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## **1917 / Project against Corruption in Albania (PACA)**

### **Technical Paper**

**Expert opinion on the draft amendments to “Instruction no. 20 of the Ministry of Finance of Albania concerning the reporting methods and procedures of the obliged persons and entities under the Law on Prevention of Money Laundering and Terrorist Financing” and “Instruction no. 21 of the Ministry of Finance of Albania on reporting methods and procedures of designated non-financial professions”**

***Prepared by Mr Herbert Zammit Laferla, Council of Europe expert***

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**Annex I – Revised version of Instruction No 20**

**Annex II – Revised version of Instruction No 21**

***(Note: both Annexes include a version with track changes and a clean version)***

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For any additional information please contact:

Economic Crime Section/ Action against Crime Department  
Information Society and Action against Crime Directorate/  
DG I  
Council of Europe , F-67075 Strasbourg Cedex, FRANCE  
Tel +33 388 41 29 76/Fax +33 390 21 56 50  
Email: [lado.lalicic@coe.int](mailto:lado.lalicic@coe.int)  
Web: [www.coe.int/economiccrime](http://www.coe.int/economiccrime)

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## EXECUTIVE SUMMARY

This Technical Paper has been compiled within the framework of the Project against Corruption in Albania (PACA). Its objective is to provide an expert opinion on the proposed amendments to two Instructions issued to the private sector by the Albania Ministry of Finance as appropriate within the terms of Law No 9917 of 19 May 2008 on the Prevention of Money Laundering and Terrorist Financing, as amended. The expert opinion is limited to those provisions concerning Customer Due Diligence in relation to Recommendation 5 of the Financial Action Task Force (FATF) (but includes assessment of Recommendation 6 on Politically Exposed Persons and Recommendation 7 on Correspondent Banking Relationships in so far as the customer due diligence for these categories of customers is concerned).

The Technical Paper:

- lays down the basis of opinion and approach adopted;
- establishes the recommendations under the Fourth Round MONEYVAL Mutual Evaluation Report which are then taken into account for the proposed amendments;
- undertakes an evaluation and assessment of the Essential Criteria for FATF Recommendation 5 against the Albania Law No 9917 of 19 May 2008 amended;
- assesses Instruction 20 followed by Instruction 21 providing an opinion on compliance with the Essential Criteria for FATF Recommendation 5 and making comments, observations and recommendations as necessary accompanied by proposed text and re-structure for both Instructions;
- includes a comparative table on compliance with the FATF Essential Criteria for Recommendation 5 following the proposed amended draft text;
- is accompanied by two Annexes with proposed text and restructure for Instruction 20 and Instruction 21 respectively.

The Paper finds that the proposed amendments to the Instructions (indicated in italics in the original documents) have at times created duplicate or repeated obligations which could be inconsistent with each other and with the essential criteria for Recommendation 5. As a result the two documents lack continuity and consistency with obligations or requirements for the same topic being found under different paragraphs that are not sequential. At times the amendments go beyond the Law – although recognising the FATF requirements - while at other times the proposals lack certain provisions for adequate compliance. Consequent to this the two Instructions need to be restructured and re-formulated to follow the FATF essential criteria and provide a more user friendly document.

The draft text to reflect the proposed changes that are required for better compliance and harmonisation with the FATF obligations is included in two documents redrafting and restructuring the two Instructions. These two documents are included in the Annexes to this Technical Paper. However there remain some issues that need to be addressed separately:

- (i) the first three recommendations in the Fourth Round Mutual Evaluation Report with respect to Recommendation 5 as these could not be addressed through the two Instructions – unless already addressed.
- (ii) Article 8(1) of Law No 9917 of 19 May 2008 needs to be amended to ensure that the obligations to identify Politically Exposed Persons is clearly applicable to all obliged persons and entities under the Law and not to a selected sector only.
- (iii) Article 9 of the Law No 9917 of 19 May 2008 needs to be revised as the title to the Article renders the relevant paragraphs subject to interpretation as to their applicability. This Paper highlights in particular paragraphs (9), (10), (11) and (13) in addition to the following under items (iv) and (v).

- (iv) Article 9(12) of Law No 9917 of 19 May 2008 needs to be amended to ensure that in all instances where the obliged person or entity has commenced the business relationship and there is failure to complete the full customer due diligence measures the relationship is terminated and a report filed with the authorities.
- (v) Article 9(14) of the Law No 9917 of May 2008 needs to be amended to ensure that in all instances where there is failure to complete the customer due diligence measures the obliged persons and entities do not open an account, enter into a business relationship or carry out a transaction and file a report with the authorities.

## **INTRODUCTION**

The Technical Paper should make an assessment and concrete recommendations concerning the amendments' conformity with Recommendation 5 of the Financial Action Task Force as well as their compliance with recommendations of the Fourth Round MONEYVAL Mutual Evaluation Report.

This Technical Paper is drawn up as follows. It first lays down the basis of opinion and the approach adopted. Next it establishes the recommendations under the Fourth Round MONEYVAL Mutual Evaluation Report followed by an evaluation and assessment of the Essential Criteria for the FATF Recommendation 5 against the Albania Law No 9917 of 19 May 2008 on the Prevention of Money Laundering and Terrorist Financing as amended. On the basis of the foregoing the Paper next assesses Instruction 20 followed by an assessment of Instruction 21 providing an opinion on compliance with the Essential Criteria for Recommendation 5 of the Financial Action Task Force and making comments, observations and recommendations as necessary, accompanied by proposed text and structure for both Instructions. To this effect the Paper is complemented by two Annexes which form an integral part of the expert opinion. Annex I provides a revised and restructured Instruction 20 with proposed text in track-changes with side comments while Annex II similarly provides for Instruction 21.

