***

2756. EC 40.6 requires that the exchange of information is not to be made subject to disproportionate or unduly restrictive conditions.

2757. In empowering the FIU to exchange information spontaneously or upon request the AML/CFT Law does not impose disproportionate or unduly restrictive conditions.

2758. In accordance with the general international practice in the exchange of such information, paragraph (1.7) of Article 14 requires that the exchange of information is subject to reciprocity and that the information provided shall be used only with the consent of the FIU and only for the purposes of combating ML, predicate offences and FT. Such conditions are not to be criticised as their objective is the protection and use of information exchanged.

***Involvement of fiscal matters – Essential Criterion 40.7***

2759. EC 40.1 requires that requests for cooperation should not be refused on the sole ground that the request is considered to involve fiscal matters.

2760. The assessment team is informed that requests for assistance will not be refused on the sole ground that the request is also considered to involve fiscal matters. If the request is directed at the FIU then under the AML/CFT Law the reply will only cover matters in the mandate of the FIU, i.e. on ML and TF matters. Requests received through ILECU/Interpol that concern fiscal matters will be referred to the competent authority, in this case most likely to be TAK.

2761. It should be mentioned that in terms of the CC tax evasion is a criminal offence and hence fiscal matters become a predicate offence for the purposes of the AML/CFT Law – refer to the analysis of FATF Recommendation 13 under Section 3 of this Report.

***Refusal on grounds of confidentiality laws – Essential Criterion 40.8***

2762. EC 40.8 requires that requests for cooperation should not be refused on the grounds of laws that impose secrecy or confidentiality requirements on financial institutions and DNFBPs except where legal professional privilege or legal professional secrecy applies.

231. Essential Criterion Recommendation 40.4.1.

2763. In the case of requests referred to the FIU, paragraph (1) of Article 37 of the AML law states that professional secrecy cannot be used as a ground for rejecting a request for information that should be provided by law or has been collected in compliance with the AML/CFT Law law. There are exceptions which relate to the legal professional privilege in the provision of legal advice and in relation to the provision of information for supervisory purposes.

2764. Moreover, according to paragraph 1(a) of Article 15 of the AML/CFT Law, the FIU is able to exchange, domestically as well as internationally, all information accessible or obtainable directly or indirectly by it.

***Use of information exchanged – Essential Criterion 40.9***

2765. According to EC 40.9 countries should establish controls and safeguards to ensure that information received by competent authorities is used only in an authorised manner, consistent with national provisions on privacy and data protection.

2766. KP and KC must comply with the requirements of the Kosovo Data Protection Agency. Requests for information to be released must comply with the minimum standards of data protection. The requesting party must show the reasons for the request, the suspected criminality and an outline of the circumstances, the use to which the information requested may be put and how it will be held if released to the requesting party.

2767. Information received from other jurisdictions in response to a request, or that has been furnished in support of a request of the Kosovo authorities, is subject to the provisions of the Kosovo Data Protection Law 03/L-172 and it must be held securely in compliance with Articles 3 and 14.

***Prompt and constructive exchange of information – Additional Element 40.10***

2768. AE 40.10 seeks to identify whether mechanisms are in place to permit a prompt and constructive direct or indirect exchange of information with non-counterparts. AE 40.10.1 further enquires whether the requesting authority discloses to the requested authority the purpose of the request and on whose behalf the request is made.

2769. Exchange of information with non-counterparts will go via indirect channels. Either ILECU or Interpol will channel the request but in the case of Interpol there must also be a request through diplomatic channels within 18 days – thus an indirect routing. In either case the positioning of ILECU or Interpol means there is an intermediary in the process.

2770. On exchange, it is a requirement that the requesting authority disclose the purpose of the request, what the information will be used for and other information to enable the party processing the request sufficient information to verify that the request is in compliance with the law.

***Obtaining relevant information requested by a foreign counterpart – Additional Element 40.11***

2771. AE 40.11 enquires whether the FIU can obtain from other competent authorities or other persons relevant information requested by a foreign counterpart FIU.

2772. Paragraphs (1.2) and (1.3) of Article 14 of the AML/CFT Law respectively provide for the powers of the FIU for the collection of information that is relevant to ML activities or the financing of terrorist activities and that is publicly available (including through commercially available databases); and for the purposes of analysing suspected ML or financing of terrorist activities, by requesting and receiving records, documents and information from public or governmental bodies or any international or intergovernmental body or organisation (in Kosovo) concerning a person, entity, property or transaction.

2773. As explained earlier the FIU has the authority, either spontaneously or upon request, to share this information with its counterparts both domestically and internationally in accordance with paragraph (1.7) of Article 14 and paragraph (1a) of Article 15.

2774. There are no provisions in the AML/CFT Law however for the FIU to collect information from banks and financial institutions or DNFBPs that is requested by foreign counterparts – see also CETS 198 paragraph (5) of Article 46 below.

2775. In the course of the on-site visit the assessment team was told that the FIU collects such information under its powers through paragraph (2) of Article 22 of the AML/CFT Law. The assessment team does not concur with this interpretation of paragraph (2) of Article 22 which only provides for the collection of additional information on the basis of an STR that has already been submitted to it – see also Recommendations and Comments under the analysis of Recommendation 26 in this Report.

***Criteria 40.1 to 40.9 applicable to obligations under SR.V – Essential Criterion SR.V.5***

2776. As noted, no exception is foreseen in the MLA Law or elsewhere in the law of Kosovo for FT and terrorism related offences and therefore the rules described above would likewise apply under circumstances under SR V.

**CETS 198 – Council of Europe Convention**

2777. The paragraphs that follow will assess Kosovo compliance with specific relevant provisions of the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – CETS 198 – notwithstanding that Kosovo is not a signatory to the Convention.

2778. Article 46 of the Convention deals with the cooperation between FIUs and, to this effect, it establishes procedures to be followed by FIUs in order to provide the widest co-operation possible.

***FIU co-operation with all types of FIUs - CETS 198 Article 46.3***

2779. Paragraph (3) of Article 46 of CETS 198 calls upon each Party to the Convention to ensure that the performance of the functions of their respective FIUs under Article 46 are not affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.

2780. Article 14 of the AML/CFT Law allows the FIU to co-operate with counterpart agencies performing a similar function in another country regardless of the nature of the agency (FIU).

***Grounds for a request by FIU - CETS 198 Article 46.4***

2781. In accordance with paragraph (4) of Article 46 of the Convention, requests made under Article 46 are to be accompanied by a brief statement of the relevant facts known to the requesting FIU who shall specify in the request how the information sought will be used.

2782. The FIU prepares its requests for information addressed to foreign FIUs describing facts and grounds in a short statement for the making of such a request. This will include a statement on how the information will be used (Art 46.4). Any extension of use will be referred back to the originator for permission.

***Provision of information by FIU - CETS 198 Article 46.5***

2783. Paragraph (5) of Article 46 of CETS 198 requires that upon a request made in accordance with Article 46, the FIU shall provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.

2784. The FIU is able to share information in connection with its mandate. Articles 14 and 15 of the AML/CFT Law enable the FIU to request specific information from LEAs and Government Departments and share this information with counterparts performing the same functions. This information is only released for information purposes and cannot be used as evidence without the specific written approval of the Director of the FIU. The FIU cannot request obliged entities for

information based on a request of a foreign FIU (see also Section 2.6: *Recommendations and Comments* of this Report and analysis of AE 40.11 above).

***Refusal to divulge information - CETS 198 Article 46.6***

2785. Paragraph (6) of Article 46 of the Convention establishes the criteria under which the requested FIU may refuse to provide information requested by the requesting FIU. It requires that any such refusal shall be appropriately explained to the FIU requesting the information.

2786. There have been cases when the FIU has rejected a request but only for technical reasons i.e. that the request did not contain sufficient information to substantiate a suspicion of organised crime, ML or TF. There are no statistics for these instances.

***Restriction on use of information by third parties - CETS 198 Article 46.7***

2787. In terms of paragraph (7) of Article 46 of CETS 198 information or documents obtained under Article 46 shall only be used for the purposes of combating ML and investigating within the FIU. Thus information supplied by a counterpart FIU shall not be disseminated to a third party, nor be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU.

2788. Article 15 of AML/CFT Law restricts the use of information supplied by the FIU to foreign counterparts to that of 'information only'. No extension of use is allowed without the written permission of the FIU Director.

***Imposition of restrictions and conditions on use of information. - CETS 198 Article 46.8***

2789. Paragraph (8) of Article 46 of the Convention empowers the transmitting FIU when transmitting information or documents to impose restrictions and conditions on the use of information for purposes other than those stipulated in Article 46 and the receiving FIU shall comply accordingly.

2790. The FIU informed that it includes a restrictive clause when supplying information to foreign counterparts. It is foreseen that the party which is requesting the information should maintain the confidentiality of a document and use it for the purposes of intelligence only.

***Refusal to allow information to be used in investigations as evidence - CETS 198 Article 46.9***

2791. According to paragraph (9) of Article 46 of CETS 198 the transmitting FIU may not refuse its consent to the request of the other Party for the use of transmitted information or documents for criminal investigations or prosecutions unless it does so on the basis of restrictions under its national law or conditions referred to in Article 46. Any refusal to grant consent shall be appropriately explained.

2792. Although Article 15 of the AML/CFT Law allows the Director FIU to authorise the use of information transmitted for information purposes as evidence, this should only be in exceptional circumstances when all other possibilities to obtain the material in an evidential format have been exhausted. MLA requests should be used as the prime route to secure evidence required for investigation and prosecution.

***Transmitted information not accessible by other agencies - CETS 198 Aricle.46.10 & 46.11***

2793. Paragraph (10) of Article 46 of CETS 198 obliges FIUs to undertake all necessary measures, including security measures, to ensure that information submitted under Article 46 is not accessible by any other authorities, agencies or departments. To this effect, paragraph (11) requires that the information submitted shall be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.

2794. Kosovo is not a member of the Egmont Group so it does not have access to the Egmont Secure Web. The FIU has applied for membership of the EU intra-FIU communication system

FIU.net but this has not yet materialised. The FIU uses the UN supplied goAML system which has inbuilt secure messaging service and the FIU would like to use this with as many FIUs as possible. The FIU informed that information so received is not made available to other agencies.

***Feedback - CETS 198 Article 46.12***

2795. In terms of paragraph (12) of Article 46 of the Convention the transmitting FIU may make reasonable enquiries as to the use made of information provided and the receiving FIU shall, whenever practicable, provide such feedback.

2796. The FIU may, depending on the case, make comments and recommendations to receiving counterparties for the purposes of increasing the effectiveness of analysis related to prevention and combating of ML. Where the FIU has a MoU in place with foreign counterparts there is a clause that requests feedback over the use of information exchanged.

***Postponement of suspicious transactions - CETS 198 Article 47***

2797. Article 47 requires that each Party to the Convention adopts legislative or other measures to permit urgent action to be initiated by an FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transactions.

2798. While paragraph (6) of Article 22 of the AML/CFT Law empowers the FIU to suspend a domestic suspicious act or transaction for a maximum of forty eight (48) hours, or two (2) working days, whichever period is longer, there are no provision for the FIU to take such action upon the request of a foreign FIU. The assessment team is informed that this situation has been brought to the attention of the legislators and a remedy should be included in future amendments to the AML/CFT Law or any other relevant legislation.

