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MOLI SERBIA

TECHNICAL PAPER:

REVIEW OF THE PROVISIONS OF THE DRAFT LAW IN SERBIA ON RESTRICTIONS ON DISPOSAL OF PROPERTY WITH THE AIM OF PREVENTING TERRORISM

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1. EXECUTIVE SUMMARY

1.1 This Opinion considers the draft law in Serbia on restrictions on disposal of property with the aim of preventing terrorism. While much of the draft law successfully deals with the issues identified by Moneyval in 2009 as contributing to a non compliant rating in this area, there remain a number of areas where further drafting work needs to be done.

1.2 In particular, there needs to be more precision as to how this system will work in practice, since efficient and speedy working of the law will be essential if Serbia truly wishes to comply with the various UNSCRs. While much of the detail may be prescribed internally by regulations, there needs to be greater emphasis in the draft law on effective working practices.

1.3 Specific perceived defects in the drafting are pointed out in the Opinion which considers all the provisions in detail.

1.4 One serious omission from the draft is the failure to deal with the seizure and confiscation of terrorist property in accordance with the second limb of SR3.

2. INTRODUCTION

2.1 I have been asked by the Council of Europe's Office in Serbia with responsibility for the Project against Money Laundering and Terrorist Financing in Serbia (MOLI Serbia) to prepare an Opinion on a Draft Law on the Restrictions on Disposal of Property with the Aim of Preventing the Financing of Terrorism.

2.2 I have considered the draft law and have also had regard to a number of background documents. In particular, (but not exclusively) I have considered

a) The Mutual Evaluation Report of Serbia dated 8 December 2009, prepared by Moneyval, within the Council of Europe
b) The Progress Report on Serbia, dated 8 December 2010, prepared by Moneyval
c) United Nations Special Resolutions 1267, 1373 and 1452
d) The 40 Recommendations and 9 Special Recommendations of FATF, (especially SR 3) as well as the FATF International Best Practices Document, from June 2009, on "Freezing of Terrorist Assets".
e) The Interpretative Note to SR3 produced by the FATF
f) The Third EU Money Laundering Directive and its associated Implementing Directive

2.3 Taken as a whole, the international obligations on Serbia relate broadly to the requirement to have in place procedures that will enable Serbia to freeze or if appropriate seize terrorist related funds or other assets without delay.

2.4 The Report by Moneyval in December 2009 rated the current system in Serbia as non compliant with SR 3 and the obligations there in relation to the freezing and confiscation of terrorist assets. In coming to the conclusion that Serbia was non-compliant with SR 3, the evaluators noted in particular (page 290 of Report) that there was/were:

a) No effective laws and procedures in place for freezing of terrorist funds or other assets of designated persons and entities in accordance with S/RES/1267 and 1373 or under procedures initiated by third countries, and to ensure that freezing actions extend to funds or assets controlled by designated persons.
b) No designation authority in place for S/RES/1373.
c) No effective systems for communicating actions under the freezing mechanisms to the financial sector immediately upon taking such action.
d) No practical guidance to financial institutions and DNFBP-s.
e) Lack of effective and publicly known procedures for considering de-listing requests and for unfreezing funds or other assets of de-listed persons or entities and persons or entities inadvertently affected by a freezing mechanism.
f) No procedure for authorising access to funds or other assets frozen pursuant to S/RES/1267 in accordance with S/RES/1452.
g) No procedures to challenge frozen measures taken pursuant to the implementation of S/RES/1267 and 1373.
h) Shortcomings in the legal framework related to freezing, seizing and confiscating of terrorist related funds or other assets.
i) No measures which would enable to monitor effectively the compliance with implementation of obligations under SR.III and to impose sanctions.

2.5 The Moneyval Progress Report of 2010 contained the strong recommendation that the Serbian authorities "adopt a comprehensive set of rules (judicial or administrative) which would enable them to adequately implement the targeted financial sanctions contained in the United Nations Security Council Resolutions (UNSCRs) relating to the prevention and suppression of the financing of terrorist acts – UNSCR 1267 and its successor resolutions and UNSCR 1373 and any successor resolutions related to the freezing, or, if appropriate,

seizure of terrorist requirements under the 13 criteria of SR.III."