It should be mentioned that both Instructions carry provisions that go beyond Recommendation 5 concerning Customer Due Diligence – reporting obligations, record keeping obligations and others. These provisions have not been assessed and any proposed changes thereto are only of an editorial nature. However, since Recommendation 6 (Politically Exposed Persons) and Recommendation 7 (Cross Border Correspondent Banking) are both intrinsically related to Customer Due Diligence (enhanced) these are taken into account in the assessment of the Instructions as applicable.

## **BASIS OF OPINION AND APPROACH ADOPTED**

The opinion is provided on the basis of the English versions of both Instructions as provided by the Council of Europe on 24 November 2011.<sup>1</sup> They may therefore include comments or proposed amendments which could be language related. The approach adopted for the assessment of the two Instructions involved a review of the Law no. 9917 against the Essential Criteria for Recommendation 5 highlighting any shortcomings, and a review with proposed amendments to both Instructions against the Law itself and the identified shortcomings. The approach included an evaluation of the recommendations of the MONEYVAL Fourth Round Mutual Evaluation Report, ensuring that the revised Instructions address these recommendations.

The proposed amending text is provided through a restructured revised version of both Instructions with relevant comments in this Paper – see Annexes I and II. The Technical Paper includes other comments and observations where these did not require any revised

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<sup>1</sup> The English version of Instruction 20 was slightly revised on 25 November 2011.

text – example where the provisions of the Instructions appear to be in conflict with or go beyond those of the Law no. 9917 of 19 May 2008.

## **FOURTH ROUND MUTUAL EVALUATION REPORT**

Recommendation 5 has been rated as partially compliant (PC) in the Fourth Round Mutual Evaluation Report which was adopted by the MONEYVAL Committee at its 35<sup>th</sup> Plenary in April 2011. The Report has made a number of recommendations in relation to Recommendation 5, which are also applicable to the designated non-financial businesses and profession (DNFBPs) through Recommendation 12.<sup>2</sup> The recommendations are being addressed within the context of the review of Instruction No 20 and Instruction No 21 as applicable and as appropriate to ensure that proposed text covers these concerns.

- Amend Articles 1025 and 1026 of the Civil Code and/or pass legislation to prohibit the issuing of bearer passbooks;
- Pass legislation to prohibit the issuing of any other bearer instruments (e.g. certificates of deposit);
- Prohibit the use of cheques with multiple endorsements over a certain threshold;
- Extend the circumstances when “CDD” is required to all aspects of CDD, not just identification and verification;
- Clarify or amend the term “reasonable doubt for money laundering or terrorist financing” in Article 4 of the AML/CFT Law to ensure that it fully covers cases where there is a suspicion of money laundering or terrorist financing;
- Clarify in law or regulation the requirement to verify that a person acting on behalf of another is so authorized;
- Include a requirement in law or regulation to verify the identity of a beneficial owner;
- Extend the requirements in relation to beneficial ownership to include beneficial ownership of legal arrangements;
- Clarify the inconsistency between the AML/CFT Law and Instruction 12 regarding the threshold for identifying the shareholding and voting rights of legal persons in determining beneficial ownership;
- Clarify the meaning of “de facto controls the decisions made by the legal person” in the AML/CFT Law, or otherwise provide a specific requirement in law, regulation or other enforceable means (“OEM”) to understand the ownership or control structure of customers who are legal persons, and in law or regulation the requirement that obliged entities must take reasonable measures to determine who are the natural persons who exercise effective control over a legal person or arrangement;
- Establish a requirement in law or regulation to determine whether a person is acting on behalf of another;
- Include a requirement in law, regulation or OEM that obliged entities obtain information on the purpose and intended nature of the business relationship;
- Clarify the requirements in the AML/CFT Law on carrying out “continuous monitoring”, and on “periodically” updating client data by either amending the Law itself or issuing further guidance to ensure that ongoing monitoring is fully and consistently implemented by the obliged entities;
- Provide further guidance on the categorization of clients deemed to require enhanced due diligence for all obliged entities, and (for entities supervised by the BoA) clarify that the indicators of suspicious activity given in Annexes I and II of Decision 44 can be used for this purpose, as well as for STR reporting.
- Clarify in law, regulation or OEM, or in guidance, the steps to be taken in when obliged entities are required to apply enhanced due diligence;

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<sup>2</sup> Source: paragraph 649 pages 171 – 173 Fourth Round Mutual Evaluation Report on Albania

- Establish in law, regulation or OEM requirements for all obliged entities not to open accounts and to consider submitting an SAR when they are unable to comply with criteria 5.6, and additionally for all obliged entities not supervised by the Bank of Albania when they are unable to comply with criteria 5.1 to 5.5;
- Set out in law, regulation or OEM a requirement to apply CDD measures to existing clients on the basis of materiality and risk, for example by clarifying what is meant by the term “periodically” in Article 6 of the AML/CFT Law.

The first three recommendations require specific legislative changes – unless already done – and are not therefore reflected in this assessment and opinion.

## LAW NO 9917 AND THE ESSENTIAL CRITERIA FOR FATF RECOMMENDATION 5

FATF Recommendation 5 on Customer Due Diligence (CDD) comprises 18 Essential Criteria (EC). The following table identifies each criterion against the relevant provisions of the Law No 9917 of 19 May 2008 on the ‘Prevention of Money Laundering and Terrorist Financing’. In so doing the assessment provides comments on shortcomings or non-compliance thereto. The identified shortcomings are then carried forward in the assessment of the relevant Instructions and are identified against proposed amendments as indicated in Annex I and Annex II respectively for Instruction 20 and Instruction 21 thus to ensure enhanced harmonisation and compliance with the FATF Recommendation 5.