***Statistics and effectiveness***

2799. The Kosovo FIU has provided the following statistics for international information exchange:

***Table 36: Requests received from foreign FIUs***

| Year<br>Referrals | 2011 | 2012 | 2013 |
|---|---|---|---|
| FIU Croatia | 0 | 1 | 0 |
| FIU Netherlands | 0 | 1 | 0 |
| FIU "the former Yugoslav Republic of Macedonia" | 3 | 4 | 2 |
| FIU Montenegro | 4 | 4 | 5 |
| FIU Albania | 2 | 0 | 0 |
| FIU Germany | 1 | 0 | 0 |
| **Total** | **10** | **10** | **7** |

***Table 37: Processed requests from foreign FIUs***

| Year<br>Referrals | 2011 | 2012 | 2013 |
|---|---|---|---|
| FIU Croatia | 0 | 1 | 0 |
| FIU Netherlands | 0 | 1 | 0 |
| FIU "the former Yugoslav Republic of Macedonia" | 3 | 4 | 2 |
| FIU Montenegro | 4 | 4 | 5 |
| FIU Albania | 2 | 0 | 0 |
| FIU Germany | 1 | 0 | 0 |
| **Total** | **10** | **10** | **7** |

***Table 38: Answers request to foreign FIUs***

| Year<br>Referrals | 2011 | 2012 | 2013 |
|---|---|---|---|
| FIU Croatia | 0 | 1 | 0 |
| FIU Netherlands | 0 | 1 | 0 |
| FIU "the former Yugoslav Republic of Macedonia" | 6 | 5 | 1 |
| FIU Montenegro | 2 | 6 | 5 |
| FIU Albania | 2 | 0 | 0 |
| FIU Bosnia and Herzegovina | 1 | 0 | 0 |
| FIU Germany | 1 | 0 | 0 |
| **Total** | **12** | **13** | **6** |

2800. The assessment team was informed that the Kosovo FIU initiated 5 spontaneous disseminations to foreign FIUs (Albania and "the former Yugoslav Republic of Macedonia" (3 times) and Netherlands).

2801. Kosovo authorities have provided some statistics with regard to international information exchange in 2014 by the KP, either through ILECU or otherwise. However, the data provided are not detailed enough to allow the assessment team to judge about the effectiveness.

### 6.5.2. Recommendations and Comments

2802. ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where ML or TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness.

2803. The AML law should include the ability for the FIU or the prosecutor to seek a bank account monitoring order (CETS 198 paragraph (1) of Article 19).

2804. Kosovo should clarify whether or not it refuses international co-operation on the grounds that it relates to a political offence (CETS 198 paragraph (1.e) of Article 28).

2805. FIU should have the power to demand information from reporting subjects (financial sector and DNFBPs) based upon a request of a foreign FIU (AE 40.11 and CETS 198 paragraph (5) of Article 46).

2806. FIU should have powers to suspend or postpone transactions on the request of a foreign FIU (CETS 198 Article 47).

### 6.5.3. Rating for Recommendation 40[232]

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.40** | **LC** | • effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF;<br>• there are no service standards on turnaround times of foreign requests which could impede effectiveness of the system;<br>• FIU lacks power to request obliged entities for information based on a request of a foreign FIU; and<br>• FIU does not have power to suspend or postpone a transaction at the request of a foreign FIU. |

232. For rating of Special Recommendation V, please refer to Section 6.3.3 of this Report.

# 7. OTHER ISSUES

## 7.1. Resources and statistics (R.30 and R.32)

2807. The text of the description, analysis and recommendations for improvement that relate to Recommendations 30 and 32 is contained in all the relevant sections of the Report i.e. parts of Section 2, all of Sections 3 and 4, and parts of Sections 5 and 6. In particular reference should be made to the analysis for Recommendations 23, 26 and 27 and Special Recommendation IX. There is a single rating for each of these Recommendations, even though the Recommendations are addressed in several sections. Section 7.1 of the Report primarily contains the boxes showing the rating and the factors underlying the rating.

| | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.30** | **NC** | • increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness;<br>• there is insufficient awareness/capacity in the KP regarding the need to proactively pursue criminal proceeds when dealing with acquisitive crime;<br>• human resources for both the CBK and the FIU for AML/CFT supervisory purposes are inadequate thus impacting effectiveness;<br>• inadequate budget for the FIU which, according to the FIU Performance and Resource Plan 2014 – 2016 is not at a satisfactory level and creates difficulties for the FIU to execute its mandate; and<br>• lack of relevant training programmes for supervisory staff impacts effectiveness. |
| **R.32** | **NC** | • need to strengthen obligation for all competent authorities, reporting subjects and other persons and entities to maintain statistical data through a legal provision;<br>• meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime;<br>• the lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis;<br>• the lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy;<br>• need for supervisory authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged;<br>• effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; and<br>• effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF. |

# TABLES

**Table 1: Ratings of compliance with FATF Recommendations**

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC)), or could, in exceptional cases, be marked as not applicable (N/A). These ratings are based only on the essential criteria, and defined as follows:

| | | |
|---|---|---|
| Compliant (C) | ➢ | The Recommendation is fully observed with respect to all essential criteria. |
| Largely Compliant (LC) | ➢ | There are only minor shortcomings, with a large majority of the essential criteria being fully met. |
| Partially Compliant (PC) | ➢ | The jurisdiction has taken some substantive action and complies with some of the essential criteria. |
| Non-compliant (NC) | ➢ | There are major shortcomings, with a large majority of the essential criteria not being met. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| ***Legal Systems*** | | |
| **R.1**<br>ML Offence | **PC** | • the offence of market manipulation is not covered among predicate offences to ML;<br>• inadequate regulation of the required level of proof for the predicate crime in paragraph (4.1) of Article 32 causing uncertainty to and unfamiliarity with the respective provisions among practitioners;<br>• unclear and inadequate formulation of the provision that defines the coverage of self-laundering (paragraph (4.2) of Article 32);<br>• harmonisation required between AML/CFT Law and CC in terms of concept and terminology as regards ancillary offences; and<br>• effectiveness issues:<br>– tax evasion is practically excluded from the range of potential predicate offences to ML;<br>– self-laundering is considered not to be prosecutable together with the predicate offence; and<br>– effective application of the ML offence could not be assessed due to the incomplete statistics for the years prior to 2013 and the lack of detailed additional information regarding pending cases. |
| **R.2**<br>Liability for ML offence | **PC** | • serious uncertainty in legislation as regards the basics of corporate criminal liability (whether or not it depends on the culpability of the natural person);<br>• ineffectively mild sanctioning provisions of legal entities for criminal offences (low range of punishment); and<br>• harmonisation required between AML/CFT Law and CC or LLP Law in terms of concept and terminology as regards:<br>– the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC); and |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | – the basics of corporate criminal responsibility and that of the related natural persons (Article 34 AML/CFT Law vs Article 40 CC / Article 5 LLP Law). |
| **R.3**<br>Seizure and confiscation | **NC** | • no procedure or standard of proof indicated in CPC to allow for the confiscation of instrumentalities intended for the use in a criminal offence;<br>• while the provisions of third party confiscation included in the CC meet international standards, the supporting Articles of the CPC conflict with these provisions;<br>• the standard of proof for a *bona fide* third party is unjustifiably high, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property;<br>• there is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation;<br>• the effectiveness of the existing measures must be considered low due to an insufficiency of prosecutions resulting in low levels of confiscation of the proceeds of crime;<br>• meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime; and<br>• LEAs and prosecutorial authorities do not proactively undertake asset tracing and recovery when pursuing any acquisitive crime. |
| ***Preventive Measures*** | | |
| **R.4**<br>Secrecy laws consistent with the Recommendations | **LC** | • There is a need for legal clarity for lifting confidentiality for the CBK with regards to and for the purposes of the provisions of the AML/CFT Law beyond prudential matters. |
| **R.5**<br>Customer due diligence | **PC** | • This Report expresses concerns regarding the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context that the UNMIK Regulation 2004/2 has been entirely repealed.<br>• This Report also expresses concern on the definitions of 'financial institution' in the respective laws which differ in some instances.<br>*Deficiencies specific to Recommendation 5*:<br>• legal ambiguity on the obligation to apply full CDD measures;<br>• no explicit prohibition for keeping accounts in fictitious names;<br>• threshold for wire transfers not clear;<br>• where doubts arise on the veracity or adequacy of previous obtained customer identification data applies only for occasional transactions;<br>• insufficient legal obligation to identify beneficial owner for legal arrangements and life insurance policies; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • lack of guidance on the obligation to understand the ownership and control structure of the customer;<br>• lack of guidance on the obligation to understand the purpose and intended nature of the business relationship;<br>• insufficient obligation to exercise ongoing monitoring of business relationship in all circumstances beyond high risk customers;<br>• lack of guidance on implementing a risk based approach;<br>• inconsistencies in the timing of the verification process against the timing of the identification process;<br>• failure to complete CDD process applies only to the verification process;<br>• failure to complete CDD where business relationship already exists is not adequately covered;<br>• obligation to apply CDD to existing customers is dated and only provided under Rule X in relation to repealed UNMIK Regulations;<br>• better distribution and application of lists of designated persons; and<br>• effectiveness issues with regard to the scope and extent of application of CDD, identification of the beneficial owner and application of the risk-based approach. |
| **R.6**<br>Politically exposed persons | **PC** | • shortcomings in the definition of a PEP;<br>• lack of legal clarity on the application of enhanced measures to domestic PEPs;<br>• no obligation to identify if a beneficial owner is or becomes a PEP;<br>• no obligation for senior management approval for continuation of business relationship with a PEP;<br>• no obligation to have appropriate risk management systems in place;<br>• legal obligation to identify source of wealth not clear; and<br>• effectiveness issues related to extended definition of PEP, guidance on continued monitoring and beneficial owner status. |
| **R.7**<br>Correspondent Banking | **LC** | • no definition of correspondent banking relationship;<br>• lack of legal clarity in distinguishing between "correspondent" and "respondent" banks;<br>• no obligation to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action; and<br>• concerns on effectiveness. |
| **R.8**<br>New technologies and non face-to-face business | **LC** | • legal ambiguity on the application of non-face to face business relationships; and<br>• consequent effectiveness concerns. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.9**<br>Third parties and introducers | **NC** | • absence of clear legal provisions;<br>• consequent absence of criteria for reliance which is being done in practice; and<br>• effectiveness implications for the system |
| **R.10**<br>Record Keeping | **NC** | • lack of provisions for the commencement retention period for linked occasional transactions;<br>• lack of guidance on methodology of record retention;<br>• lack of legal power for the extension of the five (5) year retention period for both transaction and identification records when necessary;<br>• inconsistency with international standards on the timing for the commencement of the retention period for identification records;<br>• ambiguity on the availability of records to competent authorities; and<br>• effectiveness issues related to conflicting or lack of legal provisions and uneven playing field among the entire reporting subjects |
| **R.11**<br>Unusual transactions | **LC** | • no requirements to examine background and purpose of transactions;<br>• no clear requirement for the retention of the findings of the examination; and<br>• effectiveness concerns arising out of the limited legal provisions and implementation guidance. |
| **R.12**<br>DNFBP – R.5, 6, & 8-11 | **NC** | • most weaknesses identified for the financial sector under R.5, R.6 and R.8 – R11 apply;<br>• need to strengthen awareness of obligations under the Law;<br>• legal ambiguities in the AML/CFT Law on the application of the relevant Recommendations;<br>• lack of clarity on who constitutes a client for certain DNFBPs such as NGOs and Political Entities;<br>• lack of clarity on the status of gaming houses and licensed objects of games of chance as reporting subjects;<br>• scope of AML/CFT measures for the accountancy profession does not appear to cover situations contemplated by the FATF Recommendations;<br>• lack of clarity on the application of additional obligations under the AML/CFT Law for certain DNFBPs;<br>• general lack of awareness of obligations under the AML Law and hence lack of effectiveness; and<br>• effectiveness issues arising therefrom. |
| **R.13**<br>Suspicious Transaction Reporting | **PC** | • no reporting obligation in situations where information available indicates possible ML or FT activities;<br>• no reporting obligation for transactions suspected to be linked to the FT;<br>• low number of STRs;<br>• concern over non-filing of suspicious CTRs as STRs; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • concerns on the outcome of STRs that could involve tax matters; and<br>• effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs, investigation of STRs that could be related to tax matters and lack of effective supervision. |
| **R.14**<br>Protection and no tipping off | **NC** | • not clear that safe harbour protection for disclosures applies to directors, officers and employees, temporary or permanent;<br>• prohibition of disclosure (tipping off) does not apply to banks and financial institution as entities;<br>• legal inconsistency on prohibition and penalties for banks and financial institutions;<br>• prohibition of disclosure (tipping off) does not specify whether it applies to both permanent and temporary employees;<br>• prohibition of disclosure (tipping off) covers situations where the report itself is provided to the third party;<br>• prohibition of disclosure (tipping off) does not cover situations where an investigation is being or may be carried out;<br>• legal uncertainty on the protection of personal data of employees making the report or providing information;<br>• limitations on lifting of prohibition of disclosure in specific circumstances; and<br>• effectiveness issues due to divergences from the international standard. |
| **R.15**<br>Internal controls, compliance and audit | **PC** | • absence of adequate criteria for the appointment of the compliance officer;<br>• absence of adequately defined roles and responsibilities of the compliance officer;<br>• absence of appropriate legal provisions for the powers of the compliance officer for timely access to information;<br>• function of internal audit limited to testing the reporting and identification system under the AML/CFT Law;<br>• lack of statistics on training;<br>• legal inconsistency in screening obligations for new recruits; and<br>• effectiveness issues arising out of inconsistencies in the AML/CFT Law; inadequate guidance and lack of statistics on training. |
| **R.16**<br>DNFBP – R.13 - 15 & R.21 | **NC** | • some DNFBPs are not required to submit an STR when they suspect of have reasonable grounds to suspect that funds are the proceeds of a criminal activity;<br>• DNPBPs are not required to report situations where information available indicates that a person may be or may have been involved in ML or the FT;<br>• DNPBPs are not required to report transactions or persons suspected to be linked to the FT; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • directors, officers and employees of some DNFBPs are not prohibited from disclosing the fact that an STR or related information is being reported or provided to the FIU;<br>• the prohibition of disclosure is not imposed on the DNFBPs entities themselves;<br>• inconsistency with international standards on the circumstances for the prohibition of disclosure;<br>• some DNFBPs are not required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees;<br>• DNFBPs are not required to develop appropriate compliance management arrangements;<br>• DNFBPs are not required to appoint a compliance officer and hence there are no provisions for the compliance officer to act independently and to report to senior management above the compliance officer's next reporting level or the board of directors;<br>• some DNFBPs are not required to maintain an adequately resourced and independent audit function;<br>• requirement to establish ongoing employee training programme is not imposed on all categories of DNFBPs;<br>• the majority of DNFBPs are not required to put in place screening procedures to ensure high standards when hiring employees;<br>• DNFBPs are not advised of concerns about weaknesses in the AML/CFT systems of other countries/jurisdictions;<br>• there is no obligation to document the findings of the analysis of large complex transactions;<br>• there are no provisions for relevant competent authorities to take counter-measures in circumstances where a country or jurisdiction does not apply or insufficiently applies the FATF Recommendations; and<br>• Effectiveness issues related to:<br>– extremely low number of STRs submitted;<br>– very low level of awareness from DNFBPs; and<br>– lack of supervision. |
| **R.17**<br>Sanctions | **PC** | • concern over the applicability of certain provisions of the Law for administrative sanctioning purposes;<br>• concern over dual criminal offences in the AML/CFT Law and specific financial legislation carrying different penalties;<br>• non applicability of sanctions under Article 31A and Article 31B to reporting subjects that are not in the form of a legal person;<br>• legal ambiguity on the application of penalties under Article 31A and Article 31B for breaches of obligations that are not covered by the AML/CFT Law;<br>• legal uncertainty on the designation of a |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | competent authority to impose administrative sanctions under Article 31A and Article 31B;<br>• legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects;<br>• absence of range of disciplinary administrative sanctions;<br>• concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law; and<br>• consequent effectiveness issues arising out of the inadequacy of the range of sanctioning regime and the lack of application of sanctions. |
| **R.18**<br>Shell banks | **PC** | Note: *In assessing compliance with Recommendation 18 the Report has analysed licensing provisions for banks and financial institutions in the relevant banking laws and regulations.*<br>• lack of legal clarity in distinguishing between 'correspondent' and 'respondent' banks in dealing with shell banks;<br>• no definition of correspondent banking relationship;<br>• no obligation for banks to ensure that 'respondent' institutions do not allow their accounts to be used by shell banks; and<br>• effectiveness concerns due to lack of legal clarity, |
| **R.19**<br>Other forms of reporting | **C** | |
| **R.20**<br>Other DNFBPs and secure transaction techniques | **PC** | • no documented policy to reduce the use of cash;<br>• extensive use of high denomination currency notes;<br>• no facilities for direct debits and direct credits through banking system;<br>• conflicts in statistics on currency notes issued and deposited;<br>• huge movements of currency cross border that have no explanation; and<br>• apparent lack of effectiveness in monitoring compliance with the provision of Article 13 of the Law on Tax Administration and analysis of currency movements across the borders. |
| **R.21**<br>Special attention for higher risk countries | **PC** | • obligations not applied to relationships with 'other financial institutions';<br>• lack of guidance on determination of high risk countries;<br>• no requirements to examine background and purpose of transactions;<br>• no clear requirement for the retention of the findings of the examination;<br>• no legal or other provisions for the authorities to apply counter-measures; and |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • effectiveness concerns arising out of the limited legal provisions and implementation guidance. |
