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Technical Paper

Expert opinion on the draft "Law on some addenda and amendments to the Law No. 7895 dated 27.01.1995 'Criminal Code of the Republic of Albania' as amended" in light of its compliance with Special Recommendation II of the Financial Action Task Force

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

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ABBREVIATIONS

AML/CFT - Anti-money Laundering and Countering Financing of Terrorism

CC - Criminal Code

EC - Essential Criteria (per FAFT Recommendations)

FATF - Financial Action Task Force

FT – Financing of Terrorism

ML – Money Laundering

MONEYVAL - The Council of Europe's Committee of Experts on the Evaluation of Anti-money laundering Measures and the Financing of Terrorism

PACA – Project against Corruption in Albania

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 the Criminal Code of the Republic of Albania (hereinafter "CC") as set out in the draft "Law on some addenda and amendments to the Law No. 7895 dated 27.01.1995 'Criminal Code of the Republic of Albania' as amended" (hereinafter: "Draft Amendments to CC"). The expert opinion is limited to provisions concerning the criminalization of Financing of Terrorism (hereinafter "FT") in relation to Special Recommendation II of the Financial Action Task Force (FATF).

The Technical Paper:

- lays down the basis of opinion and approach adopted;
- establishes the recommendations under the Fourth Round MONEYVAL Mutual Evaluation Report (hereinafter "the Report") which are then taken into account for the proposed amendments;
- undertakes an evaluation and assessment of the Essential Criteria for FATF Special Recommendation II against the relevant provisions of the Albanian CC as amended by the Draft Amendments to CC;
- provides an opinion on compliance with the Essential Criteria for FATF Special Recommendation II making comments, observations and recommendations as necessary, including a comparative table on compliance with the respective (sub-)criteria.

The Paper finds that the Draft Amendments to CC clearly brings the existing FT offences more in line with the respective international standards by abandoning the pre-existent structure of the related offences and replacing them by a single, separate, autonomous FT offence in light of Special Recommendation II and the recommendations made by the the Report. It is also found, however that less attention was paid to properly harmonize the new rules also in terms of their coexistence with older CC provisions. The shortcomings derived from the lack of harmonization, together with some definitional deficiencies, may easily endanger the effective applicability of the FT offence and therefore the Albanian authorities should revisit the problematic issues discussed below. Equally, there remains a number of deficiencies indicated in the Report, particularly as regards some aspects of the offence of terrorist act, which also need to be remedied.

INTRODUCTION

The Technical Paper should make an assessment and concrete recommendations concerning the amendments' conformity with Special Recommendation II of the Financial Action Task Force as well as its compliance with the respective recommendations of the 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 Report followed by an evaluation and assessment of the Essential Criteria for the FATF Special Recommendation II against the Criminal Code of the Republic of Albania as amended by the current Draft Amendments. On this basis, the Paper provides an opinion on compliance with the Essential Criteria and sub-criteria for Special Recommendation II making comments, observations and recommendations as necessary. To this effect the Paper is complemented by two Annexes which form an integral part of the expert opinion. Annex I provides the Draft Amendments to CC while Annex II contains the entire Criminal Code in its consolidated version mentioned above.

It should be mentioned that the Draft Amendments carry provisions that go beyond Special Recommendation II concerning the criminalization of terrorist financing – first of all, those amending the money laundering offence in Article 287 CC – which have not been assessed.

BASIS OF OPINION AND APPROACH ADOPTED

The opinion is provided on the basis of the English version of the Draft Amendments to CC as compared to the (unofficial) English translation of the Criminal Code of the Republic of Albania (in a consolidated version as of 13th October 2009, both provided by the Council of Europe). Based upon all possible sources of information, it was concluded that no further amendments have since been adopted regarding the relevant parts of the CC.

Both sources are English translations of the respective Albanian original and therefore it cannot be excluded that certain terms or phrases in these texts may have been inadequately or inaccurately translated. As a consequence, some comments or proposed amendments could also be language related.

The approach adopted for the assessment of the relevant parts of the Draft Amendments also involved a comparative review of the penal provisions of the treaties annexed to the United Nations International Convention for the Suppression of the Financing of Terrorism (hereinafter **"**FT Convention") by comparing them to the respective sub-paragraphs in Article 230/a (2) CC as amended.

All this comparative analysis was aimed at identifying and highlighting any shortcomings which are then summarized in a table followed by proposed amendments thereto. The approach also included an evaluation of the recommendations of the MONEYVAL Fourth Round Mutual Evaluation Report ensuring that these are equally addressed.