Rec 5 <sup>3</sup>	Subject of EC	Law 9917	Comments/shortcomings
EC 5.1*	Anonymous accounts	Article 11(2)	
EC 5.2*	When CDD is required	Article 4(1)	Only in relation to identification and verification of identity procedures and not for the full CDD.
EC 5.3*	Customer Identification and verification of identity	Article 4(1)	But not with reference to independent source documents although this may be partly implied through Article 5 which however does not distinguish between the identification and verification processes
EC 5.4(a)*	Legal Persons and Legal Arrangements representative	Article 5(1)(d)	The word ‘copy of the act of representation’ could be interpreted within the context of authorisation on behalf of the company to establish a business relationship but there is no similar references for legal arrangements (trusts, etc)
EC 5.4(b)	Verification of legal status for legal persons and legal arrangements	Article 5(1)(c) and 5(1)(ç)	The provisions do not cover other legal arrangements such as trusts.
EC 5.5*	Identification and verification of identity of beneficial owner.	Article 4(2)	There is no reference to the verification process for the beneficial owner under Article 5.
EC 5.5.1*	Customer acting on	Article 9(7)	Whereas the obligation under EC 5.5.1

<sup>3</sup> An (\*) near an EC (Essential Criterion) number signifies that, according to the FATF Methodology that obligation or requirement should be found in law or regulation i.e. either primary or secondary legislation.

	behalf of third party		is generic under the FATF Methodology i.e in all instances where a persons is acting obo another, the title to Article 9 implies that Article 9(7) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied. Moreover there is no guiding reference to the verification process
EC 5.5.2(a)	Ownership and control structure of legal person or legal arrangement	Article 9(9)	Whereas the obligation under EC 5.5.2(a) is generic under the FATF Methodology i.e in all instances where for legal persons and legal arrangements obliged entities are to understand the ownership and control structure, the title to Article 9 implies that Article 9(9) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied. Moreover, the article refers only to legal persons and does not make reference to legal arrangements such as trusts.
EC 5.5.2(b)*	Determination of ultimate owner or controller of legal person or legal arrangements	Article 9(9)	Whereas the obligation under EC 5.5.2(b) is generic under the FATF Methodology i.e in all instances where for legal persons and legal arrangements obliged entities are to determine ultimate owner or controller, the title to Article 9 implies that Article 9(9) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied. The article refers only to legal persons and does not make reference to legal arrangements such as trusts.
EC 5.6	Purpose and intended nature of business	Article 9(10)	Whereas the obligation under EC 5.6 is generic under the FATF Methodology i.e in all instances where a business relationship is to be established obliged entities are to determine the purpose and intended nature of the business, the title to Article 9 implies that Article 9(10) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied.
EC 5.7*	Conduct ongoing due diligence	Article 6	
EC 5.7.1	Ongoing due diligence procedures	Article 6(1)	The Article falls short from defining a process that includes the scrutiny of transactions and the source of funds as appropriate.
EC 5.7.2	Updating of customers' data, information and	Article 6(2)	The Article creates the obligation but falls short of referring to CDD

	documents		documents, of explaining processes to be applied and of referring to higher risk categories of customers or business relationships.
EC 5.8	Application of enhanced due diligence	Article 7 and Article 8	
EC 5.9	Option to apply reduced or simplified customer due diligence measures	n.a.	The Law 9917 as amended does not provide for the option of simplified or reduced customer due diligence
EC 5.10	Reduced or simplified customer due diligence – country of origin	n.a	The Law 9917 as amended does not provide for the option of simplified or reduced customer due diligence
EC 5.11	Reduced or simplified customer due diligence – not to be applied where there is suspicion of ML or TF	n.a.	The Law 9917 as amended does not provide for the option of simplified or reduced customer due diligence
EC 5.12	Application of the CDD process on a risk sensitivity basis	Article 7(1)	Article partly indicates towards a risk based approach but only for higher risk customers and no relevant guidance given.
EC 5.13	Timing of verification of identity of customer and beneficial owner	Article 4(1) Article 4(2)	Article 4(1) does not refer to beneficial owner. It is Article 4(2) that refers to beneficial owner but it does not provide for timing of verification nor does it provide for verification procedures under Article 5
EC 5.14	Option to delay the verification procedures	Article 9(11)	The legal empowerment is only inferred as the Article requires obliged persons and entities to have the necessary risk procedures and risk management in place. To this effect the Article does not establish the criteria including instances as stipulated under the FATF and hence it becomes an open ended empowerment clause. Moreover, the title to Article 9 implies that Article 9(11) of the Law limits this option only in circumstances where <u>enhanced due diligence</u> is to be applied i.e. for higher risk situation which therefore conflicts with the <i>raison d'etre</i> for this option under the FATF Recommendations.
EC 5.14.1	Measures for delay of verification procedures	Article 9(11)	Moreover, the title to Article 9 implies that Article 9(11) of the Law limits this option only in circumstances where <u>enhanced due diligence</u> is to be applied i.e. for higher risk situation which therefore conflicts with the <i>raison d'etre</i> for this option under the FATF Recommendations.



EC 5.15	Failure to complete customer due diligence	Article 9(14)	Whereas the obligation under EC 5.15 is generic under the FATF Methodology i.e in all instances where there is such failure, Article 9(14) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied but cannot be satisfactorily completed.
EC 5.16	Failure to complete customer due diligence where business relationship has commenced	Article 9(12)	Whereas the obligation under EC 5.16 is generic under the FATF Methodology i.e in all instances where there is such failure, Article 9(12) of the Law limits this obligation only in circumstances where <u>enhanced due diligence</u> is to be applied but cannot be satisfactorily completed.
EC 5.17	Application of due diligence requirements on existing customers	Article 9(13)	Whereas the obligation under EC 5.17 is generic under the FATF Methodology and applies to all existing customers, Article 9(13) of the Law limits this to the application of <u>enhanced due diligence</u> situations only.
EC 5.18	Application of due diligence measures on accounts that fall under EC 5.1 - anonymous	n.a.	Not applied despite Article 1025 – 1026 of the Civil Code on the issue of bearer passbooks and the issue of bearer CDs under the Central Bank of Albania Guidance 79 of October 2001 – unless amended (See paragraphs 535 and 537 on page 155 of the MONEYVAL 4 <sup>th</sup> Round Mutual Evaluation Report on Albania.