| **R.22**<br>Foreign branches and subsidiaries | **NC** | • legal ambiguity on reference to 'other than a foreign bank' in Article 11 of the Law on Banks; and<br>• no legal or regulatory provisions on the application of AML/CFT measures for branches and subsidiaries outside Kosovo. |
| **R.23**<br>Regulation, supervision and monitoring | **PC** | • absence of mandate for a supervisory competent authority designated in terms of Article 36A to issue AML/CFT rules and regulations;<br>• no obligation to inform CBK on divestment of shareholding;<br>• need to strengthen criteria for approval of changes in shareholding in relation to AML/CFT issues;<br>• divergences in definition of 'financial institution;<br>• low number of on-site visits; and<br>• consequent effectiveness issues including:<br>– human resources for supervisory authorities are insufficient thus impacting effectiveness;<br>– lack of relevant training programmes for supervisory staff impacts effectiveness; and<br>– need for authorities to maintain more meaningful statistics, otherwise supervisory effectiveness cannot be adequately judged. |
| **R.24**<br>DNFBPs Regulation, supervision and monitoring | **NC** | • no definition of what constitutes a 'significant' shareholding;<br>• inconsistency of shareholding level for the identification of officers, directors and shareholders of private and quoted companies;<br>• absence of legal powers for the FIU to apply a risk based supervisory approach and hence non-application of a risk base approach;<br>• low number of on-site compliance visits by FIU;<br>• no supervisory authority appointed for building construction companies as reporting subjects under the AML/CFT Law;<br>• absence of range of sanctions to be applied proportionately to the severity of an offence;<br>• no adequate powers of enforcement and sanctions against directors or senior management of DNFBPs for failure to comply with the provisions of the AML/CFT Law;<br>• legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations; and<br>• absence of a mandate for the FIU to undertake off-site examinations. |
| **R.25**<br>Guidelines and Feedback | **PC** | • absence of comprehensive general guidance to reporting subjects in fulfilling their obligations under the AML/CFT Law;<br>• inconsistency in the AML/CFT Law requiring all reporting subjects to develop lists of indicators of suspicious transactions;<br>• inconsistency in the AML/CFT Law requiring the |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | FIU to issue guidance to "covered professionals" and casinos only;<br>• absence of legal mandate or other arrangements for competent authorities other than the FIU to issue guidance and regulations; and<br>• absence of legal mandate for the FIU to provide feedback. |
| ***Institutional and other measures*** | | |
| **R.26**<br>FIU and its functions | **PC** | • the scope and mode of FIU access to various databases is insufficient and negatively impacts the analytical function of the Unit;<br>• ambiguity in the powers of the FIU to request additional information from reporting entities open it up to legal challenges;<br>• Kosovo should consider adopting the Egmont group principles for international information exchange;<br>• the lack of feedback from law enforcement on FIU disseminations negatively impacts the effectiveness of the FIU;<br>• the lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis;<br>• insufficient specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on both - the FIU and industry and decreasing effectiveness; and<br>• the need to excessively request additional information (stemming from low quality and non-informative STRs) puts a resource burden on the FIU, negatively impacting its' effectiveness. |
| **R.27**<br>Law enforcement authorities | **PC** | • the lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy;<br>• increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness;<br>• KP has only recently started to provide feedback to FIU on cases, thus measurement of the overall effectiveness of the system cannot be undertaken;<br>• no systemic feedback provided by prosecutors to KP and other law enforcement bodies on the outcome of prosecutions;<br>• sharp drop in numbers of ML cases reported by the KP to SPRK in 2012 indicates decreasing effectiveness of the KP in pursuing ML;<br>• There is insufficient awareness in the KP about the need to proactively pursue criminal proceeds when dealing with acquisitive crime;<br>• there is insufficient awareness in the SPRK about the need to prosecute for ML; and<br>• no clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.28**<br>Powers of competent authorities | **LC** | *Effectiveness:*<br>• the lack of indictment and of convictions for ML cases does not permit to consider that, when conducting investigations of ML and underlying predicate offences, power for competent authorities to obtain documents and information for use in those investigations and in prosecutions and related actions is fully effective. |
| **R.29**<br>Supervisors | **NC** | • absence of a legal mandate for the CBK to apply prudential supervisory powers for the purposes of the AML/CFT Law;<br>• absence of a mandate for the FIU to undertake off-site examinations;<br>• legal ambiguity on the general powers of the FIU to undertake unconditioned on-site examinations;<br>• no adequate powers of enforcement and sanctions on directors and senior management; and<br>• consequent effectiveness issues including:<br>– human resources for supervisory authorities are insufficient thus impacting effectiveness;<br>– lack of relevant training programmes for supervisory staff impacts effectiveness; and<br>– need for authorities to maintain more meaningful statistics, otherwise supervisory effectiveness cannot be adequately judged. |
| **R.30**<br>Resources, integrity and training | **NC** | • increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness;<br>• there is insufficient awareness/capacity in the KP regarding the need to proactively pursue criminal proceeds when dealing with acquisitive crime;<br>• understaffing impacts the effectiveness of KC.<br>• human resources for both the CBK and the FIU for AML/CFT supervisory purposes are inadequate thus impacting effectiveness;<br>• inadequate budget for the FIU which, according to the FIU Performance and Resource Plan 2014 – 2016 is not at a satisfactory level and creates difficulties for the FIU to execute its mandate; and<br>• lack of relevant training programmes for supervisory staff impacts effectiveness. |
| **R.31**<br>National cooperation | **PC** | • effective feedback, information-sharing and coordination among authorities are too recent to have an impact on the overall ineffectiveness of the AML regime;<br>• lack of coordination at the strategic planning and policy making level between key institutions (KPC and MoF);<br>• the National Strategy has not yet been properly implemented and the Office of the NCCEC is too recent to be considered as effective; and<br>• channels of cooperation on regulatory and supervisory matters are too recent to be considered as really effective. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| **R.32**<br>Maintenance of Statistics | **NC** | • need to strengthen obligation for all competent authorities, reporting subjects and other persons and entities to maintain statistical data through a legal provision;<br>• meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime;<br>• the lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis;<br>• the lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy;<br>• need for supervisory authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged;<br>• effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; and<br>• effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF. |
| **R.33**<br>Legal persons – beneficial owners | **PC** | • no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur;<br>• concerns over the accuracy and timeliness of information available;<br>• concerns on due diligence on founders and major shareholders;<br>• concerns over the timeliness of availability of information to competent authorities;<br>• no procedures for competent authorities except for TAK for identification whether a number of business organisations belong to the same individual;<br>• no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies may own each other;<br>• concerns over the easiness of registration;<br>• legal ambiguity on foreign business organisation with bearer shares being shareholders in a JSC in Kosovo;<br>• legal ambiguity whether a foreign business organisation with bearer shares can register a branch in Kosovo; and<br>• consequent effectiveness issues. |
| **R.34**<br>Legal arrangements – beneficial owners | **N/A** | |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| ***International Co-operation*** | | |
| **R.35**<br>Implementation of Conventions | **N/A** | |
| **R.36**<br>Mutual legal assistance (MLA) | **PC** | • there are no service standards on turnaround times of foreign requests which could impede effectiveness of the system;<br>• effectiveness and timeliness could not be demonstrated due to the absence of comprehensive and meaningful statistics on MLA requests relating to ML, predicate offences and TF; and<br>• lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced. |
| **R.37**<br>Dual criminality | **C** | |
| **R.38**<br>MLA on confiscation and freezing | **PC** | • Kosovo has not considered establishing an asset forfeiture fund in the sense of EC 38.4;<br>• there are no arrangements for coordinating seizure or confiscating actions with other countries;<br>• Kosovo has not considered authorising the sharing of confiscated assets with other countries when confiscation is a result of coordinated law enforcement action; and<br>• in the absence of relevant statistics, it is not possible to determine whether and to what extent Kosovo provides effective and timely response to foreign requests concerning freezing, seizure or confiscation. |
| **R.39**<br>Extradition | **PC** | • the introduction of administrative conflict procedure against the final decision of the Minister of Justice causes lengthy and cumbersome procedures and ineffective functioning of the extradition regime; and<br>• apart from that, in the absence of proper statistics it is not possible to determine whether extradition requests are handled without undue delay. |
| **R.40**<br>Other forms of international cooperation | **LC** | • effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF;<br>• there are no service standards on turnaround times of foreign requests which could impede effectiveness of the system;<br>• FIU lacks power to request obliged entities for information based on a request of a foreign FIU; and<br>• FIU does not have power to suspend or postpone a transaction at the request of a foreign FIU. |
| ***Nine Special Recommendations*** | | |
| **SR.I**<br>Implementation of | **N/A** | |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| UN Instruments | | |
| **SR.II**<br>Terrorist financing Offence | **PC** | • duplicate criminalisation of FT that causes redundancy and leads to serious legal uncertainty for practitioners;<br>• financing of an individual terrorist (for any purpose) is clearly not covered by the FT offence in the CC;<br>• in the new FT offence in the AML/CFT Law, the provisions on the financing of a(n individual) terrorist or a terrorist organisation cannot be implemented due to the lack of definition for the terms "terrorist" and "terrorist organisation";<br>• inconsistent and/or redundant terminology used in FT-related provisions in the CC<br>• deficient coverage of "act of terrorism" as required by paragraph (1) of Article 2 of the FT Convention:<br>– no complete and general coverage of the "generic" offence of terrorism as subject of FT; and<br>– deficient coverage of the "treaty offences" as subject of FT by requiring an extra purposive element<br>• unclear whether the definition of "terrorist act" in paragraph (1) of Article 135 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence; and<br>• the range of sanctions by which the FT offence in the AML/CFT Law is threatened, including fine as a stand-alone punishment cannot be considered dissuasive. |
| **SR.III**<br>Freezing of terrorist assets | **NC** | • no effective and directly applicable laws and procedures in place for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and to ensure that freezing actions extend to funds or assets controlled by designated persons;<br>• no designation authority in place for UNSCR 1373;<br>• no effective systems for communicating actions under the freezing mechanisms to the financial sector and no practical guidance in this field;<br>• no procedures for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism;<br>• no procedure for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452;<br>• no specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs; and<br>• no measures for monitoring the compliance with implementation of obligations under SR.III and to impose sanctions. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| **SR.IV**<br>Reporting of Suspicions of Financing of Terrorism | **NC** | • no reporting obligation in situations where information available indicates possible ML or FT activities;<br>• no reporting obligation for transactions suspected to be linked to the FT;<br>• low number of STRs;<br>• concern over non-filing of suspicious CTRs as STRs;<br>• concerns on the outcome of STRs that could involve tax matters; and<br>• effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs, investigation of STRs that could be related to tax matters and lack of effective supervision. |
| **SR.V**<br>International co-operation | **LC** | • the definitional problems with the competing FT offences (e.g. the deficient and/or incomplete criminalisation of financing of an individual terrorist) might potentially limit MLA based on dual criminality. |
| **SR.VI**<br>AML requirements for money/value transfer services | **PC** | • absence of a legal mandate for CBK to apply its prudential supervisory powers under the financial legislation for the purposes of the AML/CFT Law;<br>• no legal clarity on the type of agents that may be appointed;<br>• no obligation for MVT service providers to maintain a list of agents;<br>• lack of effective, proportionate and dissuasive administrative sanctions where the MVT service provider is not a legal person;<br>• low number of on-site examinations; and<br>• effectiveness issues arising mainly out of legal uncertainties. |
| **SR.VII**<br>Wire transfer rules | **PC** | • absence of legal clarity due to lack of definition of terminology used;<br>• no link to CDD measures between Article 19 - *wire transfers* and Article 17 - *customer due diligence*;<br>• legal ambiguity on the retention of records related to wire transfers for the purposes of Recommendation 10;<br>• absence of guidance for use of wire transfers in batch-files;<br>• unconditional use of a unique reference number;<br>• no obligation for banks and financial institutions to have risk-based procedures to scrutinise wire transfers;<br>• concerns on application of sanctions as anlayised under Recommendation 17; and<br>• effectiveness concerns arising out of the limited provisions of Article 19 of the AML/CFT Law. |
| **SR.VIII**<br>Non Profit Organisations | **NC** | • no risk assessment of sector carried out;<br>• no outreach and no legal obligation for authorities to outreach to the NGOs sector;<br>• absence of prudential supervisory oversight;<br>• hence absence of AML/CFT supervisory oversight; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|---|---|
| | | • no obligation to maintain governance information on a continuous basis in all instances;<br>• prudential sanctions not available for all breaches under the Law on NGOs;<br>• conflicts between AML/CFT Law and Law on NGOs;<br>• no empowering provisions for DRLNGO to demand any other information it may require;<br>• concerns over identification of NGOs that should be investigated and hence possibility of investigations; and<br>• effectiveness issues consequent to narrow views on its responsibilities by DRLNGO and in sharing of information. |
| **SR.IX**<br>Cross-border declaration and disclosure | **LC** | • no record-keeping rules in KC with regard to information on declarations/false declarations and suspicions of ML/TF;<br>• prosecutor does not provide structured feedback on cases referred by KC. |

