Funded by the European Union

EUROPEAN UNION

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Implemented by the Council of Europe

Project against Money Laundering and Terrorist Financing in Serbia
MOLI Serbia

TECHNICAL PAPER:

ANALYSIS AND RECOMMENDATIONS ON THE SERBIAN ANTI- MONEY LAUNDERING/COUNTERING TERRORIST FINANCING LEGISLATION

Opinion of the Action against Crime Department (DGI), Council of Europe, prepared on the basis of the expertise by Mr Andres Cedhagen, Council of Europe expert

September 2011

CMU-MOLI/Serbia-2/2011

For any additional information please contact:
Corruption and Money Laundering Unit
Economic Crime Division/DISAC
Directorate of Co-operation - DG-HL, Council of Europe
F-67075 Strasbourg Cedex FRANCE
Tel: +33 388 41 29 76/Fax +33 390 21 56 50
Email: ilknur.yuksek@coe.int
Web: www.coe.int/economiccrime

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union and/or the Council of Europe.

TABLE OF CONTENTS

INTRODUCTION

Under Activity 1.1 of its Workplan, the MOLI-Serbia Project is to conduct an Analysis of Serbian legislation and practice and provide support in the preparation of the necessary legislative drafts. This technical paper provides the 'Analysis and Recommendations on the Serbian Anti-Money Laundering and Countering Financing of Terrorism legislation' submitted by Mr. Anders Cedhagen, Judge of Appeal, Sweden, on behalf of the Council of Europe MOLI-Serbia Project

It has been produced for the benefit of the Administration for the Prevention of Money Laundering (APML) and other relevant institutions such as Ministry of Interior, Ministry of Justice, Ministry of Finance, Prosecutor's Office and Judiciary to enable them to monitor the completeness and coherence of the relevant Serbian legislation and its conformity with international standards and policy goals.

The paper is a comparison between the Serbian Criminal Code (CC), the Serbian Criminal Procedure Code (CPC), the Law on the Prevention of Money Laundering and the Financing of Terrorism (AML/CFT Law) of Serbia, and the international standards in the field of anti-money laundering and countering financing of terrorism (AML/CFT). Thus, the Serbian laws are on one hand and the international standards in the field of anti-money laundering and countering financing of terrorism (AML/CFT) on the other.

The national materials used are the English translation of the Serbian Criminal Code (CC) ("Official Gazette of RS", Nos. 85/2005, 88/2005, 107/2005), the Serbian Criminal Procedure Code (CPC), and the Serbian Law on the Prevention of Money Laundering and the Financing of Terrorism.

The international standards used are mainly the Financial Action Task Force (FATF) 40 Recommendations on money laundering, the FATF 9 Special Recommendations on Terrorist Financing, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), the 2000 United Nations Convention on Transnational Organized Crime (the Palermo Convention), the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism (the Financing of Terrorism Convention), the Methodology for assessing compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations (the Methodology), and the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the Warsaw Convention). The most important Articles are attached in the Annex to this report.

The following articles in the Serbian Criminal Code were evaluated; Articles 7, 17, 30-37, 79, 87, 91-93, 112, 221, 312, 345, 391 and 393. Furthermore, the Special part of the Criminal

Code was assessed against the FATF list of "designated categories of offences", especially insider trading and market manipulation. Articles 82-86, 201-212, 512-520 and chapter XXIX (a) of the Criminal Procedure Code and the Law on the Prevention of Money Laundering and the Financing of Terrorism were evaluated.

After the initial evaluation three additional documents were assessed. The first of them related to changes in the Criminal Code, Articles 231 and 393 concerning Money Laundering and Terrorist Financing respectively. The second related to amendments in the Law on Capital Markets that criminalized Market Manipulation and Insider Trading. The third was a Rulebook concerning cross border transfer of currency and the declaration of other bearer negotiable instruments that was published in the Serbian Official Journal 2009.

The conclusions drawn from the analysis are produced at the end of each particular section of legislation assessed so as to aid understanding of the paper.

EXECUTIVE SUMMARY

The overall impression is that the Serbian Laws are of a good standard and that most of the international AML/CFT standards have been implemented. There are however some comments and recommendations on amendments that could be made. From this comparison the following deficiencies can be concluded:

As far as the financing of terrorism concerned, the CC makes it an offence to provide or collect funds. However, there is no definition in the CC on funds, which makes the scope of the offence unclear. Moreover, it is uncertain which of the treaties referred to in the Annex to the UN Financing of Terrorism Convention[1] Serbia is a party to. If any of these treaties are not implemented in Serbia, Serbia should ensure that any act that constitutes an offence within the scope of and as defined in one of these treaties is an offence in Serbia. It is, therefore, unclear if Article 2. 1. a of the Financing of Terrorism Convention is implemented in practice.

In addition to the financing of terrorist acts, the financing of terrorists and financing of terrorist organisations also have to be criminalized. This is not the case in the CC. Article 393 is therefore too narrow and should be amended to cover all that is required by international standards.

It is unclear if the CC requires that funds are used to carry out a terrorist act(s) or that funds are linked to a specific terrorist act(s). None of the offences set out in Article 2(5) of the Terrorist Financing Convention are covered by the CC.

[1] http://www.un.org/law/cod/finterr.htm

The seizure and confiscation regime as laid down in the CC and CPC is basically sound and comprehensive, although not completely in line with all relevant mandatory standards. The following issues should be addressed, or at least revisited:

- The principle of the instrumentalities being only subject to confiscation conditional to belonging to the offender, can only apply if the actual owner is *bona fide*;
- The criminal proceeds should be subject to confiscation wherever located or not only when in the property of the offender;
- Confiscation of proceeds in the hands of third parties, where the *bona fide* has not been established, should be unconditional and not depend from the acquisition price;
- The law should leave no doubt that the definition of "proceeds" also covers all immaterial, indirect and intermingled proceeds;
- All terrorism related assets in general should be subject to confiscation;
- The rules and procedure surrounding the protection of the *bona fide* third party should be thoroughly reviewed and adapted;
- Ensure that the execution of confiscation orders cannot be obstructed by contractual evasive action;
- Ensure that provisional conservatory measures can also be taken in respect of untainted property to safeguard effective subsequent equivalent value confiscation.

Serbia should immediately implement effective laws and procedures to freeze terrorist funds or other assets of persons designated by the relevant United Nations Security Council Resolutions. Such freezing should take place without delay and without prior notice to the designated persons involved.

The AML/CFT Law should be amended to include and make clear that there is a definition of funds in relation to reporting requirements. In respect to cash couriers, firstly, customs should be able to request and obtain further information from the carrier. Secondly, the Law should also cover the situation when the person makes a false declaration. Thirdly, freezing and confiscation of bearer negotiable instruments (and currencies) should be made possible.

The requirements concerning alternative remittances should be implemented in the AML/CFT Law or, if possible, in another law. Serbia should also conduct the required review concerning non-profit organisations.

1. FINANCING OF TERRORISM OFFENCE

Relevant provisions:

Art. 393 of the CC

1.1 SUMMARY OF STANDARDS

References:

Art. 2 of the Financing of Terrorism Convention

Art. 2 of the Warsaw Convention

FATF Special Recommendation II / Methodology II 1 – 4

The Financing of Terrorism Convention makes it an offence when a person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds 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 an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex to the Convention or 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, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

For an act to constitute an offence, it shall not be necessary that the funds were actually used to carry out an offence. Any person also commits an offence if that person attempts to commit an offence. Any person also commits an offence if that person participates as an accomplice in an offence or organizes or directs others to commit an offence or contributes to the commission of one or more offences by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence or be made in the knowledge of the intention of the group to commit an offence.