The following are some further comments arising out of Law No 9917 of 19 May 2008 on 'The Prevention of Money Laundering and Terrorist Financing' that have relevance for the assessment of Instruction 20 and Instruction 21 and hence on the expert opinion provided in this Paper:

- (i) Article 2 (Definitions) item 12. The definition of beneficial owner refers to the beneficial owner being a 'natural or legal person'. In terms of the FATF Recommendations and Methodology the beneficial owner must always be a natural person.
- (ii) Article 7 (Extended diligence towards a client) paragraph 2. The words 'ask for the physical presence of the client' seem to imply that the physical presence is only required for enhanced customer due diligence - but then the Law is otherwise silent on non-face-to-face business.
- (iii) Article 8 (Categories of clients to whom extended diligence is applicable) para 1. The words 'subjects defined in letter "a" of article 3 of this law' imply that the Politically Exposed Persons (PEPs) obligation for extended (enhanced) diligence is only imposed on selected elements of the financial sector i.e. those under the supervision of the Bank of Albania. This has serious implications for both Instructions as the obligation for higher due diligence for PEPs is applicable to all obliged persons and entities under the FATF Recommendations.

- (iv) Article 9 (Categories of transactions to which extended diligence is applicable) is subject to interpretation and hence creates conflicts of application and implementation. The implication from the title to the Article is that the paragraphs of the Law 9917 that follow within that Article are all subject to situations of the application of extended (enhanced) due diligence and not within the normal application of the Customer Due Diligence (CDD) as required under the FATF Methodology for the Recommendations – please refer to comments in Table above.

The Sections that follow indicate those instances where paragraphs included in both Instruction 20 and Instruction 21 may be going beyond the provisions of the Law (in particular for Article 9). These paragraphs have been included to bring the Instructions (which are considered as ‘regulations’) more in harmony and in compliance with the FATF requirements. For paragraphs (12), (13) and (14) of Article 9 which, further to the title of the Article, specifically state their applicability in situations requiring the application of extended (enhanced) due diligence, the obligation is included in both the application of normal and extended (enhanced) Customer Due Diligence measures in order to comply with the provisions of the Law. However it is highly recommended that the Law be revised accordingly.

## **REVIEW AND ASSESSMENT OF INSTRUCTION NO 20**

### ***General overall comments***

An overall review and assessment of Instruction No 20, which is addressed to the financial sector, identifies some generic shortcomings which can be categorised as indicated below. The reference to Articles and paragraphs are in relation to the original document as received and may not match with those in the Annex I.

- (i) Duplication or repetition of obligations: Some of the amendments have been included as additional paragraphs to the relevant Article without taking into consideration that the Article may already be making some references to the same provisions, even if at times these lacked compliance with the relevant requirements under the FATF Recommendations. These are commented upon in the side comments in the revised document in Annex I - by way of example in Article 4 where paragraph 2 has been partly repeated in the proposed amendments (italics) under paragraph 4.
- (ii) Lack of continuity: The addition of the proposed amendments have created a lack of continuity in that references to the same obligations are found under different paragraphs that are not in sequence. These create difficulty and confusion or complexity for the obliged persons and entities to understand and effectively implement the measures required. For example reference to the identification and verification of beneficial owner under paragraph 12 of Article 4 is a continuation of the requirements for legal persons as defined in paragraph 4 of Article 4. In these instances the revised document in the Annex is restructured by integrating the requirements for a particular obligation under one paragraph or under separate paragraphs that are sequential.
- (iii) Going beyond the Law 9917: As indicated in the Table above the provisions of the Law at times go short in meeting full compliance and harmonisation with the Essential Criteria for the relevant FATF Recommendations. These are being addressed in the proposed amendments. However the Instruction at times goes beyond the provisions of the Law – for example the moving of paragraph 6 of Article 5 to paragraph 18 of Article 4 renders the obligation for measures when CDD cannot be completed under all circumstances when Article 9(12) and Article 9(14) of the Law limit this to situations where *extended* due diligence cannot be completed. This is an important element that needs to be addressed, even though the proposed amendments are retaining this obligation under both circumstances in

the light that the Instruction is considered as *regulation* for the purposes of the Methodology evaluation and to clearly reflect the Law.