**Table 2: Recommended Action Plan to improve AML/CFT system**

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|---|
| **1. General** | **No text required** |
| **2. Legal System and Related Institutional Measures** | |
| 2.1 Criminalisation of Money Laundering (R.1) | • Revise the legal definitions related to proceeds of crime so as to eliminate confusion and redundancy in this field.<br>• Redefine the required level of proof for the predicate crime (Article 32 paragraph (4.1)) and/or provide for adequate guidance to practitioners in this respect.<br>• Reformulate the provision that defines the coverage of self-laundering (Article 32 paragraph (4.2)) so as to remedy its current inadequacy.<br>• Reconsider the current prosecutorial practice so that self-laundering can be prosecuted together with the predicate offence.<br>• Harmonise the respective provisions of the AML/CFT Law and the CC, both in terms of concept and terminology, as regards ancillary offences.<br>• Provide for the adequate criminalisation of the offence of market manipulation and include it among predicate offences to ML.<br>• Reconsider the prosecutorial approach by which tax evasion is practically excluded from the range of potential predicate offences. |
| 2.2 Liability for ML offence (R.2) | • Revise the basics of corporate criminal liability as it is currently stipulated by legislation (whether or not it depends on the culpability of the natural person).<br>• Harmonise the respective provisions of the AML/CFT Law and the CC, both in terms of concept and terminology, as regards<br>– the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC)<br>– the basics of corporate criminal responsibility and that of the related natural persons (Article 34 AML/CFT Law vs Article 40 CC / Article 5 LLP Law)<br>• Prescribe more severe sanctions (increase the range of fines) applicable to legal entities for criminal offences. |
| 2.3 Criminalisation of Terrorist Financing (SR.II) | • The duplicate criminalisation of FT (in the CC on the one hand and in the recently amended AML/CFT Law on the other) should urgently be addressed by Kosovo legislation (involving both the MoJ and the MoF) so as to provide for a single, autonomous and comprehensive FT offence that meets all aspects of SR.II.<br>• Revise the current coverage of "terrorist act" ("act of terrorism" etc.) in the CC and redefine it in full compliance with paragraph (1) of Article 2 of the FT Convention, including<br>– providing for the complete and general coverage of the "generic" offence of terrorism<br>– abandon requiring the extra purposive |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|---|
| | element to the "treaty offences" as subject of FT<br>– make it clear that the definition of "terrorist act" in paragraph (1) of Article 135 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence<br>• The actions listed below all refer to the FT criminalisation as it is currently provided by the CC :<br>– criminalise the financing of an individual terrorist (for any purpose) in the FT offence<br>– revise and reformulate the inconsistent and/or redundant terminology used in FT-related provisions<br>• The actions listed below all refer to the new FT criminalisation as it is currently provided by the AML/CFT Law :<br>– revise and correct the range of criminal sanctions applicable to the FT offence so that fine cannot be imposed as a stand-alone punishment,<br>– adopt appropriate definitions for the terms "terrorist" and "terrorist organisation" so that the respective provisions on the FT offence can be implemented. |
| 2.4 Confiscation, freezing and seizing of proceeds of crime (R.3) | • The Criminal Procedure Code should be amended to include provisions that indicate the standard of proof required to allow for the confiscation of instrumentalities intended for the use in a criminal offence.<br>• Kosovo should harmonise the norms of the CC and CPC with regard to third party confiscation. In this case priority should be given to the framework set out in the CC, which is generally in line with international standards, and would not pose effectiveness problems in terms of implementation, contrary to the norms of the CPC.<br>• Kosovo should revise the provisions of the CPC regulating the protection of the rights of bona fide third parties. The standard of proof required from the bona fide to prove their legitimate rights and intentions with regard to property should be lowered.<br>• Kosovo should institute mechanisms prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.<br>• The judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime.<br>• Kosovo should implement the relevant components of the AML/CFT strategy as soon as possible, particularly to enhance the role of financial |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|---|
| | investigations, asset recovery mechanisms and interagency coordination and cooperation in these fields.<br>• The Office of the NCCEC, foreseen under the strategy should become staffed and operational as soon as possible in order to monitor and enhance the effectiveness of interagency cooperation and coordination in the area of financial crime.<br>• The AMSCA, KP, KPC and KJC should be required to keep coordinated statistics with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences.<br>• There should be consistency of terminology throughout the legislation to dispel ambiguities, including the discrepancies between the AML/CFT Law, CC and CPC.<br>• The substitution of non-criminally acquired assets in lieu of confiscating the actual proceeds/material benefit is implied in paragraph (1) of Article 97 of the Criminal Code. This should be redrafted to remove any doubt.<br>• Temporary Freezing Orders are initiated by the Prosecutor. There are provisions for appeal by those affected by the Order but it is not explicitly stated in the CPC that application for these Orders are ex parte. The language of the relevant provision (Article 274 CPC) should be explicit to remove doubt.<br>• Kosovo should consider implementing a system of in rem confiscation of the proceeds of crime. The amendments to the extended law on confiscation do not provide this. |
| 2.5 Freezing of funds used for terrorist financing (SR.III) | • Draft and adopt effective laws and procedures for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and ensure that freezing actions extend to funds or assets controlled by designated persons.<br>• Establish a competent designating authority for the purposes UNSCR 1373.<br>• Set up effective systems for communicating actions under the freezing mechanisms to the financial sector and provide adequate practical guidance in this field.<br>• Introduce appropriate procedures :<br>– for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism;<br>– for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452;<br>– and for specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs.<br>• Provide for measures for monitoring the compliance |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | with implementation of obligations under SR.III and to impose sanctions. |
| 2.6 The Financial Intelligence Unit and its functions (R.26) | • The MoF and the Governing Board of the FIU should take measures to facilitate and promote the institutional standing of the FIU with regard to other authorities.<br>• The number of databases that FIU has access to should be expanded. Those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML to enhance the quality, scope and speed of analysis.<br>• The FIU should take additional measures to increase the quality of STRs and ultimately alleviate the burden of additional requests by working with the reporting sector by continuing to provide general (typologies) and targeted feedback on the outcome of STR disseminations.<br>• A formal and regular system of feedback on progression of FIU referrals should be implemented jointly with KP, KC and Prosecutors. This issue should be considered as one of the priorities by the National Office for Economic Crime Enforcement.<br>• The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort led by the newly appointed National Coordinator for Economic Crime Enforcement.<br>• The publication of the annual report by the FIU should continue to be considered a priority in order to raise awareness about the activities of the FIU among the wider interagency community, as well as the reporting sector. This report should be used, inter alia as an effective tool by the FIU to provide feedback to the reporting sector, and thus should always include information on current ML typologies.<br>• It is recommended to modify the text of the AML/CFT Law so as to make the FIU power to request additional information unequivocal and not subject to any interpretation.<br>• That the FIU should implement the Egmont Principles of Information Exchange in its dealings with foreign FIUs. |
| 2.7 Law enforcement, prosecution and other competent authorities (R.27 and R.28) | • The Office of the NCCEC should urgently design measures for closer FIU-KP collaboration and monitor their implementation in order to increase the efficiency in the use of FIU resources by the KP.<br>• KPC should maintain statistics on the reasons why cases are dropped or investigations ceased in order to understand how the investigation process could be improved in order to increase the very low number of indictment for ML.<br>• The KP liaison officer placed in the FIU following the signing of the planned MoU should become the main channel of feedback between the two agencies, particularly with regard to the supply of information on the progress of FIU cases. This should be explicitly specified in the text of the MoU. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | Additionally the FIU should hold regular consultations and coordination meetings with the KP ML unit on issues pertaining to the content of supplied material.<br>• To introduce objective and transparent criteria for appointment/dismissal of the General Director and top management of the KP in order to ensure operational independence of the KP (see description in the AC Report, Section 2.3).<br>• It is recommended to adopt guidelines for KP concerning the approval of exceptional outside engagement for police officers and establish a limit for the remuneration on such engagements (see description in the AC Report, Section 2.3).<br>• The KPI role should be expanded to include an evaluation on whether KP is effective and 'fit for purpose'.<br>• There should be a concerted effort to clear the backlog of ML cases in the prosecutorial system.<br>• Kosovo competent authorities should continue their late effort in order to review ML/TF trends and techniques on a regular interagency basis with detailed input from the KP and prosecution.<br>• Kosovo authorities should introduce in the legislation a clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved |
| 2.8 Cross border declaration or disclosure (SR.IX) | • Consideration should be given to ensure a high level of motivation and integrity among the staff.<br>• A periodic external fit-for-purpose evaluation should be carried out with regard to KC in order to assess function, structure, effectiveness and value for money. The results should be made public. |
| **3. Preventive Measures – Financial Institutions** | |
| 3.1 Risk of money laundering or terrorist financing | • Kosovo authorities should undertake a sectorial assessment of ML and TF risks. |
| 3.2 Customer due diligence, including enhanced or reduced measures (R.5) | • Publication and effectively implementation of the proposed CBK Regulation reviewing Rule X, and incorporating Advisory Letter 2007/1, within the context of the revised AML/CFT Law and the repeal of the UNMIK Regulations.<br>• Harmonisation of the definition of 'financial institution' in the respective laws and regulations.<br>• Clarification of the legal obligation for the application of the full CDD measures as defined in the AML/CFT Law as opposed to the application of the identification and verification processes which only form a component of the CDD concept.<br>• A review of the distribution and application of the United Nations and other lists of designated persons and entities.<br>• A general review of the AML/CFT Law in specific areas related to enhanced and reduced CDD within the context of the application and guidance on the risk based approach and the harmonisation of provisions as indicated in the respective Essential Criteria. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| 3.3 Politically Exposed Persons (PEPs) (R.6) | • Harmonise the definition of a PEP with the FATF definition in the AML/CFT Law with reference to middle ranking and more junior officials.<br>• Impose legal obligation to identify if a beneficial owner of a legal entity falls within the definition of PEP.<br>• Amend Article 21 of the AML/CFT Law to ensure that procedures are applied to identify if a customer or a beneficial owner is eventually identified as a PEP or becomes a PEP.<br>• Clarify in Article 21 of the AML/CFT Law that the identification of the source of funds is applicable on an ongoing basis to all transactions with PEPs.<br>• Clarify the obligation to establish the source of wealth in Article 21 of the AML/CFT Law.<br>• Provide guidance with an obligation to have appropriate risk management systems in place. |
| 3.4 Cross border correspondent banking (R.7) | • Include of a definition of "correspondent banking" in the AML/CFT Law.<br>• Clarify paragraph (4) of Article 21 of the AML/CFT Law to refer to "respondent" institutions in accordance with the definition of "correspondent banking".<br>• Amend paragraph (4.1) of Article 21 of the AML/CFT Law to require banks to identify whether the foreign ("respondent") bank has been subject to a ML or FT investigation or regulatory action.<br>• Ensure the proposed CBK Regulation reflects paragraph (4.4) of Article 21 of the AML/CFT Law with respect to the documentation of responsibilities.<br>• Remove legal ambiguity on use of terminology for "payable through accounts" as defined in the AML/CFT Law. |
| 3.5 Misuse of Technology and non-face to face relationships (R.8) | • Remove legal ambiguity in undertaking non-face to face business relationships.<br>• Provide additional guidance to the industry to ensure that non-face to face relationships are closely monitored under the internal risk based systems for customer categorisation and monitoring. |
| 3.6 Third parties and introduced business (R.9) | • Introduce specific legislative provisions in the AML/CFT Law which either prohibit or allow reliance on third parties, even if this is to be allowed only intra-group.<br>• If this is to be allowed, even intra-group, then the Law should further provide under which conditions reliance can be placed or introduced business accepted.<br>• Pending legislative changes, and on the basis that the AML/CFT Law is silent on the matter, the FIU should ensure that instructions to this effect (prohibition) be issued to all reporting subject. |
| 3.7 Financial institution secrecy or confidentiality (R.4) | • A new bullet point be added to paragraph (2) of Article 74 of the Law on the CBK, to clarify the lifting of confidentiality when the CBK provides information to the FIU or to other appropriate domestic or foreign competent authorities when such information |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | relates to the prevention of ML and FT. |
| 3.8 Record keeping (R.10) | • Insert a new paragraph (6.3) to Article 17 in connection with the timing of the retention period for a series of linked occasional transactions.<br>• Insert a new paragraph (7) to Article 17 empowering the FIU to extend the retention period in specific cases for both transaction and identification documentation.<br>• Amend paragraph (6.1) of Article 17 consistent with international standards.<br>• Harmonise Article 17 and Article 20 on the availability of retained records to competent authorities. |
| 3.9 Wire Transfers (SR.VII) | • Introduction of appropriate definitions of parties to wire transfers and terminology used.<br>• Complete revision of the provisions of Article 19 with the objective of clarifying the roles, obligations and responsibilities of the main parties to a wire transfer: originating institution; intermediary institution; beneficiary institution.<br>• Linkage of the requirement to obtain and maintain originator information with the CDD obligations under the AML/CFT Law.<br>• Provision for the maintenance of records by the main parties to the wire transfer activities in accordance with the record retention provisions under the AML/CFT Law. |
| 3.10 Monitoring of transactions and relationships (R.11 and R.21) | *Recommendation 11*<br>• Implement effective supervisory procedures to ensure compliance in particular with reference to the automated process of identifying transactions with the established characteristics.<br>• Revise Article 20 of the AML/CFT Law to the extent that the provisions require the examination, to the extent possible, of the background and purpose of these transaction; the documentation of the findings; and the retention of the findings as part of the report required under paragraph (3) on the information surrounding the transaction and the parties involved.<br>*Recommendation 21*<br>• Amend and clarify paragraph (2) of Article 20 of the AML/CFT Law to include reference to 'other financial institutions'.<br>• Provide guidance to banks and financial institutions and the entire reporting subjects on how to determine whether a jurisdiction, if not included in the FATF list, still could present a high risk for the financial sector in Kosovo.<br>• Appropriate procedures be put in place to ensure that lists issued by the FATF or other bodies indicating an elevated risk in specific jurisdictions be made immediately available to all reporting subjects with guidance on the extent of implementation.<br>• Provide legislative provisions in the AML/CFT Law empowering the relevant competent authorities to take counter-measures. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| 3.11 Suspicious transaction reporting (R.13 & SR.IV) | • Amend the definition of 'suspicious acts and transactions' to include situations where information available indicates that a person or entity may be involved in criminal activities.<br>• Amend Article 22 to introduce the reporting obligation for the FT.<br>• FIU to undertake measures to ensure that CTRs that raise suspicions are also reported as STRs and to create awareness accordingly.<br>• FIU to ensure that relevant competent authorities are made aware on the obligation to investigate and prosecute for AML/CFT purposes STRs that could be related to tax matters. |
| 3.12 Protection and no tipping off (R.14) | • Amend Article 35 of the AML/CFT Law to extend protection to directors, officers and employees, temporary or permanent.<br>• Amend paragraph (4) of Article 22 imposing the prohibition of disclosure in accordance with the international standards.<br>• Clarify legal inconsistency on prohibition and penalties for banks and financial institutions.<br>• Ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution making the report or providing the information.<br>• Review paragraph (2) of Article 15 of the Law to limit the entities or authorities to whom the information could be provided to those to whom the FIU forwards its reports.<br>• Add a new paragraph (4) to Article 15 of the AML/CFT Law which obliges any authority that for any reason has possession of personal information on employees of reporting subjects who have filed a report or provided information, to protect such information and keep it confidential.<br>• Consider the provisions of Article 28 of the EU Third Directive on the lifting of the disclosure prohibitions in specific circumstances.<br>• Consider inserting a new paragraph (4A) to Article 22 of the AML/CFT Law imposing a prohibition of disclosure in circumstances as provided under the Council of Europe Convention (CETS 198) |
| 3.13 Other reporting – Currency Transaction Reporting (R.19) | • Consider setting a time limit for banks and financial institutions, and for casinos, gaming houses and licensed objects of games of chance for the reporting of currency transactions as established for "covered professionals".<br>• Consider to take measures to ensure that lawyers, notaries, certified accountants, licensed auditors and tax advisors and casinos and gambling houses correctly fulfil their obligation of declaration of cash transactions as provided by the AML/CFT Law. |
| 3.14 Guidance and feedback to financial institutions and DNFBPs (R.25) | • The FIU issues overarching guidance to reporting subjects, other than the financial sector, on the implementation of obligations under the AML/CFT Law, and including guidance on indicators of suspicious transactions thus removing uneven playing field due to the proposed CBK Regulation to |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | the entire financial sector.<br>• The CBK issues its proposed Regulation.<br>• Remove legal inconsistencies and ambiguities in the AML/CFT Law for the establishment of guidance by the competent authorities other than the FIU.<br>• New provisions be made in the AML/CFT Law for the provision of general and specific feedback to the reporting subjects based on the FATF Best Practice Guidance on Providing Feedback to Reporting Financial Institutions and Other Persons.<br>• Establish closer co-operation and effective liaison between the FIU and other competent authorities which under the AML/CFT Law are delegated supervisory powers to ensure harmonisation in the issue of guidance to those under their respective supervisory remit. |