1.2 ANALYSIS OF RELEVANT PROVISIONS

Article 393 - states that it is an offence to directly or indirectly provide or collect funds intended for the financing of terrorism (article 312), international terrorism (article 391) and taking hostages (article 392). It is also an offence to encourage or assist someone to provide or collect funds for the financing of terrorism regardless of whether the act is committed or whether the funds are used for commit the financing of terrorism.

Article 312 - criminalises whoever has an intent to compromise the constitutional order or security of Serbia, causes an explosion or fire, or commits another generally dangerous act,

or commits an abduction of a person or some other act of violence, or by threat of committing such generally dangerous act or use of nuclear, chemical, biological, or other dangerous substances and thereby causes fear or insecurity among citizens.

1.3 CONCLUSIONS AND RECOMMENDATIONS

Terrorist financing should be criminalised consistent with Article 2 of the Financing of Terrorism Convention, and should have the following characteristics:

Firstly, terrorism financing offences should extend to any person who wilfully provides or collects funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in full or in part:

(i) To carry out a terrorist act(s);

(ii) By a terrorist organisation; or

(iii) By an individual terrorist.

Secondly, terrorism financing offences should extend to any funds, as that term is defined in the Financing of Terrorism Convention. This includes funds whether from a legitimate or illegitimate source.

Thirdly, terrorism financing offences should not require that the funds:

(i) Were actually used to carry out or attempt a terrorist act(s); or

(ii) Be linked to a specific terrorist act(s).

Fourthly, it should also be an offence to attempt to commit the offence of terrorist financing.

Fifthly, it should also be an offence to engage in any of the types of conduct set out in Article 2(5) of the Financing of Terrorism Convention.

According to the interpretative note to Special Recommendation II

1. The term terrorist refers to any natural person who:

(i) Commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
(ii) Participates as an accomplice in terrorist acts;
(iii) Organises or directs others to commit terrorist acts; or
(iv) Contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

2. The term terrorist organisation refers to any group of terrorists that:
(i) Commits, or attempts to commit, terrorist acts by any means, directly or indirectly,

unlawfully and wilfully;
(ii) Participates as an accomplice in terrorist acts;
(iii) Organises or directs others to commit terrorist acts; or
(iv) Contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

The CC makes it an offence to provide or collect funds. However, there is no definition in the CC on funds, which makes it uncertain on the scope of the offence. Moreover, it is also uncertain which of the treaties referred to in the Annex to the Financing of Terrorism Convention that Serbia is a party to. If any of these treaties are not implemented in Serbia, Serbia should make sure that any act that constitutes an offence within the scope of and as defined in one of these treaties is an offence in Serbia. It is therefore uncertain if Article 2. 1 (a) in the Financing of Terrorism Convention is implemented.

It seems that Article 2.1 (b) in the Financing of Terrorism Convention is implemented in the CC.

Besides the financing of terrorist acts, financing of terrorists and financing of terrorist organisations also have to be criminalised. This is not the case in the CC. Article 393 is therefore too narrow and should be amended to cover all obligations as required by the international standards.

It is not clear whether the CC requires that the funds be actually used to carry out a terrorist act(s) or if it is required that they be linked to a specific terrorist act(s).

None of the offence set out in Article 2(5) of the Financing of Terrorism Convention are covered by the CC.

The summary is therefore that the criminalisation of Financing of Terrorism has to be updated and more in line with the international standards.

2. CONFISCATION AND PROVISIONAL MEASURES

Relevant provisions:

Art. 79 / 87/ 91-93 of the CC

Art. 82-86/ 201-212/ 512-520 of the CPC

2.1 SUMMARY OF STANDARDS

References:

Art. 8 of the Financing of Terrorism Convention

Art. 3 – 5 and 7 of the Warsaw Convention

FATF Recommendation 3 / FATF Special Recommendation III / Methodology III.11

2.1.1 Confiscation

FATF Special Recommendation III states that countries should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organizations and also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations. According to the FATF Methodology SR III.11 the Criteria concerning money laundering shall also apply in relation to the freezing, seizing and confiscation of terrorist-related funds or other assets in context other than those described in Criteria III.1 – III.10. In the following I have therefore made an analysis of the objective of confiscation and provisional measures concerning money laundering.

In respect of money laundering and terrorism financing the international standards require every national criminal legislation to provide for the confiscation of:

- The object of the offence: the money laundered or the funds intended to finance terrorism (in its broadest sense);
- The instrumentalities used or intended for use: items facilitating the commission of the offence;
- The proceeds of the offences: assets derived from the commission of predicate offences, ML or TF;
- Equivalent value property: in case the object or proceeds of the offence have disappeared or cannot be effectively recovered.

“Proceeds” should cover all assets directly and indirectly originating or deriving from an offence, including the substitute assets and income or yields from such primary or substituted

assets. Confiscation should not be conditional to the assets belonging to or being in the possession of the offender. The rights of the *bona fide* third parties involved must however be protected. According to FATF Methodology Criteria III.12 such protection should, in the context of terrorism financing, be considered with the standards provided in Article 8 of the Terrorism Financing Convention, where applicable. There should be legal means preventing or invalidating any action obstructing the recovery of the relevant asset.

2.1.1 Provisional measures

An appropriate tracing and seizure regime should ensure an effective recovery of all assets subject to confiscation according to the principle of what can be confiscated, can be seized

2.2 ANALYSIS OF RELEVANT PROVISIONS

Preliminary Remark: In the English version of the CC there is confusion between the notion of "confiscation" and "seizure". "Seizure" is used in provisions that clearly refer to confiscation rules (e.g. art. 87 CC). "Temporary seizure" is then meant to cover the provisional seizure measure. Presumably this is a translation issue and the original Serbian text is making the appropriate differentiation between both terms. This analysis is based on following use of the terminology:

- *Confiscation* is the permanent deprivation of assets by order of a competent judicial authority
- *Seizure* is initiated by a competent judicial authority temporarily prohibiting the transfer, conversion, disposition or movement of assets, predominantly for purposes of safeguarding the evidence or secure effective confiscation.

2.2.1 Confiscation

Article 79 of the CC

Provides for the "confiscation of objects" as a security measure that can be imposed on an offender. Apparently this refers to Article 87 of the CC (incorrectly translated as "seizure of objects").

Article 87 of the CC

Provides for the confiscation of the (intended) instrumentalities and the product of the offence under certain conditions:

- General principle: discretionary confiscation if the item is property of the offender.
- The condition of the item belonging to the offender does not apply when deprivation is required for safety reasons or risk of repeated use for criminal purposes. The rights of third parties on compensation however take priority.

- Confiscation of instrumentalities and the product is mandatory if so specifically stipulated in the law.

It is important to note that the product of the offence ("… objects resulting from the commission of a criminal offence...") is not to be interpreted as also referring to criminal proceeds, which are specifically covered by Art. 91 *et seq.* of the CC

The international standards allow for a discretionary application of the measure, but do not make it a condition of the instrumentalities belonging to the offender. If the term "instrumentalities" is correctly understood as objects or equipment facilitating the commission of an offence, then this reservation can be seen in the light of the protection of the rights of the *bona fide* owner. The formulation however seems to refer to the *"partie civile"* who suffered damages, not to the *bona fide* owner of the instrumentalities as such (see *infra* for the comments on art. 93 CC).

In the context of the ML and TF offence, the confiscation of the instrumentalities is not expressly provided, so the general principle applies. The condition of the instrumentality belonging to the offender is only in accordance with the standards under the condition of the third party owner being *bona fide*. This condition is not specified in Art. 87 of the CC.

Article 91 – 92 of the CC

Art. 91 of the CC state the general principle of the mandatory and conviction based confiscation of the criminal proceeds. Art. 92 enumerates the different forms of such proceeds that have to be recovered "from the offender", and also provides for the equivalent value confiscation "when such confiscation should not be possible" (1). Confiscation in the hands of third parties is only possible if they have received it without paying or against clearly insufficient compensation (2). Proceeds of somebody else's criminal activity are also subject to mandatory confiscation (3).