- (iv) Missing Provisions: The proposed amendments in the original document at times still lack provisions for full compliance with the FATF Recommendation 5. In particular this is relevant with reference to the Customer Due Diligence principle. The Law lacks a definition of Customer Due Diligence and while referring to such terminology and providing sporadically for its full implementation, the Law does not seem to provide a clear distinction between Customer Due Diligence and the previous Know Your Customer principle particularly since the latter is only one element of the former. To this effect a new Article is being proposed to be included in the Instruction for clarification and to ensure full compliance by the industry.
- (v) Consistency: The Instruction is divided into a number of Articles each addressing specific elements of the obligations for compliance with the FATF Recommendations. For example whereas Articles 3 to 6 all refer to an extent to the customer due diligence obligations, Article 3 provides for the identification and verification of the customer and the beneficial owner; Article 4 provides for customer due diligence while Article 5 provides for extended (enhanced) due diligence; and Article 6 provides for the continuous monitoring of the business relationship. Notwithstanding paragraphs 5 and 16 under Article 4 deal with extended (enhanced) due diligence rather than under Article 5 while paragraph 13 also under Article 4 deals with ongoing due diligence when this is addressed under Article 6.
- (vi) Structure: Taking into consideration the above comments the document is being restructured to create a more harmonious, consistent and user friendly document that would be of better assistance to the industry. For example the provisions under paragraphs 9 and 10 of Article 4 dealing with anonymous accounts and the obligation to identify the customer have been move up within Article 4 as these are the fundamental obligations for Recommendation 5. Moreover, although it may be an issue of translation, proposed linguistic changes are being proposed. In particular this refers to the use of the word 'should' as opposed to 'shall'. The former leaves some room for flexibility while the latter is more assertive (mandatory) and thus ensures more harmonisation in the application of the Instruction throughout all obliged persons and entities. Also, whereas the Instruction states that it is applicable to obliged persons and entities 'a', 'b', 'c', 'ç', 'd', 'e', 'ë', 'f' and 'k' of article 3 of the Law no. 9917, May 19th 2008 "On the prevention of money laundering and terrorism financing" as amended, yet the amendments to the Law have removed item 'ç' while item 'dh' (every other natural or legal person who issues or manages means of payment or of money or who performs the transfer of things of value (debit and credit cards, checks, traveller's checks, payment orders and bank payment orders, electronic money or other similar instruments)) is not included. The authorities may wish to consider this as the Consultant is not aware of any specific reason for this. Finally, for the purpose of consistency subjects under Article 3 of the Law as applicable under the Instruction are being generally referred to as 'obliged persons and entities'.
- (vii) Following the annexes, the original document again includes Article 4 – 6 of the original document of the Instruction with the same proposed additions and amendments. These are considered as superfluous and should therefore be deleted.

### ***Proposed amendments to Instruction No 20***

This section provides some insight into the proposed amendments to Instruction 20 which complements the specific proposals under Annex I. Consequently references in this section to Articles and paragraphs are those related to the numbering of articles and paragraphs under the document with track changes in the Annex.

- (i) A new **Article 3** under the title 'Customer Due Diligence' is being introduced and consequently all previous articles from Article 3 onwards have been renumbered. Article 3 introduces the full concept of customer due diligence by providing a definition that respects that of the FATF Recommendations. It is also imposing the obligation to apply the full CDD in situations as defined in Article 4(1) of the Law No 9917. As the Law requires the application of extended (enhanced) due diligence, the new Article 3 provides for the application of CDD on a risk sensitivity basis for higher risks and therefore imposes the obligation for obliged persons and entities to develop policies and procedures on a proportionality basis but that identify the extent of risk and ensure the application of customer due diligence obligations commensurate with such risk. Thus the new Article 3 is covering compliance with Essential Criterion 5.2\* and Essential Criterion 5.12.
- (ii) **Article 4** (renumbered from previous Article 3) on the identification and verification of the customer and beneficial owner is being slightly amended. First to indicate that the verification process is done against documents through reliable independent sources (EC 5.3\*). Second to clarify that the beneficial owner should always be a natural person and that identification and verification of the beneficial owner should be done in accordance with the provisions of paragraph 1 of the same Article for individuals (EC 5.5\*). Third to ensure that identification and verification in all circumstances is done before establishing the business relationship (EC 5.13). It should be mentioned that paragraph 5 of this Article which provides for the non-identification and verification of shareholders of legal persons listed on a regulated stock exchange (EC 5.5.2 – Note) limits regulated stock exchanges to those 'outside the country' thus excluding internal ones. This goes beyond the requirements under the FATF Methodology and the Albania authorities may wish to reconsider.
- (iii) **Article 5** (renumbered from previous Article 4) is being retitled as 'Customer Due Diligence measures' consequent to the new Article 3 and as it deals with the application of customer due diligence. Substantial amendments are being proposed for this Article in particular due to restructuring, duplication of obligations, consistency and continuity.

*Paragraph 1* is being amended to provide guidance on the expected designing of rules and regulations required to prevent money laundering and terrorist financing.

*Paragraph 2* on anonymous accounts is lifted from paragraph 11 - which is to be deleted - and slightly amended to cover numbered accounts (EC 5.1\* and EC 5.18).

*Paragraph 3*, dealing with identification and verification of customers and which is lifted from the paragraph 12 which is to be deleted is now linked to Article 4 for continuity and consistency (EC 5.3\*).

*Paragraph 4* is to be deleted as this is now integrated under paragraph 6.

*Paragraph 5* clarifies the need to identify the third party and links the process to Article 4 (EC 5.5.1\*). The original text to paragraph 5 includes the words 'or during the monitoring of this relationship' which gives the impression that such determination can be made after the business relationship is established. It is proposed to remove these words. However it should be highlighted that the title to Article 9 of the Law 9917 implies that this obligation (Article 9(7)) is only applicable in situations where extended (enhanced) due diligence is to be applied and hence the proposed paragraph 5 may be going beyond the provisions of the Law. The Law should be amended accordingly at the first opportunity.

*Paragraph 6* is completely restructured and now comprises all obligations related to legal persons or legal arrangements – thus covering EC 5.4(a)\*, EC 5.4(b), EC 5.5\*, EC 5.5.2(a) and EC 5.5.2(b)\*. As a result some of the proposed

amendments (in italics) have been incorporated, integrated and enhanced under this paragraph for continuity purposes. The original amendments (in italics) will now be deleted. However it should be highlighted that for some parts of paragraph 6 – refer to side comments in Annex 1 - the title to Article 9 of the Law 9917 implies that these obligations (Article 9(9)) are only applicable in situations where extended (enhanced) due diligence is to be applied and hence some of the proposed elements to paragraph 6 may be going beyond the provisions of the Law. The Law should be amended accordingly at the first opportunity.

*Paragraph 7* is to be deleted as the proposed amendment refers to correspondent banking relationships which are separately addressed under Article 6 (renumbered from previous Article 5) on extended (enhanced) due diligence. Paragraph 7 will therefore be integrated into Article 6 as appropriate.