| 3.15 Internal Controls, compliance, audit and foreign branches (R.15 and R.22) | *Recommendation 15*<br>• Revise the relevant Article in the AML/CFT Law to remove legal inconsistencies mainly relating to the establishment of internal policies and procedures, the appointment of a compliance officer and the screening of new recruits.<br>• Ensure harmonisation in implementation of procedures.<br>• Without prejudice to the position of this Report on a permanent legal basis, CBK issues its proposed Regulation to clarify the appointment, roles and responsibilities of the compliance officer and ensure its effective implementation through on-site visits.<br>• Review Article 23 of the AML/CFT Law to include provisions for the right of timely access to relevant information for the purposes of the AML/CFT Law by the compliance officer in order to fulfil obligations under the Law and regulations.<br>• Review paragraph (2.6) of Article 23 of the AML/CFT Law to remove the limited function of internal audit from to test the reporting and identification system to a broader remit to ensure full compliance of the system with the legal and regulatory provisions and to ensure its effectiveness.<br>• Without prejudice to the position of this Report on a permanent legal basis, CBK to issue its Administrative Directive on Training and to ensure its full implementation and the maintenance of appropriate training statistics.<br><br>*Recommendation 22*<br>• Introduce a new Article 23A on branches and majority owned subsidiaries in other countries which should provide for the obligations for the implementation of Recommendation 22.<br>• Amend paragraph (2) of Article 23 to also make reference to the FT: *written internal procedures and controls for the prevention and detection of money laundering* and the financing of terrorism. |
| 3.16 Shell banks (R.18) | • Redraft paragraph (6) of Article 21 to remove legal uncertainties.<br>• Insert a definition of 'correspondent banking |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | relationship' incorporating both 'correspondent' and 'respondent' institutions in accordance with the definition in the FATF Glossary to the Methodology; |
| 3.17 Ongoing Supervision and Monitoring and Market Entry (R.23) | • The supervisory legal mandate for the CBK should be accompanied with a mandate to issue binding and mandatory rules and regulations for AML/CFT purposes (beyond the powers of the CBK in this regard under Article 85 of the Law on Banks for prudential purposes).<br>• Insert a new paragraph (6) to Article 37 of the Law on Banks requiring a person or entity, alone or in concert with another, divesting of a significant interest or to reduce current shareholding to inform the CBK accordingly.<br>• Insert a new paragraph (2) to Article 38 of the Law on Banks requiring application of AML/CFT criteria as established under the EU Directive on Mergers and Acquisitions for approval of changes in shareholding.<br>• Amend paragraph (3) of Article 39 of the Law on Banks on mergers, consolidations and acquisitions consequent to the proposed paragraph (2) to Article 38.<br>• Harmonise the definitions of 'financial institution' in the various laws. |
| 3.18 Supervisors (R.29) | • Insert a new paragraph to Article 36A in the AML/CFT Law to the effect that a supervisory authority appointed under the AML/CFT Law that already has a supervisory remit under other legislation may apply its prudential supervisory powers under the respective laws for the purposes of supervising compliance under the AML/CFT Law with the exception of the application of administrative or other penalties and sanctions under these laws as these are contemplated under the AML/CFT Law.<br>• Insert a new paragraph (6) to Article 30 of the AML/CFT Law providing for the off-site examination powers of the FIU.<br>• Clarify the general powers of the FIU to undertake unconditional on-site examinations. |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|---|
| 3.19 Sanctions (R.17) | • Review of paragraph (8) of Article 24, paragraph (7) of Article 25, paragraph (14) of Article 26 and paragraph (4) of Article 27 within the context of the proposed amendments to Article 31 of the AML/CFT Law and the new designation of reporting subjects.<br>• Review present criminal and other offences for legal certainty and avoidance of legal complexity in application due to dual offences and different penalties.<br>• Redraft Article 31 to provide for a broader range of determination by the FIU for non-compliance with the provisions of the AML/CFT Law.<br>• Review the penalties under Article 31A and Article 31B with relation to obligations under the AML/CFT Law.<br>• Clarify paragraph (2) of Article 31 for the designation of an authority/authorities to impose sanctions through the revised Article 31 for the purposes of paragraph (2) of Article 31 itself, Article 31A and Article 31B.<br>• Ensure sanctions are applicable to directors and senior management through the revision of Article 31 and for this purpose amend Article 34 of the AML/CFT Law.<br>• Introduce range of disciplinary administrative sanctions that are not pecuniary in nature through the revision of Article 31 as proposed. |
| 3.20 Money or value transfer services (SR. VI) | • Harmonise the definition of a 'financial institution' in the respective legislation with that in the AML/CFT Law, including activities that may be undertaken by NBFIs.<br>• Provide the CBK as the designated competent supervisory authority with a legal mandate to apply its prudential supervisory powers remit for the purposes of the AML/CFT Law.<br>• Clarify in the Law on Payment System or through regulation the type of agents that may be appointed and under what conditions.<br>• Insert a new paragraph or Article in the Law on Payment System or the AML/CFT Law obliging MVT services providers to maintain a list of agents appointed under the Law on Payment System in addition to the register mainained by the CBK.<br>• Redraft Article 31 of the AML/CFT Law as recommended under Section 3.19 of this Report. |
| **4. Preventive Measures – Designated Non-Financial Businesses and Professions (DNFBPs)** | |
| 4.1 Customer due diligence and record keeping (R.12 applying R.5, R6 & R.8 - 11) | • Provide enhanced awareness of obligations under the AML/CFT Law through training, guidance and discussions.<br>• Remove all instances of legal ambiguity identified for various provisions of the AML/CFT Law.<br>• Ensure more awareness of DNFBPs on their obligations under the AML/CFT Law.<br>• Ensure a level playing field in the application of the provisions of the AML/CFT Law. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | • Ensure the provisions and obligation of the AML/CFT Law are not over-ridden through sector specific legislation, such as the Law on Notary. |
| 4.2 Monitoring of transactions, reporting and other issues (R.16 applying R.13 to R.15 and R.21) | • Remove inconsistency in timing for reporting between all DNFBPs with a reporting obligation (except casinos) and the financial sector.<br>• Real estate agents and real estate brokers, persons trading in goods where payment is received in cash (equal to or above €10,000) and TCSPs should be required to submit an STR when they suspect of have reasonable grounds to suspect that funds are the proceeds of a criminal activity.<br>• DNPBPs should be required to report situations where information available indicates that a person may be or may have been involved in ML or the FT.<br>• DNPBPs should be required to report transactions or persons suspected to be linked to the FT.<br>• Casinos including Gaming Houses and Licensed Object of Games of Chance, real estate agents and real estate brokers, persons trading in goods where payment is received in cash (equal to or above €10,000), TCSPs and dealers in precious metal or precious stones and their directors, officers and employees (temporary or permanent) should be prohibited from disclosing the fact that a STR or related information is being reported or provided to the FIU.<br>• Where the prohibition of disclosure is already imposed on directors, officers and employees this should be extended to temporary and permanent employees and to the DNFBP entity itself.<br>• The prohibition from disclosure which currently does not cover information that a report has been filed but the provision of the report itself to a third party should be revised and upgraded to reflect the international standard.<br>• All categories of DNFBPs that are not currently required to do so, should be required to establish and maintain internal procedures, policies and controls to prevent ML and FT, and to communicate these to their employees; these procedures, policies and controls should cover, inter alia, CDD, record retention, the detection of unusual and suspicious transactions and the reporting obligation.<br>• DNFBPs should be required to develop appropriate compliance management arrangements including the designation of an AML/CFT compliance officer at the management level and to ensure that the compliance officer and other appropriate staff have timely access to customer identification data and other CDD information, transaction records, and other relevant information.<br>• With the exception of casinos, gaming houses and licensed objects of games of chance and "covered professionals" who are already legally obliged to do so, all other DNFBPs should be required to maintain an adequately resourced and independent audit function to test compliance with AML/CFT Law proportionate to the size and complexity of the |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|---|
| | business entity.<br>• DNFBPs should be required to establish internal training programmes and to provide ongoing employee training to ensure that all officers and employees are well trained regarding AML/CFT matters.<br>• lawyers, notaries, certified accountants and licensed auditors, and tax advisors, real estate agents and brokers, dealers of precious metal and stones, persons trading in goods where payment is effected in cash (equal to or above €10,000) and TCSPs should be required to put in place screening procedures to ensure high standards when hiring employees.<br>• In establishing an obligation for all DNFBPs to appoint a Compliance Officer legal provisions should ensure that the Compliance Officers are able to act independently and to report to senior management above the compliance officer's next reporting level or the board of directors.<br>• DNFBPs should be advised of concerns about weaknesses in the AML/CFT systems of other countries/jurisdictions.<br>• An obligation should be imposed on all DNFBPs to document and maintain the findings of the analysis of large complex transactions in addition to the information surrounding the transaction.<br>• Kosovo authorities should take measures to ensure that DNFBPs are fully aware of their obligations of monitoring of transactions, reporting and internal organisation and that DNFBPs understand how to comply therewith. |
| 4.3 Regulation, supervision and monitoring (R.24, R.25) | • Recommendations for enhancing and strengthening of the supervisory powers of the FIU made under the analysis of Recommendation 29 under Section 3 of this Report in general apply also for Recommendation 24.<br>• Notwithstanding that current there are no operative casinos in Kosovo, the FIU should consider developing sub-legal acts for casinos as required under Article 28 of the AML/CFT Law.<br>• A definition of 'significant interest' on the basis of the said definition in the Law on Banks should be included in the Law on Games of Chance and the licensing criteria under Article 33 of the Law should be harmonised accordingly.<br>• Consideration should be given to either extending the supervisory powers of the FIU to cover also the construction sector or a separate competent authority be appointed for this purpose with arrangements with the FIU under Article 36A of the AML/CFT Law.<br>• Either provide the FIU with adequate resources to meet its supervisory mandate or introduce arrangements under Article 36A of the AML/CFT Law similar to those with the CBK for the financial sector.<br>• Introduce legal and implementing measures for a risk based supervisory approach. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| 4.4 Other businesses and professions and Modern secure transaction techniques (R.20) | • CBK should document its policy for better cash management techniques with objectives and milestones including the introduction of direct debit and direct credit systems.<br>• CBK should co-ordinate a study on the statistics on currency issued and currency deposited to identify the source of these differences in cooperation with other authorities such as KC and TAK.<br>• This study should also identify reasons for the high use of the €500 currency note and the huge movements of currency cross border.<br>• Ensure effectiveness of the implementation of Article 13 of the Law on Tax Administration by TAK. |
| **5. Legal Persons and Arrangements and Non-Profit Organisations** | |
| 5.1 Legal persons – Access to beneficial ownership and control information (R.33) | • Introduce an obligation for immediate reporting of changes to shareholding and directors further to the *ad hoc* appointment of a person responsible to do so.<br>• Introduce procedures and systems for competent authorities and the industry to identify where a person owns more than one business organisation.<br>• Introduce administrative procedure to ascertain to the extent possible the accuracy of documents and contents by the KBRA in order to ensure that both natural and legal persons establishing companies be checked and monitored with respect to possible criminal records or professional disqualifications, as well as against the United Nations and other lists of designated persons and entities.<br>• Introduce procedures to identify interconnectivity between registered business organisations.<br>• Introduce measure for accuracy and validity of applications for registration to cater for the short registration period.<br>• Introduce legislative steps so as to eliminate ambiguity on whether foreign business organisation with bearer shares can register a branch in Kosovo or if it can be a shareholder in a JSC registered in Kosovo. |
| 5.2 Legal arrangements – Access to beneficial ownership and control information (R.34) | • Perform a thorough review of the respective legislation (starting with the AML/CFT Law) in order to detect and eliminate all the false and/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 the law of Kosovo. |
| 5.3 Non-profit organisations (SR.VIII) | • Insert a new Article 2A on the 'Designation and Competences of the Competent Body' in the Law on NGOs establishing the competencies of the Competent Body with regards to designation; functions and responsibilities under the Law; oversight of NGOs; and periodic risk assessment including sharing of information.<br>• Amend definition of 'Competent Body' in Article 2 of the Law on NGOs accordingly.<br>• Amend paragraph (11) of Article 9 of the Law on NGOs requiring NGOs also to report changes in |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | relation to paragraphs (4.2) and (4,3) of Article 18 of the Law on NGO.<br>• Consider introducing prudential sanctions for breaches of Article 4 and paragraph (11) of Article 9 of the Law on NGOs.<br>• Harmonise Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body.<br>• Insert a new paragraph (1.3) to Article 21 of the Law on NGOs providing a link to Article 24 of the AML/CFT Law on removal of registration for non-compliance with Article 24 of the AML/CFT Law.<br>• Amend paragraph (4) of Article 24 of the AML/CFT Law to provide for the maintenance of transaction records and their availability to competent authorities without prejudice to the provisions of paragraph (6) of Article 17 of the AML/CFT Law.<br>• Establish practical mechanisms for co-operation and sharing of information between authorities relevant to the NGOs sector, including supervisory matters and findings.<br>• Undertake an assessment of risks and vulnerabilities to which NGOs may be exposed or be exploited for FT and implement an outreach programme for NGOs to create more awareness of such risks and vulnerabilities including training awareness sessions.<br>• DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector's international activities. This assessment should be shared with the FIU.<br>• Extend FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR on designated individuals and organisations to DRLNGO.<br>• Implement the relevant components of the AML/CFT Strategy with immediate effect. |
| **6. National and International Co-operation** | |
| 6.1 National co-operation and coordination (R.31) | • In order to rectify the deficiencies in the area of interagency cooperation authorities in Kosovo should make it a priority to implement the AML/Economic Crime and KPC Strategies. This however should be done in a coordinated fashion, given the number of cross-cutting issues among the two documents.<br>• In view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action plan of the Strategy.<br>• This Joint Rule of Law Coordination Board should be kept informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan on Inter-Institutional Cooperation in order to ensure coordination and complementarity with other issues being discussed on its agenda.<br>• Following the signing of the supervisory delegation |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | agreement between the FIU and the CBK for the financial sector it is important that the two authorities establish effective practical channels of co-operation on both regulatory and supervisory matters for the financial sector. |
| 6.2 The Convention and U.N. Special Resolutions (R.35 and SR.I) | • *Recommendation 35 and Special Recommendation I are not applicable in the case of Kosovo* |
| 6.3 Mutual Legal Assistance (R.36, R37 and R.38 and SR.V) | • Provide for service standards on turnaround times of foreign requests which could impede effectiveness of the system.<br>• Revise procedural legislation so as to overcome lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced.<br>• Consider establishing an asset forfeiture fund in the sense of EC 38.4 as well as concluding arrangements for coordinating seizure or confiscating actions with other countries and authorising the sharing of confiscated assets with other countries when confiscation is a result of a coordinated action. |
| 6.4 Extradition (R.39) | • Reconsider the legal and practical necessity of allowing for the initiation of an administrative conflict procedure as an extraordinary appeal against the final decision of the Minister of Justice and either abandon it entirely or, at least, render it having no effect on the executability of the final ministerial decision. |
| 6.5 Other Forms of International Co-operation (R.40) | • ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where ML or TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness.<br>• The AML law should include an ability for the FIU or the prosecutor to seek a bank account monitoring order.<br>• Kosovo should clarify whether or not it refuses international co-operation on the grounds that it relates to a political offence.<br>• FIU should have the power to demand for information from reporting subjects (financial sector and DNFBPs) for information based on a request of a foreign FIU (AE 40.11 and CETS 198 paragraph (5) of Article 46).<br>• FIU should have powers to freeze or postpone transactions on the request of a foreign FIU. |
| **7. Other Issues** | |
| 7.1 Resources and statistics (R. 30 & 32) | *Recommendation 30*<br>• Both the CBK and the FIU need to address their respective capacities for the supervision of the financial sector for the purposes of the AML/CFT Law in order to effectively undertake such responsibility.<br>• The role of the KC authority in Kosovo is especially important given the wider regional consequences of the drug and weapons trafficking and organised crime, that originates/transits from/through Kosovo. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | In this regard consideration should be given to ensure a high level of motivation and integrity among staff.<br><br>*Recommendation 32*<br><br>• The AMSCA, KP, KPC and KJC should be required to keep coordinated statistics with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences.<br>• The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort.<br>• The Office of the NCCEC should institute a system of maintaining unified statistics among police and prosecution on ML cases, in order to ensure that accurate analysis of effectiveness of the system can be made.<br>• A new Article 30A under the title "Statistical Data" as indicated should be introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects and relevant competent authorities.<br>• ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where ML/TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness. |