MONEYVAL FOURTH ROUND MUTUAL EVALUATION REPORT

Special Recommendation II was rated as partially compliant (PC) in the Fourth Round Mutual Evaluation Report adopted by the MONEYVAL Committee at its 35th Plenary in April 2011. The Report made a number of recommendations[1] in relation to Special Recommendation II the majority of which are, at least to a certain extent, addressed by the Draft Amendments to CC as discussed later in this Paper:

[1] *Source*: paragraph 236 page 84 of MONEYVAL Fourth Round Mutual Evaluation Report on Albania

- Enact amendments to the FT criminalization provisions in Chapter VII of the CC provisions, so that:
    - Article 230/a applies regardless of whether the terrorist act is actually committed or attempted;
    - it is clear that the prohibited financing extends to the full extent of "funds" as that term is defined in the FT Convention;
    - the financing of individual terrorists regardless of whether the funds are provided or collected to support terrorist activities is criminalized.

- Enact amendments to Article 230 CC so that:
    - it covers each specific action that is required to be criminalized under all the treaties that are annexed to the FT Convention;
    - it covers actions "intended to cause" death or serious bodily harm, not simply that "might" cause this;
    - the specific purpose or intent requirement set forth in Article 2 para. 1 (b) of the FT Convention is not required in the case of the conducts specified in the annexed treaties (Article 2, para. 1(a));
    - the purpose set forth in the Article is to compel the Albanian or foreign government rather than "Albanian or foreign governmental agencies".

- Either revise CC provisions on ancillary offences to deal with gaps in coverage as set forth in Recommendation 1, or incorporate coverage for all required ancillary conduct (facilitating in the absence of an agreement) directly in the CC Chapter VII – Terrorist Act provisions.

- Work towards developing additional cases as domestic intelligence, coordination with foreign partners working on FT and terrorism matters, and suspicious transactions reporting (STR) provide such opportunities.

It was also recommended that Albanian authorities consider making it clear that the Article 230 reference of "actions with terrorist purposes" is coextensive with the Article 230/a use of the term "terrorism".

The one before the last recommendation goes beyond the scope of the present Technical Paper and therefore it is not reflected in this assessment and opinion.

THE ESSENTIAL CRITERIA FOR FATF SPECIAL RECOMMENDATION II – AS CONTRASTED TO THE CRIMINAL CODE BEING IN FORCE AND THE DRAFT AMENDMENTS THERETO

FATF Special Recommendation II on the scope of the criminal offence of Terrorist Financing comprises 4 Essential Criteria (EC II.1 to II.4) many of which are then further divided into more sub-criteria respectively. In the following part of the Paper, each ECs and, where applicable, each sub-criteria will be taken into account one by one against the relevant provisions of the Criminal Code of the Republic of Albania as amended by the current Draft Amendments, also providing comments on shortcomings or non-compliance thereto.

EC II.1.a – Conducts that establish FT

> Terrorist financing offences should extend to any person who willfully provides or collects funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in full or in part:
> (i) to carry out a terrorist act(s);
> (ii) by a terrorist organisation; or
> (iii) by an individual terrorist.

In the current Criminal Code, the notion of FT is addressed by two separate criminal offences, that is, the Financing of Terrorism (Article 230/a CC) and the Collection of Funds for

Financing of Terrorism (Article 230/d CC). Articles 4 and 5 of the Draft Amendments to CC are expected to bring about fundamental changes in the criminal legislative approach in this field by eliminating the existing dual structure and replacing it with a single FT offence intended to meet all the relevant international standards. The latter criminal offence should be rendered under Article 230/a CC (the designation of the offence remains "Financing of Terrorism") while Article 230/d would be repealed. The core FT offence can be found in the first paragraph of the draft Article 230/a CC as follows:

> *Provision or collection of funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in full or in part in order*
> *a) to commit offences with terrorist purposes;*
> *b) by a terrorist organization;*
> *c) by a person who commits even an only criminal offence with terrorist purposes(...)*

As for the main structure of the core FT offence and particularly the conducts by which it may be established, there is no need for a profound comparative analysis to prove that the draft legislation practically copies the wording of EC II.1.a from the FATF Methodology (which in itself is based on of Article 2 of the FT convention) in terms of

- provision and collection of funds (as the two basic, optional conducts)
- that may be committed by any means as well as directly or indirectly (the widest scope of conducts)
- and also the knowledge/intention standard being literally identical in both texts ("with the unlawful intention..." etc.)

It appears the only difference that the definition in Special Recommendation II explicitly refers to the "willful" act of the offender while this specification is absent from the Draft Amendments to CC. This divergence from the FATF standard is however far from being an actual shortcoming, considering that the mental element of the offence would anyway meet the intention/knowledge standard (as indicated by terms such as "with the unlawful intention" or "in the knowledge") and hence the criminal act would necessarily be committed "willfully".

As for the three main options that denote the possible targets of financing activities, there is again a visible similarity with the Essential Criterion quoted above, even though the wording is more adapted to the context of the Criminal Code.