*Paragraph 8* on understanding the purposes and intended nature of the business relationship has been expanded to include reference to the obligation of drawing up the customer business and risk profiles - (EC 5.6). However it should be highlighted that the title to Article 9 of the Law 9917 implies that this obligation (Article 9(10)) is only applicable in situations where extended (enhanced) due diligence is to be applied and hence the proposed paragraph 8 may be going beyond the provisions of the Law. The Law should be amended accordingly at the first opportunity.

*Paragraph 9* dealing with the timing of the verification is being extended to incorporate additional obligations, including criteria for allowing for instances when the verification process could be completed after the business relationship is initiated in compliance with EC 5.14 and EC 5.14.1. However it should be highlighted that the title to Article 9 of the Law 9917 implies that this obligation (Article 9(11)) is only applicable in situations where extended (enhanced) due diligence is to be applied and hence the proposed paragraph 9 may be going beyond the provisions of the Law. The Law should be amended accordingly at the first opportunity.

*Paragraph 10* which deals with obligations for failure to complete the identification and verification processes where the business relationship has already commenced is slightly amended in order to better reflect the obligations under EC 5.16. It should be noted that Article 9(12) of the Law 9917 only provides for such obligations when the enhanced due diligence process cannot be completed. It should however be pertinent to include this obligation for the general failure in compliance with the FATF requirements. It is however highly recommended that the Law should be amended accordingly at the first opportunity.

*Paragraph 11* dealing with anonymous accounts as proposed amendment (italics) has been moved as paragraph 2 under this Article and hence is to be deleted.

*Paragraph 12* imposing the obligation to identify and verify the identification of the customer as proposed amendment (italics) is being moved as paragraph 3 of this Article and hence shall be removed.

*Paragraph 13* dealing with obligations of legal persons shall be removed as proposed amendment (italics) has been integrated with paragraph 6 of this Article.

*Paragraph 14* is to be deleted as proposed amendment (italics) includes obligations on legal persons some of which are already included under paragraph 6 (previous paragraph 4). For the sake of clarity, continuity and consistency therefore the proposed paragraph 14 with amendments has been incorporated within the restructured paragraph 6.

*Paragraph 15* as proposed addresses the ongoing due diligence of the customer relationship which is already specifically addressed under Article 7 (previously Article 6). Paragraph 15 is therefore being amended to provide a link to Article 7 for continuity purposes but the obligations are retained under Article 7 – EC 5.7\*.

*Paragraph 16* as proposed addressing the updating of identification documents is also already included under Article 7 (previously Article 6) and hence should be removed.

*Paragraph 17* as proposed on the timing of verification of customer and beneficial owner identity has been moved as paragraph 6 to Article 4 which deals with identification and verification and amended accordingly (EC 5.13).

*Paragraph 18* dealing with the application of customer due diligence measures to existing customers is being amended to provide guidance for the timing of this obligation – EC 5.17

*Paragraph 19* - Since extended (enhanced) due diligence is specifically addressed under Article 6 this paragraph has been amended to provide a link from the application of the customer due diligence to the application of enhanced due diligence – EC 5.8.

*Paragraph 20* as originally proposed (italics) has been lifted from the previous Article 5 dealing with enhanced due diligence in the original document. It has however been amended to better reflect EC 5.15 and is therefore linked to items (i) to (iii) of paragraph 1 of the new Article 3 (Customer due diligence) of this Instruction. Indeed paragraph 9(14) of the Law 9917 only provides for the obligations to apply when enhanced due diligence cannot be satisfactorily completed. The relevant criteria for the FATF Recommendations require this obligation in all instances. Although this may be going beyond the Law yet it is pertinent to include it here also as it is within the spirit of the Law itself and better reflects EC 5.15. It is however highly recommended that the Law 9917 be amended accordingly at the first opportunity – EC 5.15.

- (iv) **Article 6** (renumbered from previous Article 5) deals with enhanced due diligence and, as already indicated above, now incorporates all requirements and obligations that fall within the principle of enhanced due diligence. The introduction to the Article has been extensively enhanced to reflect the concept of enhanced due diligence.

*Paragraph 1* is reflecting the previous paragraph 19 and imposes the obligation to apply enhanced customer due diligence measures in specified situations as previously included under paragraph 19, and for other categories of customers where the identification measures may be hindered and thus reflect a higher risk – EC 5.8.

*Paragraph 2* retains the previous paragraph 1 on large complex transactions but is being amended to better reflect EC 11.1 to EC 11.3.

*Paragraph 3* deals with correspondent banking relationships but has now been amended to integrate all provisions in this Instruction that refer to such relationships and the due diligence that is required. As amended the paragraph now clearly addresses EC 18.2 and EC 18.3 on shell banks and EC 7.1 to EC 7.5 on correspondent banking relationships.

*Paragraph 4*, previously paragraph 3, addresses the application of enhanced due diligence under situations involving Politically Exposed Persons (PEPs). The paragraph is being revised by reference to the identification of 'source of wealth' and 'source of funds' and provides definitions accordingly – thus better reflecting the provisions of EC 6.1 to EC 6.4. However it must be noted that whereas the Instruction is applying this obligation to all obliged persons and entities, Law No 9917 as amended under Article 8 imposes this obligation only on those subjects defined under letter "a" of Article 3 i.e. banking subjects as well as every other subject who is licensed or supervised by the Bank of Albania, including, but without being limited to, the subjects provided in letters "b", "c" and "ç" (which is now deleted). Paragraph 4 of Article 6 of Instruction No 20 may therefore be going beyond the Law but in conformity with the FATF requirements. Unless there is a specific reason for this drafting, which is not understood by the

Consultant, it is highly advisable that the Albanian authorities address this issue in the Law at the earliest.