# ANNEXES

**ANNEX 1: List of abbreviations**

| | |
|---|---|
| AC | Anti-corruption |
| ACH | Automated Clearing House |
| AE | Additional Element/Elements |
| AML/CFT | Anti-Money Laundering / Countering or Combating the Financing of Terrorism |
| AMSCA | Agency for Managing Seized and Confiscated Assets |
| ATM | Automated Teller Machine |
| CBK | Central Bank of Kosovo |
| CC | Criminal Code |
| CDD | Customer Due Diligence |
| CETS | Council of Europe Treaty Series |
| CFT | Countering or Combating the Financing of Terrorism |
| CoE | Council of Europe |
| CPC | Criminal Procedure Code |
| CTR | Cash Transaction Report |
| DCT | Department of Counter-terrorism - formerly the Counter-Terrorism Unit (CTU - within KP) |
| DECCI | Directorate against Economic Crime and Corruption Investigation |
| DILC | Department for International Legal Cooperation |
| DNFBPs | Designated Non-Financial Businesses and Professions |
| DRLNGO | Department for Registration and Liaison with NGOs |
| EBRD | European Bank for Reconstruction and Development |
| EC | Essential Criteria/Criterion |
| EU | European Union |
| EUD | European Union Directive |
| EULEX | European Union Rule of Law Mission |
| FATF | Financial Action Task Force |
| FDI | Foreign Direct Investment |
| FIC | Financial Intelligence Centre (forerunner of the FIU) |
| FIU | Financial Intelligence Unit |
| FT or TF | Financing of Terrorism or Terrorism Financing |
| GDP | Gross Domestic Product |
| GP | General Partnership |
| IB | Individual Business |
| IFC | International Finance Corporation |
| ILECU | Directorate for International Law Enforcement Co-operation |
| IMF | International Monetary Fund |
| IPA | Instrument for Pre-Accession Assistance (of the European Commission) |
| JSC | Joint Stock Company |
| KBRA | Kosovo Business Registration Agency |
| KC | Kosovo Customs |
| KCA | Kosovo Cadastral Agency |
| KCA | Kosovo Chamber of Advocates |
| KCN | Kosovo Chamber of Notaries |
| KFOR | Kosovo Force |
| KIA | Kosovo Intelligence Agency |
| KJC | Kosovo Judicial Council |
| KJI | Kosovo Judicial Institute |
| KP | Kosovo Police |
| KPC | Kosovo Prosecutorial Council |
| KPI | Kosovo Police Inspectorate |
| LEA | Law Enforcement Agency |
| LLC | Limited Liability Company |
| LLP | Liability of Legal Persons for Criminal Offences (Law on) |
| LP | Limited Partnership |
| MCO | Municipal Cadastral Office |
| MFE or MoF | Ministry of Finance and Economy (now referred to as Ministry of Finance) |
| MFI | Micro Finance Institution |
| MIA | Ministry of Internal Affairs |