The confiscation of the own proceeds is clearly covered in (1), and so is its equivalent value aspect. The condition for the equivalent value confiscation is quite generally phrased ("… not be possible..."), but as it refers to "such confiscation" apparently it should be understood as referring to the specific situation where the assets cannot be found in the possession or ownership of the offender. As such it is not a deficiency, but it raises a question: what if the proceeds are identified in the property of a third party? The principle is that proceeds should be subject to confiscation regardless of whether they are held or owned by the offender or by a third party, so the first focus should be on the proceeds, irrespective of where they are located, and equivalent value confiscation is applied only when they cannot be recovered in any event.

It should also be noted that the standards refer to "property of corresponding value" or

"property the value of which corresponds …", so the equivalent value confiscation should also apply to and executed on other assets than money, e.g. real estate.

Art. 92 (2) & (3) of the CC refer to proceeds held by a third party and raise an interpretation issue. As already stated, proceeds should also be subject to confiscation when held by a third party (reservation made for the rights of the bona fide third party). When read together, it can be deduced from (2) and (3) that such confiscation is subject to the condition of the third party having acquired the assets for free or below their value. If this is the case, then (2) should be deleted: the only exception the standards allow for third party confiscation is the bona fide reservation, irrespective of the cost of the acquisition.

Proceeds (translated as "material gain") are described as "money, items of value and other material gains". This enumeration raises an issue as to what is exactly covered.

- First of all the translation seems to indicate material, i.e. tangible assets. There should be no doubt that all economical advantages, material or immaterial, are covered. Article 513 CPC refers to "proceeds from crime" which is appropriate, however this only refers to the determination of criminal proceeds.
- Secondly, the standards target not only the direct proceeds, but also the indirect ones, including the transformed or converted property (substitute assets) and the income or other yields of such direct or indirect assets. It may be that jurisprudence has already given the appropriate clarification, but if not, the law should expressly provide for the required widest possible coverage.
- Thirdly, the Criminal Code does not make any reference to how to approach intermingled (criminal and clean) proceeds. The solution may e.g. lie in the application of the equivalent value confiscation, but that should be confirmed by an authoritative source (such as jurisprudence, doctrine, parliamentary documents) or a legal reference should clarify how to deal with this situation.

The Criminal Code surprisingly makes no reference at all to any general principle of confiscation of the object of the offence, i.e. the item the offence relates to or is perpetrated on (such as drugs in drug trafficking), which is a normal feature in continental law systems and differs from the notion of instrumentality. In the context of money laundering this relates to the criminal proceeds being laundered, in the terrorism financing context the funds or equivalents that (are destined to) support the terrorist, terrorist group or terrorist act. Both instances are however specifically covered by the mandatory confiscation provided by respectively Art. 231 (5) CC (ML) and Art. 393 (2) CC (TF), so the international standards are observed in this respect.

However, SR III, more particularly SRIII.11 of the methodology, goes further. Confiscation

should be provided for any “terrorism-related funds”, meaning also funds related to or in the possession of terrorists or terrorist groups in general, which goes beyond those funds collected or used to finance the specific terrorist acts indicated in Art. 393(2) of the CC. There are no provisions in the Serbian CC that cover such eventualities.

Article 93 of the CC and Article 201 – 212 of the CPC

Art. 93 of the CC covers the rights of the “injured party”. It may be a question of translation, but as this apparently refers to the continental law figure of *“Partie Civile”, i.e.* the person suffering damages caused by the offence, it seems to basically cover a different situation than the one related to the *bona fide* third party held (equivalent) proceeds, even if both notions and interests may sometimes coincide. The procedure elaborated in Article 201 CPC *et seq.* clearly relates to the regulation of the civil action concerning the claims to compensate the damage inflicted on others by the commission of an offence, during the criminal proceedings. It does not cover the situation arising from the confiscation of assets affecting the interests of third parties.

As such, the provision does not protect the rights of the *bona fide* third parties as required by the standards, nor is such protection adequately organised elsewhere, although some provisions may already be considered more or less apt to be used for this purpose (*e.g.* art.207 CPC). They should have the express possibility to claim their rights and status both during and after the criminal proceedings in the conditions and according to procedures determined by law. This is of particular importance in the context of the confiscation of equivalent seizure/confiscation and the execution of foreign confiscation orders.

Article 512 – 520 of the CPC

Art.512 of the CPC makes an exception from the conviction based confiscation of objects in general: in case the criminal proceedings do not end in a conviction, there is still the possibility for the court to confiscate “in the interest of general security or reasons of morality”. Here again the confiscation is viewed as a security measure. Art. 517 CPC goes further in respect of the criminal proceeds: beside confiscation based on a conviction, there are several other instances where the court can order confiscation. This is not against the international standards as such (common law systems use the civil *in rem* confiscation procedure), but if the notions of “general security” and “morality” are taken too far, or if there are no sufficient safeguards for surrounding non-conviction based confiscations, there might be a problem in respect of the fundamental principle of the presumption of innocence and the rights of the defence, especially in the case of an acquittal. I however cannot go into detail or give a substantiated opinion for lack of insight and knowledge of the procedures mentioned in Article 517 of the CPC.

Article 514 of the CPC is linked to the application of Art. 92 (2) and (3) of the CC. Reference is made to the remarks made in respect of this provision. The purpose of this provision is not entirely clear: it seems that the procedure is meant to determine the real value of the transferred proceeds, and not to determine the *bona fide* of the third party. Neither is it clear what ”the representative of a legal entity” means.

The other articles do not call for any comments.

2.2.2 Provisional measures

Art. 82 – 86 of the CPC

Note: the translated text again confuses the terms “confiscation” and “seizure”. The analysis is based on a correct use of the terminology.

Art. 82 state the general principle of seizure as a measure to ensure efficient subsequent confiscation of “objects” (no mention of “proceeds”) and to safeguard the evidence.

The relevant provisions do not specify if the procedure is conducted *ex parte* (unilaterally) or without prior notice (FATF crit. 3.3), but that seems implied. Seizure or production orders of confidential and protected documents, suspension of payments and transactions, and seizure of bank deposits are not adequately addressed. What is mentioned in paragraph 2 is automatic data processing devices and equipment on which electronic records are kept or may be kept.

The reservation made in art. 83 (1) CPC finds no support in the standards.

FATF Recommendation 3 calls for the ability to seize any asset that is subject to confiscation. Whereas the principle is stated in the CPC as far as the objects and proceeds derived from an offence are concerned, the possibility to seize assets unrelated to an offence to safeguard the equivalent value confiscation is not addressed in the CPC. So the law should provide for the seizure of *e.g.* the house of a drug dealer, even if he received it as part of his heritance and no connection with any offence can be proven, in the prospect of (the execution of) an equivalent value confiscation order.

2.2.3 Other issues

FATF Recommendation 3 also requires jurisdictions to have the authority to prevent or void contractual or other actions that (are intended to) create an obstacle to recover criminal assets. It is not evident if the Serbian confiscation regime covers such eventuality. Prevention is obviously achieved through an adequate application of the seizure measures, but what about the “voiding of (contractual) actions”? In principle these actions should not obstruct a domestic confiscation order when the party involved is *mala fide*, and consequently guilty of money laundering. However it is questionable whether there are

appropriate legal counter-measures available when the execution of a foreign confiscation order is thwarted by schemes or contracts intended to shield the assets from confiscation (donation, sale, mortgage, pawning…). The legal provisions under consideration here do not provide a clear answer, so the issue deserves closer examination by the authorities.

Although the related international standards are not of a mandatory nature and leave the decision to the discretion of individual jurisdictions, it is also recommended to give serious consideration to introduce following features in the seizure/confiscation regime:

- The reversal of burden of proof on the origin of the assets subject to confiscation, *post* conviction for the offence (protection of the principle of presumption of innocence)[2];
- The establishment of a criminal asset forfeiture bureau supporting the investigation in tracing the assets and the implementation of the confiscation orders, and managing the assets efficiently[3];
- The establishment of an asset forfeiture fund to be used for law enforcement purposes or other means to enhance the fight against ML and TF;

2.3 CONCLUSIONS AND RECOMMENDATIONS

The seizure and confiscation regime as laid down in the Serbian Criminal Code and Criminal Procedure Code is basically sound and comprehensive, although not completely in line with all the relevant mandatory standards. The following issues should be addressed, or at least revisited:

- The principle of the instrumentalities being only subject to confiscation conditional to belonging to the offender, can only apply if the actual owner is bona fide;
- The criminal proceeds should be subject to confiscation wherever located or not only when in the property of the offender;
- Confiscation of proceeds in the hands of third parties, where the bona fide has not been established, should be unconditional and not depend from the acquisition price;
- The law should leave no doubt that the definition of “proceeds” also covers all immaterial, indirect and intermingled proceeds;
- All terrorism related assets in general should be subject to confiscation;
- The rules and procedure surrounding the protection of the bona fide third party should be thoroughly reviewed and adapted;

[2] Article 3.4 of the CoE Warsaw Convention is phrased in a mandatory sense (“shall adopt”) if the principles of the domestic law so allow.

[3] Article 6 of the CoE Warsaw Convention imposes “proper management” of the assets.

- Ensure that the execution of confiscation orders cannot be obstructed by contractual evasive action;
- Ensure that provisional conservatory measures can also be taken in respect of untainted property to safeguard effective subsequent equivalent value confiscation.

3. FREEZING ACCORDING TO THE UN LISTS

Relevant provisions:

3.1 SUMMARY OF STANDARDS

References:

FATF Special Recommendation III & FATF Methodology III. 1-10

United Nations Security Council Resolutions 1267 and its successors, and SCR 1373

Countries should, according to FATF Special recommendation III, implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations Security Council Resolutions relating to the prevention and suppression of the financing of terrorist acts.

3.2 ANALYSIS OF RELEVANT PROVISIONS

Countries should have effective laws and procedures to freeze terrorist funds or other assets of persons designated by the United Nations Security Council Resolutions. Such freezing should take place without delay and without prior notice to the designated persons involved. From the material I have been provided I have not found any such regulation or procedures.

3.3 CONCLUSIONS AND RECOMMENDATIONS

Serbia should immediately implement the required measures.

4. PREVENTION OF THE FINANCING OF TERRORISM

Relevant provisions:

The Law on the Prevention of Money Laundering and the Financing of Terrorism

4.1 SUMMARY OF STANDARDS

References: FATF Special Recommendations IV-IX / Methodology IV-IX

4.1.1 Reporting suspicious transactions related to terrorism

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

4.1.2 International Co-operation

Countries should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations. Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

4.1.3 Alternative Remittance

Countries should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Countries should also ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

4.1.4 Wire transfers

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain. Moreover, countries should take measures to ensure that financial institutions, including money remitters, conduct

enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number).

4.1.5 Non-profit organizations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they can not be misused:

(i) By terrorist organisations posing as legitimate entities;

(ii) To exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

(iii) To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

4.1.6 Cash Couriers

Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation. Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that they suspect to be related to terrorist financing or money laundering, or that are falsely declared or disclosed. Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing or money laundering, countries should also adopt measures, including legislative ones consistent with Recommendation 3 and Special Recommendation III, which would enable the confiscation of such currency or instruments.

4.2 ANALYSIS OF RELEVANT PROVISIONS

4.2.1 Reporting suspicious transactions related to terrorism

Terrorism financing is defined in Article 2 of the AML/CFT Law. This definition is much broader then in the CC. It should be one and the same definition in all Laws to avoid confusion.

The AML/CFT Law definition of terrorism financing includes most of what is mentioned above under financing of terrorism offence, however the Law does not define funds, which makes it uncertain on the scope.

Article 37 of the AML/CFT Law states that the obligor shall furnish the APML with data whenever there are reasons for suspicion of terrorism financing with respect to a transaction or customer, before the transaction, and shall indicate, in the report, the time when the

transaction is to be carried out. In a case of urgency, such report may be delivered also by telephone, in which case it shall subsequently be sent to the APML in writing, but no later than the next business day. The reporting obligation for transactions shall also apply to a planned transaction, irrespective of whether or not it has been carried out.

There is therefore an obligation to send Suspicious Transaction Reports (STRs) to the FIU as required in SR IV.

4.2.2 International Co-operation

Article 61-64 in the AML/CFT Law provides the FIU with a broad competence for international co-operation also for cases connected with terrorism financing. Therefore, FATF Recommendation 40 can be considered to be fulfilled. Whether Recommendations 36-39 is implemented has not been able to evaluate on the material I have been provided.

4.2.3 Alternative Remittance

There are no regulations in the AML/CFT Law or the CC or the CPC concerning alternative remittances. There might be some regulation in the banking law or any other law concerning financial institutions or other enterprises.

4.2.4 Wire transfers

Wire transfer is defined in Article 3 as transaction carried out by a payment and collection service provider, on behalf of the originator of the wire transfer, which is carried out electronically, in order to make the funds available to the beneficiary of the wire transfer at another payment and collection service provider, irrespective of whether the originator and the beneficiary is one and the same person.

According to FATF Recommendation 5 the due diligence measures should include wire transfers in the circumstances covered by the Interpretative Note to SR VII. Wire transfer is not included in the application of due diligence actions and measures in Article 9. However, wire transfers is included in Article 12 A and 12 B under the headline “Exemption from customer due diligence in relation to certain services”. The headline is misleading.

Article 12 A states that payment and collection service provider shall collect accurate and complete data on the originator, including name, address and account number, and include it in the form or message accompanying the incoming or outgoing wire transfer, regardless of the currency. Such data shall accompany the wire transfer throughout the entire payment chain, regardless of whether intermediaries participate in the payment chain and regardless of their number.

The payment and collection service provider shall identify and verify the identity of the wire transfer originator before such transfer. The provisions shall be applied irrespective of whether the wire transfer is domestic or international.

Article 12 A and 12 B seems to be in line with the international standards. Furthermore, in Article 12 C there are exemptions from the requirements that also seem to be in line with the standards. There are also sanctions provided for in Articles 88 and 89 in the AML/CFT Law.

4.2.5 Non-profit organizations

There are no regulations in the AML/CFT Law or the CC or the CPC concerning non-profit organizations.

4.2.6 Cash Couriers

Article 67-69 of the AML/CFT Law stipulates that any natural person crossing the state border carrying bearer negotiable instruments amounting to EUR 10,000 or more either in RSD or foreign currency, shall declare it to the competent customs body. The definition of bearer negotiable instruments includes cash, cheques, promissory notes, and other bearer negotiable instruments that are in bearer form. The declaration shall contain the name and surname, date and place of birth and place of permanent or temporary residence of the natural person. If the competent customs body establishes that a natural person is transferring, across the state border, bearer negotiable instruments in the amount lower than EUR 10,000, and there are reasons for suspicion of money laundering or terrorism financing, it shall obtain the purpose and intended nature of a business relationship, as well as information on the type of business and business activities of the carrier.

The competent customs body shall temporarily seize the bearer negotiable instruments that have not been declared and shall deposit them into the account, kept with the National Bank of Serbia, held by the body competent to adjudicate in minor offence proceedings.

The customs shall send the data to the APML regarding each declared or non-declared cross-border transportation of bearer negotiable instruments within three days from the date of such transfer, and where there are reasons for suspicion of money laundering or terrorism financing it shall also state the reasons thereof. In case of any cross-border transportation of bearer negotiable instruments in the amount lower than EUR 10,000, the customs shall send the data to the APML if there are reasons for suspicion of money laundering or terrorism financing.

Furthermore Article 90 of the AML/CFT Law states that any natural person not declaring to the competent customs body a cross-border transportation of bearer negotiable instruments amounting to EUR 10,000 or more in RSD or foreign currency shall be punished for minor offence with a fine amounting from RSD 5,000 to RSD 50,000, and if the declaration does

not contain all the required data, the natural person shall be punished for minor offence with a fine with the same amount.

A rulebook concerning cross border transfer of currency and other bearer negotiable instruments declaration was published in the Official Journal 2009. The rulebook prescribes the form and the content of the cross-border currency declaration. The regulation covers bearer negotiable instruments and currencies. According to the FATF Methodology IX 12, countries should consider including also the unusual movement of other precious metals or stones. However, the competent customs body, when conducting customs control in accordance with law, shall control the fulfilling of the requirement there is no legal authority to request and obtain further information from the carrier. There are no regulations in the AML/CFT Law on international co-operation regarding customs-to-customs information exchange.

Article 90 covers when a person does not declare a cross-border transportation and if the declaration does not contain all the required data, but there is no sanctions if the person makes a false declaration. It is also doubtful if it is possible to freeze any funds in accordance with the United Nations Security Council resolutions and if the Criminal Code can be used in this situation to make it possible to confiscate bearer negotiable instruments, see above.

4.3 CONCLUSIONS AND RECOMMENDATIONS

The AML/CFT Law should be amended to include and make clear that:

4.3.1 Reporting suspicious transactions related to terrorism

- There is a definition of funds

4.3.2 Cash Couriers

- There is a possibility for the customs to request and obtain further information from the carrier;
- The Law also cover the situation when the person makes a false declaration;
- Freezing and confiscation of bearer negotiable instruments (and currencies) are possible

The AML/CFT Law or other by law should implement the requirements concerning alternative remittances. Serbia should conduct the required review concerning non-profit organisations.

5. INSIDER TRADING AND MARKET MANIPULATION

Relevant provisions:

Art. 113 - 430 CC (special part)

5.1 SUMMARY OF STANDARDS

References:

Article 2 of the Palermo Convention

Article 1 of the Warsaw Convention

FATF Recommendation 1 /Methodology 1.3

There are minimum requirements on which approach countries have to have when implementing predicate offences. This is stated in FATF Recommendation 1. The predicate offences for money laundering should cover all serious offences, and countries should seek to extend this to the widest range of predicate offences. Where countries apply a threshold approach or a combined approach that includes a threshold approach, predicate offences should at a minimum comprise all offences which fall within the category of serious offences under their national law or which are punishable by a maximum penalty of more than one year's imprisonment or which are punished by a minimum penalty of more than six months imprisonment (for countries that have a minimum threshold for offences in their legal system). The absolute minimum is to include all offences, which are mentioned in the "Designated categories of offences". This means that all the listed offences have to be criminalized in each country.

5.2 ANALYSIS OF RELEVANT PROVISIONS

The Serbian CC seems to criminalize the following offences in the following articles:

- Organised criminal group - Article 346 and 349
- Racketeering - Article 346 and 349
- Terrorism - Article 312 and 391
- Terrorist financing - Article 393
- Trafficking in human beings - Article 350 and 388-389
- Migrant smuggling - Article 350
- Sexual exploitation - Article 184 – 185
- Sexual exploitation of children - Article 183 – 185
- Illicit drug trafficking - Article 246

- Illicit arms trafficking - Article 348
- Illicit trafficking in stolen goods - Article 221
- Illicit trafficking in other goods - Article 243
- Corruption - Article 367
- Bribery - Article 363 - 364 and 368
- Fraud - Article 208
- Counterfeiting currency - Article 223
- Counterfeiting products - Article 224 - 228 and 242
- Piracy of products - Article 198 - 202
- Environmental crime - Article 260 – 268
- Murder - Article 113
- Grievous bodily injury - Article 121
- Kidnapping - Article 132
- Illegal restraint - Article 132 – 133
- Hostage taking - Article 134 and 392
- Robbery - Article 206
- Theft - Article 203
- Smuggling - Article 230
- Extortion - Article 214
- Forgery - Article 355 – 358
- Piracy - Article 294

The Law on Capital Markets criminalize the following offences in the following articles

- Market Manipulation –Article 281
- Insider Trading – Article 282

5.3 CONCLUSIONS AND RECOMMENDATIONS

The author's understanding is that the money laundering offence in Article 231 is an all crime approach. What is therefore of importance is that all the offences, which are mentioned in the list of ”Designated categories of offences”, are criminalized. All of these offences seem to be covered in the CC and in the Law on Capital Market.

CONCLUSIONS AND RECOMMENDATIONS

While taking into account that Serbian Laws are generally of a good standard and that most of the international AML/CFT standards have been implemented, the above comparison clearly demonstrates that certain elements of the Serbian legislation concerning money laundering and terrorism financing do not comply with European and international standards.

In summary these deficiencies are as follows:

Terrorism Financing Offence

Terrorism financing should be criminalised consistent with Article 2 of the Financing of Terrorism Convention and therefore the criminalisation of the Financing of Terrorism has to be updated in the Serbian legislation to be more in line with the international standards.

Confiscation and Provisional Measures

The seizure and confiscation regime as laid down in the Serbian Criminal Code and Criminal Procedure Code is basically sound and comprehensive, although not completely in line with all the relevant mandatory standards.

The following issues should be addressed, or at least revisited:

- The principle of the instrumentalities being only subject to confiscation conditional to belonging to the offender, can only apply if the actual owner is bona fide;
- The criminal proceeds should be subject to confiscation wherever located or not only when in the property of the offender;
- Confiscation of proceeds in the hands of third parties, where the bona fide has not been established, should be unconditional and not depend from the acquisition price;
- The law should leave no doubt that the definition of “proceeds” also covers all immaterial, indirect and intermingled proceeds;
- All terrorism related assets in general should be subject to confiscation;
- The rules and procedure surrounding the protection of the bona fide third party should be thoroughly reviewed and adapted;
- It should be ensured that the execution of confiscation orders cannot be obstructed by contractual evasive action;
- It should be ensured that provisional conservatory measures can also be taken in respect of untainted property to safeguard effective subsequent equivalent value confiscation.

Freezing Assets According to the UN Lists

Countries should have effective laws and procedures to freeze terrorist funds or other assets

of persons designated by the United Nations Security Council Resolutions. Such freezing should take place without delay and without prior notice to the designated persons involved. Serbia does not have any such regulation or procedures and should immediately implement the required measures.

Prevention of the Financing of Terrorism

The AML/CFT Law should be amended to include and make clear that when reporting suspicious transactions related to terrorism that there is a definition of funds.

In relation to cash couriers the AML/CFT Law should be amended to include the possibility for the customs to request and obtain further information from the carrier; it should also cover the situation when the person makes a false declaration; and that the freezing and confiscation of bearer negotiable instruments (and currencies) are possible

The AML/CFT Law or other by law should implement the requirements concerning alternative remittances and Serbia should conduct the required review concerning non-profit organisations.

Insider Trading and Market Manipulation

The money laundering offence in Article 231 is an all crime approach and what is therefore of importance is that all the offences, which are mentioned in the list of ”Designated categories of offences”, are criminalized. All of these offences seem to be covered in the CC and in the Law on Capital Markets.

The Administration for the Prevention of Money Laundering (APML) has created a legal working group of national experts to facilitate and monitor the results of the expert analysis provided by the Council of Europe expert. This group should be encouraged to meet and discuss this Technical Paper and the Council of Europe should be prepared, through the MOLI-Serbia Project, to provide further expertise and assistance as required by them to ensure that all steps are taken to remedy the deficiencies identified, thereby bringing Serbian legislation in line with European and international standards as required.

ANNEX

DEFINITIONS – PENAL

1988 UN 'Vienna' Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Article 1

(f) "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

(l) "Freezing" or "seizure" means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority;

(p) "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

(q) "Property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

2000 UN 'Palermo' Convention against Trans-national Organized Crime

Article 2 - Use of terms

For the purposes of this Convention:

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

2005 Council of Europe 'Warsaw' Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

Article 1 – Use of terms

For the purposes of this Convention:

(a) "Proceeds" means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property as defined in sub-paragraph (b) of this article;

(b) "Property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;

(c) "Instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

(d) "Confiscation" means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;

(e) "Freezing" or "seizure" means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

FINANCING OF TERRORISM

FATF II. Criminalising the financing of terrorism and associated money laundering

Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

FATF Evaluation Methodology

II.1 Terrorist financing should be criminalised consistent with Article 2 of the Terrorism Financing Convention, and should have the following characteristics:

(a) Terrorism financing offences should extend to any person who wilfully provides or collects funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in full or in part:

(i) To carry out a terrorist act(s);

(ii) By a terrorist organisation; or

(iii) By an individual terrorist.

(b) Terrorism financing offences should extend to any *funds* as that term is defined in the TF Convention. This includes funds whether from a legitimate or illegitimate source.

(c) Terrorism financing offences should not require that the funds: (i) were actually used to carry out or attempt a terrorist act(s); or (ii) be linked to a specific terrorist act(s).

(d) It should also be an offence to attempt to commit the offence of terrorism financing.

(e) It should also be an offence to engage in any of the types of conduct set out in Article 2(5) of the Terrorism Financing Convention.

II.2 Terrorism financing offences should be predicate offences for money laundering.

II.3 Terrorism financing offences should apply, regardless of whether the person alleged to have committed the offence(s) is in the same country or a different country from the one in which the terrorist(s)/terrorist organisation(s) is located or the terrorist act(s) occurred/will occur

II.4 Countries should ensure that Criteria 2.2 to 2.5 (in R.2) also apply in relation to the offence of FT

1999 UN International Convention for the Suppression of the Financing of Terrorism

Article 1

For the purposes of this Convention:

1. "**Funds**" means assets of every 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, letters of credit.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds 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:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) 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, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

CONFISCATION AND PROVISIONAL MEASURES

FATF 40 Recommendations

Recommendation 3

Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to

confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to:

(a) Identify, trace and evaluate property which is subject to confiscation;

(b) Carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property;

(c) Take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and

(d) Take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

Rec. 3 Essential Criteria Methodology 2004

3.1 Laws should provide for the confiscation of property that has been laundered or which constitutes:

a) Proceeds from;

b) Instrumentalities used in; and

c) Instrumentalities intended for use in,

the commission of any ML, FT or other predicate offences, and property of corresponding value.

3.1.1 Criterion 3.1 should equally apply:

(a) To property that is derived directly or indirectly from proceeds of crime; including income, profits or other benefits from the proceeds of crime; and

(b) Subject to criterion 3.5, to all the property referred to above, regardless of whether it is held or owned by a criminal defendant or by a third party.

All the property referred to in criteria 3.1 and 3.1.1 above is hereafter referred to as "property subject to confiscation".

3.2 Laws and other measures should provide for provisional measures, including the freezing and/or seizing of property, to prevent any dealing, transfer or disposal of property subject to confiscation.

3.3 Laws or measures should allow the initial application to freeze or seize property subject to confiscation to be made ex-parte or without prior notice, unless this is inconsistent with fundamental principles of domestic law.

3.4 Law enforcement agencies, the FIU or other competent authorities 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.

3.5 Laws and other measures should provide protection for the rights of bona fide third parties. Such protection should be consistent with the standards provided in the Palermo Convention.

3.6 There should be authority to take steps to prevent or void actions, whether 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.

Special Recommendation III

Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

SR III.11 Methodology

III.11 Countries should ensure that Criteria 3.1 – 3.4 and Criterion 3.6 (in R.3) also apply in relation to the freezing, seizing and confiscation of terrorist-related funds or other assets in contexts other than those described in Criteria III.1 – III.10.

1999 UN International Convention for the Suppression of the Financing of Terrorism

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

Article 3 – Confiscation measures

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

2. Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention, each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies

(a) Only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, each Party may make a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or

(b) Only to a list of specified offences.

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

Article 4 – Investigative and provisional measures

Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify, trace, freeze or seize rapidly property which is liable to confiscation pursuant to Article 3, in order in particular to facilitate the enforcement of a later confiscation.

Article 5 – Freezing, seizure and confiscation

Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize, and confiscate also encompass:

(a) The property into which the proceeds have been transformed or converted;

(b) Property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

(c) Income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

Article 6 – Management of frozen or seized property

Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.

Article 7 – Investigative powers and techniques

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.

2. Without prejudice to paragraph 1, each Party shall adopt such legislative and other measures as may be necessary to enable it 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; and,

(d) Ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out.

Parties shall consider extending this provision to accounts held in non-bank financial institutions.

FREEZING ACCORDING TO THE UN LISTS

Special Recommendation III

Each country should implement measures to freeze without delay funds or other assets of terrorist, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.

FATF Methodology

Freezing and, where appropriate, seizing under the relevant U.N. Resolutions:

III.1 Countries should have effective laws and procedures to freeze terrorist funds or other assets of persons designated by the United Nations Al-Qaida and Taliban Sanctions Committee in accordance with S/RES/1267(1999). Such freezing should take place without delay and without prior notice to the designated persons involved.

S/RES/1267(1999) and its successor resolutions obligate countries to freeze without delay the funds or other assets owned or controlled by Al-Qaida, the Taliban, Usama bin Laden, or persons and entities associated with them as designated by the United Nations Al-Qaida and Taliban Sanctions Committee established pursuant to United Nations Security Council Resolution 1267(1999), including funds derived from funds or other assets owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds or other assets are made available, directly or indirectly, for such persons‘ benefit, by their nationals or by any person within their territory. The Al-Qaida and Taliban Sanctions Committee is the authority responsible for designating the persons and entities that should have their funds or other

assets frozen under S/RES/1267(1999) and its successor resolutions. All countries that are members of the United Nations are obligated by S/RES/1267(1999) and its successor resolutions to freeze the assets of persons and entities so designated by the Al-Qaida and Taliban Sanctions Committee.

III.2 A country should have effective laws and procedures to freeze terrorist funds or other assets of persons designated in the context of S/RES/1373(2001). Such freezing should take place without delay and without prior notice to the designated persons involved.

S/RES/1373(2001) obligates countries to freeze without delay the funds or other assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds or other assets derived or generated from property owned or controlled, directly or indirectly, by such persons and associated persons and entities. Each individual country has the authority to designate the persons and entities that should have their funds or other assets frozen. Additionally, to ensure that effective co-operation is developed among countries, countries should examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other countries. When (i) a specific notification or communication is sent and (ii) the country receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds, or a reasonable basis, to suspect or believe that the proposed designee is a terrorist, one who finances terrorism or a terrorist organisation, the country receiving the request must ensure that the funds or other assets of the designated person are frozen without delay.

III.3 A country should have effective laws and procedures to examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other jurisdictions. Such procedures should ensure the prompt determination, according to applicable national legal principles, whether reasonable grounds or a reasonable basis exists to initiate a freezing action and the subsequent freezing of funds or other assets without delay.