2.6 It is apparent from the Progress Report that the Ministry of Foreign Affairs, which has competence in the area, was then drafting a Law on restrictive measures undertaken on the basis of UNSCRs relating to the prevention and suppression of the financing of terrorist acts – UNSCR 1267 and its successor resolutions and UNSCR 1373. I assume that the current draft law, the subject of this Opinion, is the law then in draft.

3. THE INTERNATIONAL FRAMEWORK

3.1 Compliance with the UNSCRs is secured through compliance with the FATF SR3, which itself refers back to the UNSCRs. SR3 is intended to complement the obligations in the context of the UNSCRs relating to the prevention and suppression of the financing of terrorist acts. The focus of SR3 is on the preventative measures that are necessary in the context of stopping the flow or use of funds or other assets to terrorist groups.

3.2 The text of FATF SR3 is as follows:

"Each country should 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 resolutions relating to the prevention and suppression of the financing of terrorist acts.

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 organizations."

Quoting from the Interpretative note to SR3, "*The objective of the first requirement is to freeze terrorist-related funds or other assets based on reasonable grounds, or a reasonable basis, to suspect or believe that such funds or other assets could be used to finance terrorist activity. The objective of the second requirement is to deprive terrorists of these funds or other assets if and when links have been adequately established between the funds or other assets and terrorists or terrorist activity. …. Both requirements are necessary to deprive terrorists and terrorist networks of the means to conduct future terrorist activity and maintain their infrastructure and operations."*

3.3 By securing compliance with SR3, it follows that the UNSCRs will also be complied with.

3.4 The system from beginning to end, from designation to freezing and/or seizing has to be speedy and efficient if it is to be effective. Accordingly, the new draft law must not only contain the necessary provisions, but must have the ability to deliver in practice a smooth and coordinated rapid response. It should not be overly complicated, or bureaucratic, and should be capable of delivering a system that works with as few links in the chain as possible. I have considered this aspect as well in my Opinion.

3.5 According to the Interpretative Note to SR3, the means by which the action is taken in each state is not prescribed: the freezing mechanism can be by either the order of a court, or by administrative actions. What is important is that, whatever means is chosen by a State, it should not be dependent on a criminal process. The Serbian draft law envisages an administrative process, with decisions to freeze funds taken by the Minister for Finance (Article 6).

4. THE DRAFT LAW

4.1 Article 1

4.1 The subject matter of the new draft law is declared in **Article 1** to be "actions and measures to implement the UNSC Resolutions, and acts of other organizations of which the Republic of Serbia is a member." It is clear therefore that the intention of the Serbian authorities is to make themselves UNSCRs compliant, and, as a consequence, compliant with SR3.

4.2 Article 2

4.2.1 **Article 2** contains the definitions of certain phrases used in the draft law. There are only three definitions, for "restriction on the disposal of property and funds", "property and funds" and "designated person".

a. restriction on the disposal of property and funds

The UNSCRs do not use this rather complex phrase but instead use the term "freeze" to cover the activity described here. Helpfully, the FATF Interpretative Note to SR3 provides a definition of the term "freeze" and it would seem sensible to use both the same word "freeze" and the same definition as in the Interpretative Note, for consistency, and to ensure compliance with the SR.

b. property and funds

In SR3, the obligation is to freeze "terrorist funds or other assets". It would be better if this were the term used, rather than "property and funds". Notwithstanding the difference in terminology, the definition in the draft law is similar, but not identical to the definition in the FATF Interpretative Note to SR3. It may be a question of translation, but for completeness, the term used and its definition should ideally be identical to that in the Interpretative Note.

c. designated person

Similarly, it would be helpful if the term "designated person" were defined in the same way as in the Interpretive Note. It would of course be possible to add to that definition some of the terminology included in the current draft, but it is important to include the core definition as in the Interpretative Note.

4.2.2 The Interpretative Note defines a number of other terms, some of which would be of use in the draft law. These include "seize", "confiscate", "terrorist", and "without delay". Consideration should be given to including such of these as are appropriate.

4.3 Article 3

4.3.1 Article 3 is the key to the success of the legislative measure. It is of fundamental importance that there must be a system of designation of persons who fall within the ambit of the UNSCRs. This designation system underpins the subsequent operation of the measures in the draft law. The system for designation must be speedy, clear, transparent and efficient. The Article must be read with Article 19. In Article 19 there is a requirement to produce what will be a first list of designated persons within 30 days of the coming into force of the law.

4.3.2 To comply with UNSCR 1267, the list must contain those names specifically mentioned in the UNSCR and its successor resolutions. But to comply with UNSCR 1373, instead of relying on a prepared list, the state must itself identify those individuals and entities that it believes fall within the scope of the measure. The persons and entities falling

within the definition of “designated person” will therefore change over time, and there must be provision to enable the Government speedily to amend the list.

4.3.3 Although there is mention in Art 3 para 3 of amendments to the list, there is nothing to indicate that the Minister for Foreign Affairs has an obligation to keep the list constantly under review, and to update it as appropriate. There is also nothing to indicate the basis on which the Minister should make designations. It will be necessary to include some provision about the underlying principles affecting designation. There should be reference to the standard to be satisfied before a designation is made – for example that the Minister must reasonably believe that the person to be designated is or has been involved in terrorist activity or, in the case of a legal person, is owned or controlled directly or indirectly by, or is acting on behalf or at the direction of, such a person. The Serbian authorities should consider what is appropriate to their situation, here. It may be easier to define “terrorist”, or “terrorist organization” in the definition section.

4.3.4 Since the designation process itself is so important, the Serbian authorities may wish to consider a provision allowing for a periodic review of each designation, to ensure that continued designation remains appropriate.

4.3.5 Article 3 provides that “The Government, at the proposal of the minister for foreign affairs, shall develop the list of designated persons. The list …. shall be published …. Any amendments to the list shall be made immediately after learning of any facts that are relevant for its amendment.” Amendments will be necessary when either the UN Sanctions Committee amends the designations under UNSCR 1267, or when internally in Serbia the relevant authorities have reason to include any other person or entity.

4.3.6 There should also be a requirement that any amendments are published, as well as the original list. The Interpretative Notes suggest that the term “without delay” should be used. It is noted that the term “immediately” is used in this draft. It may be considered preferable to use the suggested language wherever possible, particularly if the term is then defined.

4.4 Articles 4, 5 and 6

4.4.1 Article 4, 5 and 6 outline the mechanism for initiating the “freeze” of property. Initial suspicion leads to the “suspension” “without delay” of the activity, and a report of the suspicion is passed to the Administration for the Prevention of Money Laundering (hereafter “APML”) promptly (within 24 hours). (Art 4) The APML in turn passes the collated information to the Minister for Finance again “without delay”. (Art 5) The Minister for Finance then issues a “freezing” decision “without delay”. (Art 6) It is clear therefore that the actual freezing decision can be taken relatively quickly, and does not require a court process, and has no connection with a criminal process. To that extent the procedure is likely to be both speedy and effective.

4.4.2 Article 4 provides the direct reporting requirement. The first paragraph imposes an obligation on “any legal and natural person” to “detect the existence of any links or business transaction with the designated person”. It is not clear how this obligation could be enforced, although this may be a translation issue. How can a member of the public, or a small business, in the normal course of business with an individual, be expected to detect such a link, without any prior knowledge?

4.4.3 Having detected the link, however, the legal or natural person must immediately suspend the transaction, (presumably a temporary freeze) and pass the report on to the Minister within 24 hours. There should be a provision here about the maximum length of any temporary suspension under this Article: at present it could be open ended, and this could prove problematical not least for the holder of the property. There should also be provision

absolving the property holder from responsibility arising from the temporary freeze – it should not be possible for the designated person to sue the holder for his temporary restriction pending the full freezing order.

4.4.4 Art 4 para 6 makes provision for further regulations to be made by the Minister of Finance under Article 4, and it is not clear what is likely to be included in these. It may be that they clarify the obligations under Art 6 para 1. From the limited detail given in the draft law as to the how the obligations are to be complied with, it is clear that there will need to be many regulations made. Ensuring that these are widely disseminated and advertised is another challenge for the Serbian authorities.

4.4.5 Article 5 sets out the procedure to be followed by the APML after receiving a report of a suspicious transaction. The APML must report to the Minister, again "without delay", and its report should contain the APML's conclusion as to whether the reported person is in fact a designated person. The APML is not required to make any investigations, but merely to comment on the status of designation of the reported person. Given that this referral has to be made very quickly, this is probably as much as the APML will be able to achieve.

4.4.6 Article 6 provides for the actual freezing order to be made again "without delay" by the Minister for Finance, on receipt of the report from the APML. All of these procedures have the capacity to work well if they take place within the normal working week, but the very strict time limits will require careful implementation, to ensure 24/7 cover. The Minister's only decision before making the freezing order according to Art 6 para 1 appears to be whether the reported person is a designated person. This is at variance with Art 7, where it is provided that the Minister has to have regard not only to whether the reported person is a designated person, but also as to whether the conditions to restrict the disposal of property have been met. This inconsistency should be remedied by inserting a similar provision into Art 6 para 1.

4.4.7 The freezing order will be in respect of the "property and funds of such person." However, this will not be sufficient to include any property controlled, either directly or indirectly, by the designated person. To comply with UNSCR 1267, the freezing obligation should extend to funds and other assets owned or controlled directly or indirectly by a designated individual, entity, or organization.

4.4.8 Article 6 also provides for service of the decision to freeze on a number of persons including the person holding the funds, and the designated person himself. The Article provides that the service shall be in line with the rules of general administrative procedure. This however may not be sufficiently swift. It may be preferable (depending on the time limits in general administrative procedure) to have special rules on service here. It will be important to communicate the freezing order in the shortest possible time, particularly so that the holder of the property, who has imposed a temporary suspension, may be relieved of liability for the freeze. Failure to communicate speedily could thwart the very purpose of the legislation.

4.4.9 It will also be important to ensure that the person who is holding the property, perhaps a bank or financial institution, is informed no later than the designated person, to remove any possibility of the designated person being able to remove the funds.

4.5 Article 7

4.5.1 As has been mentioned, Article 7 makes provision for the situation where the Minister of Finance finds either that the reported person is not a designated person, or that there are no grounds for making a freezing order. In either case, notice has to be given to the reporting legal or natural person to lift the suspension. This Article should also contain a requirement to notify the APML of such a decision.

4.6 Article 8

4.6.1 Article 8 provides for an indefinite freezing of the property, so long as the person/entity remains designated. It will be necessary to establish a periodic review procedure, both of designations and of freezing orders, so that at all times the list of designated persons is up to date, and the freezing orders still relevant. This will help to ensure that Serbia's actions in this regard are proportionate, and not oppressive.

4.6.2 It should be noted that in the English translation of Art 8 there appear to be important words omitted. It reads " … until the designated person is listed on the list referred to …" and should instead read "… until the designated person is no longer listed on the list referred to …" Is the original correct?

4.7 Article 9

4.7.1 This article provides for the management of frozen assets by the "Seized/Confiscated Assets Management Directorate". Management of frozen assets is a specialised and important aspect of this procedure. I am not in a position to judge whether this body is capable of taking on this additional role. I note however that in the Moneyval evaluation of Serbia from 2009, at para 208, it is noted that "this
Directorate was not fully operational". It will be of the utmost importance that this body is equipped to undertake the management function.

4.7.2 Depending on how the Directorate is established and funded, there may need to be separate funding arrangements for the Directorate to enable it to undertake this extra function.

4.8. Article 10

4.8.1 This Article outlines the appeal procedures in respect of freezing orders made under Article 6. While the article states that appeals against such orders are not to be permitted, there is provision for contesting such orders in an administrative dispute. This distinction is not immediately clear, particularly when para 2 of the Article states that the dispute may be instituted before a competent court.

4.8.2 The appeal can be brought at any time when the property is frozen, but the fact of an appeal does not suspend the operation of the freezing order. Only two grounds of appeal are provided: that the person is not a designated person, and that the property frozen does not fall within the definition of property. There is no detail given as to how such appeals are to be progressed. There may be simple cases where a freezing order has been made against someone with the same name as a designated person, but it is the wrong person. Appeals to remedy such situations should be able to be heard speedily.

4.8.3 There is no provision for appeal against the designation per se. Although appeal against a designation under UNSCR 1267 would not be appropriate, appeal against Serbia's own designation under UNSCR 1373, either as a consequence of its own decision, or following a request from another country, should be provided for. Such an appeal should be possible at any time after the publication of the designation.

4.9. Article 11

4.9.1 Article 11 deals with the access to a part of the frozen funds for specific personal costs. This provision gives effect to UNSCR 1452. However, for the avoidance of doubt, it might be preferable to use the wording from UNSCR 1452 as to the permitted purposes, and in particular, make it clear that access to the funds is permitted to pay legal fees.

4.10. Article 12

4.10.1 The first para of this Article is difficult to understand in English. There is reference to a "final court decision". But since the proceedings envisaged are not in court, I am not clear as to its application.

4.10.2 The second para refers to the situation where there are concurrent criminal proceedings, and where these have not resulted in confiscation of the property. In such circumstances, the freezing order will still have force, notwithstanding the end of the criminal proceedings without confiscation. This is the only reference in the draft law to confiscation.

4.11 Article 13

4.11.1 This Article enables the Minister to revoke a decision made under the law when the circumstances are appropriate. Provision is made for the notification of such a decision to the designated (or formerly designated, presumably) person. It will however be just as important to make notification to the same people/entities that were notified of the original decision according to Art 6. It will particularly important to notify the person/body holding the property, and the APML.

4.11.2 There is nothing to govern when a decision to revoke will be appropriate. The reference in the Article is to Article 6, which provides the property freezing powers. But the Minister's power under that Article is based only on whether he establishes that the person reported is a designated person. Presumably therefore, the only ground envisaged for the revoking of the order will be that the Minister can no longer establish that the reported person is a designated person. The standard necessary for such a decision will have to be provided. It will be necessary here to make a similar provision to that in Art 3, in relation to "reasonable belief".

4.12 Article 14

4.12.1 Article 14 contains provisions which enable the law to be used in respect of requests from other countries. This obligation is of great importance, as it means that there can be no safe hiding place anywhere in the world for terrorist funds. The effect of this obligation should be that a foreign state can ask Serbia to seize and confiscate property in respect of a person that it has designated, who may not be himself designated in Serbia.

4.12.2 Under the procedure envisaged by this Article, the foreign state makes application to Serbia, which, after internal consultation, makes a decision as to whether the person referred to should be included in the Serbian list of designated persons, and if so, the procedure set out in this law will be followed. The internal consultation however, is potentially so lengthy, and there are no time limits provided, that the provision is seriously flawed. Consultation is envisaged with 5 different government Ministries, and it is not clear which Minister has the final decision, although it is the Minister for Foreign Affairs that has responsibility for communicating the ultimate decision to the foreign country. In the situation where Ministries were not agreed as to the decision, there is no procedure provided for resolving this.

4.12.3 For this measure to be effective, the consultation period must be short, and capable of producing thought out decisions which will withstand challenge in court. It would also be sensible to involve the APML.

4.12.4 It will also be necessary in this provision to make it clear on what basis the Serbian authorities can come to the decision to designate a person at the request of another state. Do they rely on the other state's reasonable belief, or do they independently have to be

satisfied of their own reasonable belief? And is their decision to designate subject to challenge in the Serbian courts? None of this is clear in the draft.

4.13 Article 15

4.13.1 Article 15 is concerned with supervision, and the first para is not clear. It is particularly not clear who has responsibility for ensuring compliance with the law, as the term "obligors" is not understood. The first para appears to contain a circular requirement – " Supervision of the compliance ….. will be conducted by the authorities competent for supervision of compliance with such law." It may be that there is something missing in the translation – but there should be a clear delineation of responsibility for compliance with this law.