| | |
|---|---|
| ML | Money Laundering |
| MLA | Mutual Legal Assistance |
| MoJ | Ministry of Justice |
| MoU | Memorandum of Understanding |
| MPA | Ministry of Public Administration |
| MTI | Ministry of Trade and Industry |
| MVT | Money or Value Transfer |
| NBFI | Non-bank financial institution |
| NCCEC | National Coordinator for Combating Economic Crime |
| NFA | Net foreign assets |
| NGO | Non-Government Organisation |
| NPO | Non-Profit Organisation |
| NRA | National Risk Assessment |
| PEP | Politically Exposed Person |
| POS | Point of Sale |
| RTGS | Real Time Gross Settlement System |
| SCAAK | Society of Certified Accountants and Auditors in Kosovo |
| SEPA | Single European Payment System |
| SOP | Standard Operation Procedures |
| SPO | State Prosecutor's Office |
| SPRK | Special Prosecutor's Office of Kosovo |
| SR | FATF Special Recommendation |
| STR | Suspicious Transaction Report |
| TAK | Tax Administration of Kosovo |
| TARGET | Trans-European Automated Real-time Gross Settlement Express Transfer |
| TCSP | Trust and Company Service Providers |
| TF or FT | Financing of Terrorism or Terrorism Financing |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNMIK | United Nations Interim Administration Mission in Kosovo |
| UNSCR | United Nations Security Council Resolution |

**ANNEX 2: Details of all bodies met during the on-site visit**

- Financial Intelligence Unit (FIU)
- Central Bank of Kosovo (CBK)
- Ministry of Finance (MoF) – including representatives covering the Kosovo Financial Reporting Council and the Central Harmonisation Unit of Internal Audit
- Ministry of Internal Affairs (MIA)
- Kosovo Police (KP)
- Kosovo Police Inspectorate (KPI)
- Kosovo Academy for Public Safety (KAPS)
- State Prosecutor's Office (SPO)
- Kosovo Special Prosecution Office (SPRK)
- Kosovo Prosecutorial Council (KPC)
- National Co-ordinator for Combating against Economic Crime (NCCEC)
- Kosovo Judicial Council (KJC)
- Kosovo Judicial Institute (KJI)
- Constitutional Court (CC)
- Supreme Court (SC)
- Ministry of Justice (MoJ)
- Agency for Managing Seized and Confiscated Assets (AMSCA)
- Kosovo Business Registration Agency (KBRA/MTI)
- Ministry of Trade and Industry (MTI) – representative of the Metrology Agency and representative of the Laboratory for Control of Works on Precious Metals
- Department for Registration and Liaison with NGOs (DRLNGO/MPA)
- Judges from Basic and Municipal courts of Pristina
- Kosovo Tax Administration (KTA)
- Kosovo Tax Administration – Games of Chance Division
- Kosovo Customs (KC)
- Kosovo Intelligence Agency (KIA)
- European Union Office in Kosovo (EUO)
- European Union Rule of Law Mission in Kosovo (EULEX) – representatives covering police, prosecution, judiciary and customs
- Team Leader of EU Funded Projects on "Support to AMSCA" and "Support to Kosovo Institutions for combating financial and economic crime"
- Representative of EU Twinning Project "Strengthening Criminal Investigation Capacities against Organised Crime and Corruption"
- Organisation for Security and Cooperation in Europe (OSCE) - Mission in Kosovo
- Resident Advisor of US Department of Treasury – Office of Technical Assistance
- United Nations Interim Administration Mission in Kosovo (UNMIK)
- Kosovo Institute for Policy Research and Development (KIPRED)
- World Bank Office in Kosovo
- IMF Office in Kosovo
- Society of Certified Accountants and Auditors of Kosovo (SCAAK)
- Kosovo Chamber of Notaries (KCN)
- Kosovo Chamber of Advocates (KCA)
- Kosovo Banker's Association (KBA)
- Representatives of commercial banks (Raiffeisen, Procredit, Banka Kombëtare Tregtare) and life insurance companies; and
- Association of Micro Finance Institutions in Kosovo (AMIK).

**ANNEX 3: List of key laws, regulations and other material received**

- Law on the Prevention of Money Laundering and Terrorist Financing (Law No. 03/L-196 of 30 September 2010), AML/CFT Law;
- Law on Amending and supplementing the Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing (Law No. 04/L-178 of 11 February 2013);
- Law on Central Bank of Kosovo (Law No. 03/L-209 of 22 July 2010);
- Law on Payment System (Law No. 04/L-155 of 4 April 2013);
- Law on Banks, Microfinance Institutions and Non Bank Financial Institutions (Law No. 04/L-093 of 12 April 2012);
- Law on Pension Funds of Kosovo (Law No. 04/L-101 of 6 April 2012);
- Law on amending and supplementing Law No. 04/L-101 on Pension Funds (Law No. 04/L-168 of 12 March 2013);
- UNMIK Regulation No. 2001/25 on the Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries;
- Law on Precious Metal Works (Law No. 04/L-154 of 13 December 2012);
- New Criminal Code (Law No. 04/L-082 of 20 April 2012);
- New Criminal Procedure Code (Law No. 04/L-123 of 13 December 2012);
- Law on Extended Powers for Confiscation of Assets acquired by Criminal Offence (Law No. 04/L-140 of 11 February 2013);
- Law on Execution of Penal Sanctions (Law No. 03-L-191 of 22 July 2010) -repealed;
- Law on Execution of Penal Sanctions (Law No. 04/L-149 of 29 July 2013);
- Law on Executive Procedure (Law No. 03/L-008 of 2 June 2008);
- Law on Protection of Witness (Law No. 04/L-015 of 29 July 2011);
- Law on State Prosecutor (Law No. 03/L-225 of 30 September 2010);
- Law on Special Prosecution Office (Law No. 03/L-052 of 13 March 2008);
- Law on Jurisdiction and Competences of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053 of 13 March 2008) - amended by Law No. 04/L-273 on amending and supplementing the laws related to the mandate of the European Union Rule of Law Mission in Kosovo;
- Law on the Bar (Law No. 03-L-117 of 20 November 2008) - repealed;
- Law on the Bar (Law No. 04/L-193 of 2 May 2013);
- Law on Notary (Law No. 03/L-010 of 17 October 2008);
- Law on Amending and Supplementing the Law No. 03/L-010 on Notary (Law No. 04/L-002 of 21 July 2011);
- Law on Police (Law No. 04/L-076 of 23 January 2012);
- Law on Police Inspectorate of Kosovo (Law No. 03/L-231 of 14 October 2010);
- Law on Kosovo Academy for Public Safety (Law No. 04/L-053 of 21 October 2011);
- Law on State Border Control and Surveillance (Law No. 04/L-072 of 21 December 2011);
- Law on the Kosovo Intelligence Agency (Law No. 03/L-063 of 21 May 2008);
- Law on Management of the Seized or Confiscated Assets (Law No. 03/L-141 of 10 July 2009);
- Law on Accounting, Financial Reporting and Audit (Law No. 04/L-014 of 29 July 2011);
- Customs and Excise Code of Kosovo (Law No. 03/L-109 of 10 November 2008);
- Law on Amending and Supplementing Customs and Excise Code No. 03/L-109 (Law No. 04/L-099 of 3 May 2012);
- Law on Tax Administration and Procedures (Law No. 03/L-222 of 12 July 2010);
- Law on Amending and Supplementing the Law No. 03/L-222 on Tax Administration and Procedure (Law No. 04/L-102 of 19 April 2012 and Law No. 04/L-223);
- Law on Business Organisations (Law No. 02/L-123 of 27 September 2007);
- Law on Amending and Supplementing of the Law No. 02/L-123 on Business Organisations (Law No. 04/L-006 of 23 June 2011);

- Law on Liability of Legal Persons for Criminal Offences (Law No. 04/L-030 of 31 August 2011);
- Law on Freedom of Association in Non-Governmental Organisations (Law No. 04/L-057 of 29 August 2011);
- Law on Classification of Information and Security Clearances (Law No. 03/L-178 of 1 July 2010);
- Law on Games of Chance (Law No. 04/L-080 of 6 April 2012);
- Law on International Agreements (Law No. 04/L-052 of 14 November 2011);
- Law on International Legal Cooperation in Criminal Matters (Law No. 04/L-031 of 31 August 2011) - repealed;
- Law on International Legal Cooperation in Criminal Matters (Law No. 04/L-213 of 31 July 2013);
- Law on Implementation of International Sanctions (Law No. 03/L-183 of 15 April 2010);
- Central Banking Authority of Kosovo (CBK) - Advisory Letter 2007 of 1 of May 2007 on the Prevention of Money Laundering and Terrorist Financing;
- CBK – Rule X on the Prevention of Money Laundering and Terrorist Financing;
- CBK - Regulation for International Payments of January 2014;
- CBK – Regulations on Licensing and Internal Controls for Banks, Non-bank Financial Institutions and Microfinance Institutions;
- Financial Intelligence Centre/Unit (FIU) - Administrative Directives;
- Ministry of Finance - Administrative Instruction No. 3/2013 on the Implementation of the Law No. 04/L-080 on Games of Chance;
- Kosovo Prosecutorial Council - Regulation for the Establishment and Functioning of the National Coordinator of 27 December 2013.

The present report provides the first comprehensive and structured assessment of the level of harmonization of Kosovo's anti-money laundering and combating the financing of terrorism (AMC/CFT) framework with applicable international standards. It was prepared based on the FATF/MONEYVAL evaluation methodology, specifically tailored for Kosovo. The report contains an in-depth analysis of AML/CFT measures taken by Kosovo authorities and their compliance with FATF 40+9 Recommendations, as well as other relevant international standards. The report provides specific recommendations and an action plan for addressing identified shortcomings and adopting necessary legislative, institutional and policy reforms aimed at further strengthening the AML/CFT regime in line with international standards. The report also forms a solid basis for streamlining international technical assistance to Kosovo in the economic crime area.

The report has been prepared within the framework of the European Union and Council of Europe Joint Project against Economic Crime in Kosovo (PECK), co-funded by the European Union and the Council of Europe, and implemented by the Council of Europe. The main objective of the project is to strengthen institutional capacities to counter corruption, money laundering and the financing of terrorism in Kosovo in accordance with European standards, through thorough assessments and recommendations for improving and streamlining economic crime reforms.

**www.coe.int/peck**

The Economic Crime and Cooperation Unit (ECCU) at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

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EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE