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Project against Economic Crime (PECK)

Module 1

Criminalisation of Money Laundering and Terrorist Financing

Three classical stages of Money Laundering

Placement assets derived from crime (typically cash) introduced into the financial system and/or drawn out of the country

Layering creating complicated layers of financial transactions in order to camouflage the illegal source and to conceal the identity of the owner

Integration integrating and assimilating the assets into the legitimate financial system

- theoretical/criminological approach: steps can take place either one by one or simultaneously, or separately
- some steps may also be omitted, depending on the circumstances (e.g. non-cash proceeds, being already in the financial system, do not require placement)

International Standards for Money Laundering Criminalization

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988)

United Nations Convention against Transnational Organized Crime (Palermo 2000)

FATF Recommendations 1 and 2

CETS 198 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw 2005)

Conduct to be criminalized – FATF R.1.1

Conversion/transfer – Palermo Convention 6(1)a(i)

The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her actions.

- the prosecution must prove that the proceeds were converted/transferred **and** that the conversion/transfer was for a particular purpose
- at a **minimum**, it must be an offence to convert/transfer proceeds for the 2 purposes set out in the Convention.
- **jurisdictions may go farther** than the Convention by not requiring proof of the purposive element at all (**but one purposive element is not enough**)

Conduct to be criminalized – FATF R.1.1

Concealment and disguise – Palermo Convention 6(1)a(ii)

The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

- not the form but the **content needs to be covered**, national jurisdictions may apply different terminology to define the factors listed above
- **no purposive element** allowed: the offence must be broad enough to cover the concealment/disguise of proceeds for any purpose

Conduct to be criminalized – FATF R.1.1

Acquirement, possession and use – Palermo Convention 6(1)b(i)

The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.

- to be punished subject to the **basic concepts** of the legal system of the country: coverage may vary accordingly
- again, the **content needs to be covered** – different terminology may occur in national legislation
- **no purposive element** allowed: as far as criminalization is in line with the basic concepts of the legal system, the offence must be broad enough to cover these conducts for any purpose

Ancillary offences – FATF R.1.7

Palermo Convention 6(1)b(ii)

Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences (...)

- to be punished subject to the **basic concepts** of the legal system of the country
- main issue: **conspiracy** (qv. preparation)

Predicate offences – FATF R.1.3/1.4/1.5

Palermo Convention 6(2)a–c

- widest range of predicate offences;
- all serious crimes as defined by the Convention (minimum: comprehensive range of offences associated with organized criminal groups)
- including offences committed both within and outside the respective jurisdiction (dual criminality applies)

FATF Rec.1 + Methodology

- **domestic and foreign** predicate offences should cover a range of serious offences in all 20 “**designated categories of offence**” (see Glossary to the FATF Recommendations / CETS 198 Appendix)
 - no need to have the same names as the designated categories, so long as the same underlying conduct is covered)
 - **different approaches:** all crimes / threshold / list approach
 - FATF R.1.5 vs R.1.8 (dual criminality issue)

Predicate offences – Issue of previous conviction – FATF R.1.2.1

FATF Criterion 1.2.1 – proving that property is the proceeds of crime should not require, at any stage of the proceedings, that a person be convicted of a predicate offence.

CETS 198 9(5) – a prior or simultaneous conviction for the predicate offence shall not be a prerequisite for a conviction for money laundering.

Particular importance: autonomous money laundering cases where the perpetrator of the proceeds-generating offence is not identified (or cannot be prosecuted for any reasons) and the money laundering offence is not prosecuted together with the predicate offence.

- usually reliant on judicial/jurisprudential interpretation
- risk of diverse opinions among practitioners (prosecution vs. judiciary) → high degree of specificity required in respect of the predicate offence → prosecution become hesitant to bring forward autonomous ML cases → negative impact

CETS 198 9(6) – no need for a precisely specified predicate offence

Property – FATF R.1.2

Any type of property that represents proceeds

- **"any type"** – problem of restrictive terminology (money, cash, etc.)
- **direct–indirect** proceeds (substitute assets)
- **"regardless to its value"**
 - value threshold: apparent focus on serious crimes
 - but it is against the international standards: no value thresholds allowed

Scope of criminal liability

Palermo Convention 6(2)e and 10
FATF R.1.6 and 2.3

- **self-laundering** (laundering of one's own proceeds) must be covered
- money laundering offence must apply to **legal persons**
- unless contrary to fundamental principles of domestic law
 - basic legal principles upon which national legal systems are based (e.g. presumption of innocence) not only long-standing legal tradition
 - normally found in the national Constitution or expressed through decisions of the highest court
 - typical occurrence: self-laundering vs. "ne bis in idem" principle

Scope of criminal liability

The mental element – FATF R.2.1 / 2.2

Knowledge standard (FATF R.2.1) as a minimum: Does the ML offence apply at least to natural persons that knowingly engage in ML activity?