4.13.2 Para 2 of the Article provides that the Ministry of Interior will have some element of supervisory authority for this law. I have a concern that there are too many Ministries involved in this draft law in one way or another, and that this will make either for delay or confusion or for both. The Minster for Foreign Affairs has responsibility for the designation process, the Minister for Finance makes the freezing orders, Minister for Foreign Affairs deals with requests from abroad, and the Minister for Interior deals with supervisory matters. This is not ideal, and further thought should be given to the policy here.

4.14 Articles 16 and 17

4.14.1 These two articles contain the penal provisions. Firstly, Art 16 deals with offences committed by legal persons for (broadly) failing to identify or freeze transactions by designated persons. An additional financial penalty is to be imposed on the responsible person within the legal entity. Such an additional penalty may be harsh, but there appears to be no discretion.

4.14.2 Since the decision by the Minister under Art 6 is a decision "ordering the restriction on disposal of property", it would seem sensible to have as one of the offences in this Article a failure to restrict the disposal of property.

4.14.3 Art 17 imposes a personal responsibility if individuals act in contravention of the law. The connection between these two Articles is not clear. If there is individual liability under Art 16, would there still be proceedings under Art 17?

4.15 Articles 18, 19 and 20

4.15.1 These three Articles are headed "Transitional and Final Provisions". Art 18 makes provision for the coming into force of the law.

4.15.2 Article 19 is the transitional provision that was referred to in connection with Art 3 in para 4.3.1 above. The first list of designations has to be completed within 30 days of the coming into force of the law. Presumably that first list will contain all of the names on the UNSCR 1267 list, as well as those designated by the Serbian authorities themselves under UNSCR 1373. It should be recognised though that the process of the compilation of the list of designated persons will require considerable ongoing administrative support to enable it to function properly. In particular, it will be important that the administrative support will be able to collate information in relation to proposed designations, and examine and give effect, if appropriate, to requests of other countries for designation. This will be an ongoing function, and should not be considered as a function that can be discontinued once the first list of designated persons has been prepared.

4.15.3 Article 20 lays an obligation on all persons, both natural and legal, to detect any links with designated persons within 30 days of the list being published. This provision fails to take account of the need for continued awareness of the list – changes may occur at any

time, and this provision rather seems to provide for a once only act of vigilance. It may be that this Article is not necessary, given the obligations contained in Art 4, but in any event, consideration should be given to rewording the Article to make it clear that the obligation is ongoing, notwithstanding the fact that it appears in the transitional provisions.

5. AREAS NOT COVERED BY THE DRAFT LAW

5.1 Although I am asked to give an opinion on the draft law as it appears, it is inevitable that I have had regard to the requirements of SR3, and have considered to what extent the draft will enable Serbia to be compliant with its provisions.

5.2 I have regard particularly to the specific areas in which Serbia was found not to be compliant by Moneyval in 2009. I have detailed those in full in para 2.4 above. It would be beyond the scope of this Opinion for me to comment on whether implementation of this draft Law would make Serbia compliant with SR3. However, in my view there still remain a number of areas where criticisms could be levelled at Serbia in this area.

5.3 First, and most importantly, it does not seem to me that the second paragraph of SR3 has been addressed at all. That is to say, there are no specific provisions in the draft law relating to the seizure and confiscation of terrorist related assets as a result of this Law. The provisions in Art 6 relate to freezing only. Although there is reference in Art 8 to "until the competent court passes a decision pursuant to this law", I am unclear as to what this means, and it is certainly not specific enough to make compliance with SR3 beyond doubt.

5.4 There does not appear to me to be sufficient detail given to the potential areas for challenge of this new Law. I have referred above to the need for provision to challenge the actual designation.

5.5 There is the potential for a wide ranging role for the APML in this area. At present that opportunity does not appear to have been recognised. The APML is well placed to perform many of the functions necessary under this Law, and to add value to the work of others, and thought will have to be given as to how to make the most of this important organisation.

5.6 Finally, it cannot be emphasised enough that this law will only be effective if it is strongly supported administratively and widely communicated. There will also need to be detailed guidance given to financial institutions and DNFBPs as to how the law is to be implemented, and what is expected of them. Compliance with the various provisions will need to be closely monitored.