*Paragraph 5* dealing with enhanced due diligence in the case of Non Profit Organisations is being fine tuned to better reflect the application of the obligation of enhanced due diligence.

*Paragraph 6* on the determination whether a customer is acting on behalf of a third party has been fine tuned and moved to Article 5 paragraph 5 (EC 5.5.1\*) – consequently paragraph 6 is to be removed.

*Paragraph 7* which deals with failure to complete enhanced due diligence and reflects Article 9(14) of the Law No 9917 has been proposed for deletion in the original document due to its integration in Article 4 (now Article 5). As this paragraph reflects the Law and is applicable only in situations where the enhanced due diligence cannot be completed, it is recommended that the paragraph be retained as amended – EC 5.15. As explained above this obligation is also included under paragraph 20 for Article 5 and applied in all other circumstances as reflected in EC 5.15.

*Paragraph 8* is introducing a similar provision as in paragraph 10 of Article 5 since Article 9(12) of the Law imposes the obligations to terminate the business relationship and to report to the authorities when the business relationship has started and the enhanced due diligence cannot be fully completed (EC 5.16).

- (v) **Article 7** (renumbered from previous Article 6) addresses the continuous monitoring of the business relationship. As already indicated above paragraph 15 of Article 5 links the obligation on ongoing due diligence under the Customer Due Diligence notion into Article 7.

*Paragraph 1* imposes the obligation of continuous monitoring (C 5.7\*) while providing guidance on the procedures to be adopted to comply therewith (EC 5.7.1). Minor changes are proposed.

*Paragraph 2* imposes the obligation to keep updated the identification information, data and documentation. A minor amendment is being proposed related to the timing of the application of this requirement – EC 5.7.2

- (vi) **Articles 8 – 14** have only been reviewed for editorial purposes since the provisions of these articles do not fall within the Customer Due Diligence procedures for the effective implementation of Recommendation 5.

## REVIEW AND ASSESSMENT OF INSTRUCTION NO 21

Instruction No 21 is applicable to obliged persons and entities of paragraphs 'g', 'gj', 'h', 'i', of Article 3 of the Law no. 9917 of 19 May 2008 "On the prevention of money laundering and terrorism financing" as amended – basically the designated non financial businesses and professions (DNFBPs). Instruction 21 is in principle very close to Instruction 20 and hence this section of the Technical Paper will not go into those issues already addressed under Instruction No 20 and which are likewise applicable and relevant to Instruction 21.

### **General overall comments**

The general comments items (i) to (vi) in the section on the analysis and assessment of Instruction 20 likewise apply to Instruction 21. The main issue for Instruction 21 remains the identification of PEPs and the application of enhanced due diligence thereto when the Law 9917 imposes this obligation only on those subjects defined under letter "a" of Article 3 i.e. banking subjects as well as every other subject who is licensed or supervised by the Bank of

Albania, including, but without being limited to, the subjects provided in letters “b”, “c” and “ç”. This needs to be addressed by the Albania authorities.

### ***Proposed amendments to Instruction No 21***

Since Instruction 21 basically reflects Instruction 20 this section will not repeat the detailed provisions for the relevant Articles and proposals under Instruction 20. It will however highlight proposed amendments that are particular to Instruction 21. References in this section to Articles and paragraphs are those related to the numbering of articles and paragraphs under the document with track changes in Annex II.

(i) **Article 5** on customer due diligence measures:

*Paragraph 2* dealing with anonymous accounts is being clarified for DNFBPs to provide an interpretation of the word ‘account’ within the terminology of their activities. As such the following is being added *For the purposes of this Instruction references to ‘accounts’ shall be construed to refer to any type of business relationship where the customer is not identified through the relevant identification details established by this Instruction.* (EC. 5.1\*) (EC. 5.18)

*Paragraph 9* is being added to impose the obligations arising when the business relationship has initiated and there is failure to complete the identification and verification processes satisfactorily. As for Instruction 20, paragraph 9 complements paragraph 8 on the timing of verification - (EC 5.16). Also as for Instruction 20 (paragraph 10) paragraph 9 goes beyond the provisions of the Law 9917 as amended.

*Paragraphs 5, 6, 7 and 8* may be going beyond the provisions of the Law 9917 as already indicated for Instruction 20 for paragraphs 5, 6, 8 and 9.

(ii) **Article 6** dealing with enhanced due diligence:

*Paragraph 3* imposes the obligation of the identification of PEPs and the application of enhanced due diligence measures to this category of customers. It should be noted here that whereas the Instruction is applying this obligation on all obliged persons and entities, Law No 9917 as amended under Article 8 imposes this obligation ONLY on those subjects defined under letter “a” of Article 3 i.e. banking subjects as well as every other subject who is licensed or supervised by the Bank of Albania, including, but without being limited to, the subjects provided in letters “b”, “c” and “ç” (now deleted). Article 6(3) of this Instruction may therefore be going beyond the Law BUT in conformity with the FATF requirements. In the light that the Instruction is considered as *regulation* under the FATF Methodology, it is recommended to retain this paragraph. However, unless there is a specific reason for this drafting, which is not understood by the Consultant, it is highly advisable that the Albanian authorities address this issue at the earliest.

## **COMPLIANCE WITH THE ESSENTIAL CRITERIA FOR FATF RECOMMENDATION 5**

The following Comparative Table summarises the compliance of the Albania legislative provisions (Law no. 9917, Instruction 20 and Instruction 21) with the relevant Essential Criteria for FATF Recommendation 5 following the proposed amendments in this Paper. The references to Article and paragraph numbers for Instruction no. 20 and Instruction no. 21 are those as included in the tracked versions in the Annex I and Annex II respectively to this Technical Paper.