III.4 The freezing actions referred to in Criteria III.1 – III.3 should extend to:

(a) Funds or other assets wholly or jointly owned or controlled, directly or indirectly, by designated persons, terrorists, those who finance terrorism or terrorist organisations; and

(b) Funds or other assets derived or generated from funds or other assets owned or controlled directly or indirectly by designated persons, terrorists, those who finance terrorism or terrorist organisations.

III.5 Countries should have effective systems for communicating actions taken under the freezing mechanisms referred to in Criteria III.1 – III.3 to the financial sector51 immediately upon taking such action.

III.6 Countries should provide clear guidance to financial institutions and other persons or entities that may be holding targeted funds or other assets concerning their obligations in taking action under freezing mechanisms.

III.7 Countries should have effective and publicly-known procedures for considering de-listing requests and for unfreezing the funds or other assets of de-listed persons or entities in a timely manner consistent with international obligations.

III.8 Countries should have effective and publicly-known procedures for unfreezing, in a timely manner, the funds or other assets of persons or entities inadvertently affected by a freezing mechanism upon verification that the person or entity is not a designated person.

III.9 Countries should have appropriate procedures for authorising access to funds or other assets that were frozen pursuant to S/RES/1267(1999) and that have been determined to be necessary for basic expenses, the payment of certain types of fees, expenses and service charges or for extraordinary expenses. These procedures should be in accordance with S/RES/1452(2002).

III.10 Countries should have appropriate procedures through which a person or entity whose funds or other assets have been frozen can challenge that measure with a view to having it reviewed by a court.

PREVENTION OF THE FINANCING OF TERRORISM

IV. Reporting suspicious transactions related to terrorism

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

FATF Methodology

IV.1 A financial institution should be required by law or regulation to report to the FIU (a suspicious transaction report – STR) when it suspects or has reasonable grounds to suspect that funds are linked or related to, or to be used for terrorism, terrorist acts or by terrorist organisations or those who finance terrorism. This requirement should be a direct mandatory obligation, and any indirect or implicit obligation to report suspicious transactions, whether by reason of possible prosecution for a FT offence or otherwise (so called ―indirect reporting‖), is not acceptable.

IV.2 Countries should ensure that Criteria 13.3 – 13.4 (in R.13) also apply in relation to the obligations under SR IV.

V. International Co-operation

Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

FATF Methodology

V.1 Countries should ensure that Criteria 36.1 – 36.7 (in R.36) also apply to the obligations under SR.V.

V.2 Countries should ensure that Criteria 37.1 &37.2 (in R.37) also apply to the obligations under SR.V.

V.3 Countries should ensure that Criteria 38.1 – 38.5 (in R.38) also apply to the obligations under SR.V.

V.4 Countries should ensure that Criteria 39.1 – 39.4 (in R.39) also apply to extradition proceedings related to terrorist acts and FT.

V.5 Countries should ensure that Criteria 40.1 – 40.9 (in R.40) also apply to the obligations under SR.V.

VI. Alternative Remittance

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

FATF Methodology

VI.1 Countries should designate one or more competent authorities to register and/or license natural and legal persons that perform money or value transfer services (MVT service operators), maintain a current list of the names and addresses of licensed and/or registered

MVT service operators, and be responsible for ensuring compliance with licensing and/or registration requirements.

VI.2 Countries should ensure that all MVT service operators are subject to the applicable FATF Forty Recommendations (in particular Recommendations 4-11, 13-15 and 21-23) and FATF Nine Special Recommendations (in particular SR.VII).

VI.3 Countries should have systems in place for monitoring MVT service operators and ensuring that they comply with the FATF Recommendations.

VI.4 Countries should require each licensed or registered MVT service operator to maintain a current list of its agents which must be made available to the designated competent authority.

VI.5 Countries should ensure that Criteria 17.1 – 17.4 (in R.17) also apply in relation to the obligations under SR VI.

VII. Wire transfers

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.

Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers that do not contain complete originator information (name, address and account number).

FATF Methodology

VII.1 For all wire transfers, of EUR/USD 1 000 or more, ordering financial institutions should be required to obtain and maintain 56 the following information relating to the originator of the wire transfer:

- 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 (countries may permit financial institutions to substitute the address with a national identity number, customer identification number, or date and place of birth).

(This set of information is referred to as full originator information.)

For all wire transfers of EUR/USD 1 000 or more, ordering financial institutions should be required to verify the identity of the originator in accordance with Recommendation 5.

VII.2 For cross-border wire transfers of EUR/USD 1 000 or more the ordering financial institution should be required to include full originator information in the message or payment form accompanying the wire transfer.

However, if several individual cross-border wire transfers (of EUR/USD 1 000 or more) from a single originator are bundled in a batch file for transmission to beneficiaries in another country, the ordering financial institution only needs to include the originator‘s account number or unique identifier on each individual cross-border wire transfer, provided that the batch file (in which the individual transfers are batched) contains full originator information that is fully traceable within the recipient country.

VII.3 For domestic wire transfers the ordering financial institution should be required to either:

(a) Comply with Criterion VII.2 above or

(b) Include only the originator‘s account number or a unique identifier, within the message or payment form. The second option should be permitted only if full originator information can be made available to the beneficiary financial institution and to appropriate authorities within three business days of receiving a request, and domestic law enforcement authorities can compel immediate production of it.

VII.4 Each intermediary and beneficiary financial institution in the payment chain should be required to ensure that all originator information that accompanies a wire transfer is transmitted with the transfer.

VII.4.1. Where technical limitations prevent the full originator information accompanying a cross-border wire transfer from being transmitted with a related domestic wire transfer (during the necessary time to adapt payment systems), a record must be kept for five years by the receiving intermediary financial institution of all the information received from the ordering financial institution.

VII.5 Beneficiary financial institutions should be required to adopt effective risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. The lack of complete originator information may be considered as a factor in assessing whether a wire transfer or related transactions are suspicious and, as appropriate, whether they are thus required to be reported to the financial intelligence unit or other competent authorities. In some cases, the beneficiary financial institution should consider restricting or even terminating its business relationship with financial institutions that fail to meet SR.VII standards.

VII.6 Countries should have measures in place to effectively monitor the compliance of financial institutions with rules and regulations implementing SR.VII.

VII.7 Countries should ensure that Criteria 17.1 – 17.4 (in R.17) also apply in relation to the obligations under SR.VII.

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they can not be misused:

(i) By terrorist organisations posing as legitimate entities;

(ii) To exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

(iii) To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

FATF Methodology

VIII.1 Countries should:

(i) Review the adequacy of domestic laws and regulations that relate to non profit organisations;

(ii) Use all available sources of information to undertake domestic reviews of or have the capacity to obtain timely information on the activities, size and other relevant features of their non-profit sectors for the purpose of identifying the features and types of non profit organisations (NPOs) that are at risk of being misused for terrorist financing by virtue of their activities or characteristics; and

(iii) Conduct periodic reassessments by reviewing new information on the sector‘s potential vulnerabilities to terrorist activities.

VIII.2 Countries should undertake outreach to the NPO sector with a view to protecting the sector from terrorist financing abuse. This outreach should include (i) raising awareness in the NPO sector about the risks of terrorist abuse and the available measures to protect against such abuse; and (ii) promoting transparency, accountability, integrity, and public confidence in the administration and management of all NPOs.

VIII.3 Countries should be able to demonstrate that the following steps have been taken to promote effective supervision or monitoring of those NPOs which account for: (i) a significant portion of the financial resources under control of the sector; and (ii) a substantial share of the sector‘s international activities.

VIII.3.1 NPOs should maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of person(s) who own, control or direct their activities, including

senior officers, board members and trustees. This information should be publicly available either directly from the NPO or through appropriate authorities.

