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## **Project against Economic Crime (PECK)**

# **CLOSING CONFERENCE**

**Pristina, 28 April 2015**

## **MAIN FINDINGS on AML/CFT LEGAL ISSUES**

# Criminalisation of Money Laundering

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## Money Laundering offence (Art. 32.2 AML/CFT Law)

- ✓ remarkable level of compliance with the Vienna and Palermo Conventions (material elements)
- ✗ lack of harmonization (concept + terminology) with the Criminal Code (mental element... ancillary offences...)
- ✓ all-crime approach for predicate offences
- ✗ ...with one exception (market manipulation)
- ✗ ...effectiveness issue: tax evasion offence

# Criminalisation of Money Laundering

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## Money Laundering criminalisation – Effectiveness Issues

- ❌ Inadequate legislation + lack of guidance
  - risk of unclarity and uncertainty
  - risk of reluctance to prosecute
- level of proof for the predicate offence
- own proceeds laundering (**absorption principle**)

# Criminalisation of Terrorist Financing

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## Duplication of Terrorist Financing Offences

(Art. 138 and other Articles CC vs. Art. 36B AML/CFT Law)

**☒ total lack of harmonization → legal uncertainty**

- double criminalization: CC provisions remained intact
- co-existence of two competing FT offences
- different concept and terminology: out of context
- serious risk of legal uncertainty (effectiveness issue)

# Criminalisation of Terrorist Financing

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## Terrorist Financing Offence "A" (Criminal Code)

- ✓ contextual: fits into the context of terrorism-related offences in CC
- ✗ financing of an individual terrorist is not covered
- ✗ financing of a terrorist act is deficient
  - generic act of terrorism: incomplete
  - unclear coverage of terrorism-related acts
  - treaty offences: restrictively (extra element added)

# Criminalisation of Terrorist Financing

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## Terrorist Financing Offence "B" (AML/CFT Law)

- ✓ remarkable level of compliance with the Terrorist Financing Convention (material elements)
- ✗ range of sanctions is not dissuasive
- ✗ total lack of harmonization with the Criminal Code (as above + no definition for individual terrorist)

# Corporate Criminal Liability

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- ✓ Criminal liability of legal entities is generally provided for...
- ✗ inadequate legislation regarding the basics of corporate criminal responsibility: urgent harmonization needed
  - within the respective legislation
  - among different pieces of legislation
- ✗ ineffectively mild criminal sanctions (as compared to those applicable to natural persons)
- ✗ effectiveness issue

# Confiscation and Provisional Measures Regime

## Legislation

- ✓ The regime is generally adequate in terms of legislative design and scope, but...
- ✗ confiscation of **instrumentalities intended for** the use in a criminal offence is not covered
- ✗ **different standards** for third party confiscation (Criminal Code) versus third party provisional measures (Criminal Procedure Code)
- ✗ standard of proof for a bona fide third party is **unjustifiably high**
- ✗ no authority to take steps **to prevent or void** contractual or other actions intended to prejudice the authorities in their ability to recover property subject to confiscation.



# Confiscation and Provisional Measures Regime

## Effectiveness

- **Low:** due to an insufficiency of prosecutions resulting in low levels of confiscation of the proceeds of crime.
- Law enforcement authorities and prosecutorial authorities **do not proactively undertake** asset tracing and recovery when pursuing any acquisitive crime.

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# Freezing of Terrorist Assets

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**✗ No specific legal framework available**

## Law on Implementation of International Sanctions

- essential legal basis
- legislative authorisation for issuing secondary legislation
- **but no roles, responsibilities and procedures to take the necessary measures to freeze/seize terrorist related funds without delay**

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# Freezing of Terrorist Assets

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- **no effective and directly applicable laws and procedures** for freezing of terrorist funds or other assets under the respective UNSCRs or under procedures initiated by third countries
- **no designation authority** in place for UNSCR 1373
- **no effective systems for communicating actions** to the financial sector and **no practical guidance**
- **no procedures for de-listing** requests, for **unfreezing** funds or other assets of de-listed persons, for authorising **access** to frozen assets and to **challenge** freezing actions
- **no measures for monitoring** the compliance with implementation of obligations and to impose sanctions.

# International Legal Cooperation in Criminal Matters

- ✓ Ability to provide a wide range of the possible forms of international cooperation in criminal matters

## Mutual Legal Assistance

- ✗ **No service standards on turnaround times** of foreign requests (→ could impede effectiveness of the system)
- ✗ **Lengthy backlogs** with regard to MLA requests that require Judicial Orders to be produced.

## Extradition

- ✗ **Administrative conflict procedure** against the final decision of the Minister of Justice
  - lengthy and cumbersome procedures and ineffective functioning of the regime