FATF Essential Criterion <sup>4</sup>	Law No 9917	Instruction 20	Instruction 21	Comments
EC 5.1*	Article 11(2)	Article 5(2)	Article 5(2)	
EC 5.2*	Article 4(1)	Article 3(2)	Article 3(2)	
EC 5.3*	Article 4(1)	Article 4(1) and Article 5(3)	Article 4(1) and Article 5(3)	
EC 5.4(a)*	Article 5(1)(d)	Article 5(6)	Article 5(6)	
EC 5.4(b)	Article 5(1)(c) and 5(1)(ç)	Article 5(6)	Article 5(6)	
EC 5.5*	Article 4(2)	Article 5(6)	Article 5(6)	
EC 5.5.1*	Article 9(7)	Article 5(5)	Article 5(5)	Art 9(7) of the Law needs to be amended.  'or during the monitoring of this relationship' in A 5(5) of the Instructions should be removed
EC 5.5.2(a)	Article 9(9)	Article 5(6)	Article 5(6)	Art 9(9) of the Law needs to be amended.
EC 5.5.2(b)*	Article 9(9)	Article 5(6) and Article 4(5) in relation to Note to Criterion	Article 5(6) and Article 4(5) in relation to Note to Criterion	Art 9(9) of the Law needs to be amended.  Article 4(5) of the Instructions limits exception in FATF Note to EC 5.5.2 to regulated exchanges outside the country.
EC 5.6	Article 9(10)	Article 5(8)	Article 5(7)	Art 9(10) of the Law needs to be amended.
EC 5.7*	Article 6	Article 5(15) and Article 7(1)	Article 5(14) and Article 7(1)	
EC 5.7.1	Article 6(1)	Article 7(1)	Article 7(1)	

<sup>4</sup> An (\*) near an EC (Essential Criterion) number signifies that, according to the FATF Methodology that obligation or requirement should be found in law or regulation i.e. either primary or secondary legislation.

EC 5.7.2	Article 6(2)	Article 7(2)	Article 7(2)	
EC 5.8	Article 7 and Article 8	Article 5(19) and Article 6(1)	Article 5(18) and Article 6(1)	
EC 5.9	n.a.	n.a.	n.a.	
EC 5.10	n.a.	n.a.	n.a.	
EC 5.11	n.a.	n.a.	n.a.	
EC 5.12	Article 7(1)	Article 3(3)	Article 3(3)	
EC 5.13	Article 4(1) Article 4(2)	Article 4(6)	Article 4(6)	
EC 5.14	Article 9(11)	Article 5(9)	Article 5(8)	Art 9(11) of the Law needs to be amended.
EC 5.14.1	Article 9(11)	Article 5(9)	Article 5(8)	Art 9(11) of the Law needs to be amended.
EC 5.15	Article 9(14)	Article 5(20) and Article 6(7)	Article 5(19)) and Article 6(6)	Art 9(14) of the Law needs to be amended
EC 5.16	Article 9(12)	Article 5(10) and Article 6(8)	Article 5(9) and Article 6(7)	Art 9(12) of the Law needs to be amended
EC 5.17	Article 9(13)	Article 5(18)	Article 5(17)	Art 9(13) of the Law needs to be amended.
EC 5.18	n.a.	Article 5(2)	Article 5(2)	

## CONCLUSION

The proposed amendments as included in the drafted text to Instruction no. 20 and Instruction no. 21 have taken into account the recommendations made in the Fourth Mutual Evaluation Report, the draft amendments in the original documents (italics) and the identified shortcomings in the Law No 9917 of 19 May 2008. The objective of this review is to ensure that the legislative provisions for Albania with respect to the requirements for FATF Recommendation 5 are better harmonised and consequently more in compliance. Some of the drafted text to the Instructions is subject to any translation errors or non-clarity of the provisions in the mother language of the country as translated. Annexes I and II to this Technical Paper, with the proposed drafted text, form an integral part of the expert opinion provided. It is highly recommended that the proposed changes be adopted to ensure higher harmonisation and compliance with the relevant FATF essential criteria for Recommendation 5, including Recommendations 6 and 7.

In addition to the draft text and the opinion expressed in this Paper with respect to Instruction no. 20 and Instruction no. 21, it is recommended that the Albania authorities consider the following issues:

- (i) Address separately (unless already done) the first three recommendations in the Fourth Round Mutual Evaluation Report with respect to Recommendation 5 as these could not be addressed through the two Instructions:
- Amend Articles 1025 and 1026 of the Civil Code and/or pass legislation to prohibit the issuing of bearer passbooks;
  - Pass legislation to prohibit the issuing of any other bearer instruments (e.g. certificates of deposit);
  - Prohibit the use of cheques with multiple endorsements over a certain threshold.
- (ii) Article 8(1) of Law No 9917 of 19 May 2008 needs to be amended to ensure that the obligations to identify Politically Exposed Persons is applicable to all obliged persons and entities under the Law and not to a selected sector only.
- (iii) Article 9 of the Law No 9917 of 19 May 2008 needs to be revised as the title to the Article renders the relevant paragraphs subject to interpretation as to their applicability. This Paper highlights in particular paragraphs (9), (10), (11) and (13) in addition to the following under items (iv) and (v).
- (iv) Article 9(12) of Law No 9917 of 19 May 2008 needs to be amended to ensure that in all instances where the obliged person or entity has commenced the business relationship and there is failure to complete the full customer due diligence measures the relationship is terminated and a report filed with the authorities. This will ensure better harmonisation with EC 5.16. Currently this is only required when the enhanced due diligence procedures cannot be applied.
- (v) Article 9(14) of the Law No 9917 of May 2008 needs to be amended to ensure that in all instances where there is failure to complete the customer due diligence measures the obliged persons and entities do not open an account, enter into a business relationship or carry out a transaction. This will ensure better harmonisation with EC 5.15. Currently this is only required when the enhanced due diligence procedures cannot be applied.