Optional lower levels in CETS 198

Does legislation and other measures allow for a ML offence to be established where the person suspected / ought to have assumed that the property was proceeds

The intentional element of the offence should be inferred from objective factual circumstances (FATF R.2.2)

- Usually covered by traditional principles of criminal procedure (free assessment of evidence) but exceptions may occur.
- Success also depends on what **level of intention** for ML is required by
 - (i) criminal substantive law (ii) judicial practice
 - direct intent (knowledge standard)
 - indirect intent (dolus eventualis)
 - should-have-known standard??

Terrorist financing

The phenomena of money laundering and terrorist financing differ in key ways:

ML is about turning "dirty money" into "clean money" →← TF can also use funds of illicit origin but may also be the opposite: „clean money" (e.g. legitimate donations to charities) misdirected to terrorists

- legitimate sources: no predicate offences → less possibility for classical investigative approach, more emphasis on the preventive measures
- smaller amounts of money involved → harder to notice
- UNSCR lists → problems with effectiveness
- TF and ML may be combined or carried out subsequently
 - hence TF must be a predicate offence to ML (Glossary)
 - both are financial offences that exploit the same vulnerabilities in financial systems that allow for an inappropriate level of anonymity and nontransparency in the execution of financial transactions

International Standards for Terrorist Financing Criminalization

United Nations International Convention for the
Suppression of the Financing of Terrorism (New York
1999)

FATF Special Recommendation II.

Autonomous FT offence

Terrorist financing should be an autonomous criminal offence.

FATF Interpretative Note to SR.II:

criminalization of financing of terrorism solely on the basis of aiding and abetting, attempt or conspiracy would fail to meet the standard

- legal tradition, still existent in numerous European jurisdictions
 - minimum requirement of autonomy in this respect: a separate provision in the Special Part of the Criminal Code (not only the General Part rules on ancillary offences)
- on the other hand, there are countries with more than one sui generis terrorist financing offence

Conduct to be criminalized – FATF SR.II.1

FT Convention (Art.2)

Wilfully providing or collecting funds, intending that they be used to carry out two distinct types of “terrorist act”

- the “treaty offences” ie. terrorism offences as defined in treaties listed in the Annex to the FT Convention (Art.2(1)(a))
- any other act intended to cause death or serious bodily injury for the purpose of intimidating a population, or compelling a government or international organisation to do or abstain from doing something (Art.2(1)(b))

FATF SR.II – goes beyond the Convention

(Wilfully providing or collecting funds, intending that they be used) by a terrorist organisation or individual terrorist for any purpose.

Scope of "terrorist act" in FT Convention

The "treaty offences"

the financing of all treaty offences listed in the FT Convention Annex is required by FATF SR.II (not just the treaties to which the country is a party: derogation in Art.2(2) does not apply to SR II)

- **no purposive element** is allowed in domestic implementation

The generic "terrorist act"

„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”.

- all aspects of the **purposive element** must be covered
- offence must apply to the intimidating/compelling the population or government of **any country** ("a state" vs. "the State")

Scope of terrorist financing offence – FATF. SR.II.1

Terrorist financing offences should extend to:

Funds from **legitimate or illegitimate** sources

- "funds" as defined by FT Convention
- main difference from money laundering: must cover funds/assets however acquired

Funds that **were not actually used** to commit/attempt a terrorist act (FTC Art. 2 [3][4]) and **are not linked to** a specific terrorist act

- SR.II goes beyond the Convention (covering a more general notion of terrorist activity)
- FT offence must cover also the intended use of funds

Financing of terrorist acts, terrorist organisations and individual terrorists that are located **in the same or a different country** from the terrorist financier (territorial scope of the offence) **FATF SR.II.3**

- traditional differentiation between domestic and international terrorism (and related FT) – no relevance in CFT context

Ancillary offences (attempt, participation, organisation or direction of others, conspiracy) – slightly different from the wording of Palermo

Scope of terrorist financing offence

Terrorist financing offences should extend to financing a terrorist organisation or individual terrorist for any purpose

- FATF requirement beyond the scope of FT Convention
- **definitional issues** - FATF Glossary
 - Terrorist: 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
 - Terrorist organization: any group of terrorists that... (as above)

Must cover financing regardless of any concrete terrorist act and thus for **any purpose** (including a legitimate purpose like subsistence expenses)