VIII.3.2 Countries should be able to demonstrate that there are appropriate measures in place to sanction violations of oversight measures or rules by NPOs or persons acting on behalf of NPOs. The application of such sanctions should not preclude parallel civil, administrative, or criminal proceedings with respect to NPOs or persons acting on their behalf where appropriate. Sanctions may include freezing of accounts, removal of trustees, fines, de-certification, de-licensing or de-registration.

VIII.3.3 NPOs should be licensed or registered. This information should be available to competent authorities.

VIII.3.4 NPOs should maintain, for a period of at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organisation. This also applies to information mentioned in paragraphs (i) and (ii) of the Interpretative Note to Special Recommendation VIII.

VIII.4 Countries should implement measures to ensure that they can effectively investigate and gather information on NPOs.

VIII.4.1 Countries should ensure effective 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 NPOs of potential terrorist financing concern.

VIII.4.2 Countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation.

VIII.4.3 Countries should develop and implement mechanisms for the prompt sharing of information among all relevant competent authorities in order to take preventative or investigative action when there is suspicion or reasonable grounds to suspect that a particular NPO is being exploited for terrorist financing purposes or is a front organization for terrorist fundraising. Countries should have investigative expertise and capability to examine those NPOs that are suspected of either being exploited by or actively supporting terrorist activity or terrorist organisations. Countries should also have mechanisms in place that allow for prompt investigative or preventative action against such NPOs.

VIII.5 Countries should identify appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs that are suspected of terrorist financing or other forms of terrorist support.

IX. Cash Couriers

Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation.

Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that they suspect to be related to terrorist financing or money laundering, or that are falsely declared or disclosed.

Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing or money laundering, countries should also adopt measures, including legislative ones consistent with Recommendation 3 and Special Recommendation III, which would enable the confiscation of such currency or instruments.

FATF Methodology

IX.1 To detect the physical cross-border transportation of currency and bearer negotiable instruments that are related to money laundering or terrorist financing, a country should implement one of the following two systems for incoming and outgoing cross-border transportations of currency or bearer negotiable instruments:

(a) A declaration system that has the following characteristics:

(i) All persons making a physical cross-border transportation of currency or bearer negotiable instruments that are of a value exceeding a prescribed threshold should be required to submit a truthful declaration to the designated competent authorities; and

(ii) The prescribed threshold cannot exceed EUR/USD 15,000

OR

(b) A disclosure system that has the following characteristics:

(i) All persons making a physical cross-border transportation of currency or bearer negotiable instruments should be required to make a truthful disclosure to the designated competent authorities upon request; and

(ii) The designated competent authorities should have the authority to make their inquiries on a targeted basis, based on intelligence or suspicion, or on a random basis.

IX.2 Upon discovery of a false declaration/disclosure of currency or bearer negotiable instruments or a failure to declare/disclose them, designated competent authorities should

have the authority to request and obtain further information from the carrier with regard to the origin of the currency or bearer negotiable instruments and their intended use.

IX.3 The designated competent authorities should be able to stop or restrain currency or bearer negotiable instruments for a reasonable time in order to ascertain whether evidence of money laundering or terrorist financing may be found:

(a) Where there is a suspicion of money laundering or terrorist financing; or

(b) Where there is a false declaration/disclosure.

IX.4 At a minimum, information on the amount of currency or bearer negotiable instruments declared/disclosed or otherwise detected, and the identification data of the bearer(s) shall be retained for use by the appropriate authorities in instances when:

(a) A declaration which exceeds the prescribed threshold is made;

(b) Where there is a false declaration/disclosure; or

(c) Where there is a suspicion of money laundering or terrorist financing. For a supra-national approach: The term *appropriate authorities* must include designated competent authorities for every member state.

IX.5 Information obtained through the processes implemented in Criterion IX.1 should be available to the financial intelligence unit (FIU) either through:

(a) A system whereby the FIU is notified about suspicious cross-border transportation incidents; or

(b) By making the declaration/disclosure information directly available to the FIU in some other way. For a supra-national approach, the information collected through the processes described under a) or b) should be made available to the FIUs of other member states.

IX.6 At the domestic level, there should be adequate co-ordination among customs, immigration and other related authorities on issues related to the implementation of Special Recommendation IX.

IX.7 At the international level, countries should allow for the greatest possible measure of co-operation and assistance amongst competent authorities, consistent with the obligations under Recommendations 35 to 40 and Special Recommendation V. For a supra-national approach: Regarding co-operation and assistance at the international level, member states‘ authorities should endeavour to identify the relevant sources of the information requested by third countries‘ authorities, when it is not possible for the member states‘ authorities to make this information directly available.

IX.8 Countries should ensure that Criteria 17.1 to 17.4 (in R.17) also apply to persons who make a false declaration or disclosure contrary to the obligations under SR IX.

IX.9 Countries should ensure that Criteria 17.1 to 17.4 (in R.17) also apply to persons who are carrying out a physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing or money laundering contrary to the obligations under SR IX.

IX.10 Countries should ensure that Criteria 3.1 to 3.6 (in R.3) also apply in relation to persons who are carrying out a physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing or money laundering.

IX.11 Countries should ensure that Criteria III.1 to III.10 (in SR.III) also apply in relation to persons who are carrying out a physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing.

IX.12 If a country discovers an unusual cross-border movement of gold, precious metals or precious stones, it should consider notifying, as appropriate, the Customs Service or other competent authorities of the countries from which these items originated and/or to which they are destined, and should co-operate with a view toward establishing the source, destination, and purpose of the movement of such items and toward the taking of appropriate action.

IX.13 The systems for reporting cross border transactions should be subject to strict safeguards to ensure proper use of the information or data that is reported or recorded. For a supra-national approach: Any safeguards implemented for this purpose should not impede information sharing within the supra-national jurisdiction.

IX. 14 Training, data collection, enforcement (including R.17) and targeting programmes should be developed and applied by all jurisdictions. For a supra-national approach, there should be comparable: (1) training, (2) data collection, (3) enforcement (including R.17) and (4) targeting programmes developed and applied across all member states in order to ensure the equivalent application of this standard.

IX.15 For a supra-national approach, member states should ensure that all relevant authorities from each member state have access on a timely basis to all supra-national information obtained through the process implemented in Criterion IX.1. Member states should at a minimum ensure that all relevant authorities from each member state have access immediately to all supra-national information related to suspicious cash declarations/disclosures (false or not) or intentional lack of declaration/disclosure. All other supra-national information obtained through the process implemented in Criterion IX.1 should be accessible upon request.

INSIDER TRADING AND MARKET MANIPULATION

FATF 40 Recommendations

Recommendation 1

Countries should criminalise money laundering on the basis of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and the 2000 United Nations Convention on Trans-national Organized Crime (the Palermo Convention).

Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences.

Predicate offences for money laundering 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. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

Glossary

"**Designated categories of offences**" means:

• Participation in an organised criminal group and racketeering;

• Terrorism, including terrorist financing;

• Trafficking in human beings and migrant smuggling;

• Sexual exploitation, including sexual exploitation of children;

• Illicit trafficking in narcotic drugs and psychotropic substances;

• Illicit arms trafficking;

• Illicit trafficking in stolen and other goods;

• Corruption and bribery;

• Fraud;

• Counterfeiting currency;

• Counterfeiting and piracy of products;

• Environmental crime;

• Murder, grievous bodily injury;

• Kidnapping, illegal restraint and hostage-taking;

• Robbery or theft;

• Smuggling;

• Extortion;

• Forgery;

• Piracy; and

• Insider trading and market manipulation.

When deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.

FATF Methodology

1.3 The predicate offences for money laundering should cover all serious offences, and countries should seek to extend this to the widest range of predicate offences. At a minimum, predicate offences should include a range of offences in each of the designated categories of offences. Where the designated category is limited to a specific offence, then that offence must be covered.