Financing of a Terrorist Act (EC II.1.a.i)

In subparagraph (a) of the draft FT offence quoted above, the term "offences with terrorist purposes" clearly refers to the criminal offence in Article 230 CC by which terrorist acts in general are criminalized (and which article would also be affected by the Draft Amendments to CC). At this point, one might wonder why this term is used in plural ("offences") which may imply, on the face of it, that the FT offence in paragraph (1)(a) can only be established if the offender intended to finance more than one terrorist act. The apparent confusion is likely to be caused by the fact that the designation of the offence in Article 230 CC (both in the current text and in the Draft Amendments thereto) is actually in plural ("Acts with terrorist purposes") even if only a single terrorist act is committed. It is beyond the scope of this Paper to decide whether and to what extent this designation is translated adequately to English and, if yes, whether or not its plural number might cause an actual problem for Albanian authorities, nevertheless it would perhaps be worth being more specific at least in the FT offence, for example, by modifying the current subparagraph (a) so that it refers to the offence of terrorist act by the number of the respective article (e.g. "(a) to commit an offence in Article 230").

Turning to the criminal offence in Article 230 CC it was also recommended by the Report that it cover each specific action that is required by Article 2(1)(a) of the FT Convention to be criminalized under all the treaties that are annexed to the FT Convention. That is, all these "treaty offences" should actually be criminalized by domestic criminal legislation and, as such, be subject of financing activities in the context of the FT offence. The Report made concrete

references to a number of "treaty offences" that had not been, or had not been properly, covered by Albanian criminal legislation (see paragraph 79 on page 207 of the Report).

This issue is addressed by the Draft Amendments to CC which brings upon a thorough restructuring and completion of Article 230 (2) CC where one can find the specific provisions defining the various sorts of conducts qualifiable as terrorist acts (offences with a terrorist purpose).

The level of compliance with the FT convention and hence with the FATF Special Recommendation II is broken down in the table below. This assessment is based on the comparative analysis of the respective offences in each Convention or Protocol on the one hand (taking into account the "core offences" only) and the various criminal conducts listed in Artilce 230 (2) CC as amended by the Draft Amendments.

Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.	230 (2) subpara (a)	Full coverage. Relevant as far as "aircrafts" are concerned.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done in Montreal on 23 September 1971.	230 (2) subpara (b)(c)(ç)(d) and (dh)	Full coverage. Relevant as far as "aircrafts" or "flying equipments" are concerned.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.	230 (2) subpara (e) and(ë)	Full coverage.
International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.	230 (2) subpara (f)	Full coverage for the conducts themselves but without the purposive element ("in order to compel a third party namely a State, an international-intergovernmental organization…" etc.) but it cannot be considered a deficiency in itself.
Convention on the Physical Protection of Nuclear Material, adopted by the International Atomic Energy Agency (IAEA) in Vienna on 3 March 1980.	230 (2) subpara (g) (gj) and (h)	Partial coverage achieved. Art. 7(1)(a) of the Convention (receipt, possession, use etc.) is fully covered by Article 230 (2)(g) CC as amended. Art. 7(1)(b) of the Convention ("theft or robbery") is covered by Article 230 (2)(gj) as far as "theft" is concerned but there is no mention of "robbery". The other term used by the Draft Amendments at this point ("appropriation") cannot be considered as a synonym of robbery. Art. 7(1)(c) of the Convention ("embezzlement or fraudulent obtaining") is not covered. The wording used by the Draft Amendments at the respective

		point ("profit through the fraud") is quite unusual and apparently inappropriate to denote a criminal conduct. It is not unlikely that subparagraph (gj) was simply mistranslated so it should be revisited by Albanian authorities. Art. 7(1)(d) of the Convention ("an act constituting a demand for nuclear material") is only partly, if at all, covered by Article 230 (2)(h) as amended. The "search of nuclear material" might also be an issue in translation.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done in Montreal on 24 February 1988.	230 (2) subpara (j) and (k)	Full coverage.
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done in Rome on 10 March 1988.	230 (2) subpara (a)(b)(c)(ç)(d) and (dh)	Full coverage. Relevant as far as "ships" or "maritime navigation equipment" are concerned.
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done in Rome on 10 March 1988.	230 (2) subpara (a)(b)(c) and (ç)	Full coverage. Relevant as far as "fixed platforms" are concerned.
International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.	230 (2) subpara (l)	Almost full coverage with a significant discrepancy in the text, probably caused by mistranslation. While the original Convention (Article 2.1) provides for the delivery, placement, discharge or detonation of "an explosive or other lethal device" the Draft Amendments refer to "narcotic substances or other lethal equipment" in the very same context. Since the wording is, in all other respects, quite identical and because the delivery or placement of narcotics cannot be considered a terrorist act (let alone the detonation thereof) it can be assumed that the Albanian original might have been mistranslated to English and "narcotic substances" should be understood as "explosives". This issue should urgently be revisited by Albanian authorities.

As for the generic offence of terrorist act, as it is defined by the Article 2(1)(b) of the FT Convention, compliance should be provided by the Article 230 (2)(n) of CC as amended by the Draft Amendments. The wording provided by the draft legislation remedies another one of the above mentioned shortcomings identified by the Fourth Mutual Evaluation Report, namely the lack of coverage of actions "intended to cause" death or serious bodily harm (the draft wording is completed accordingly).

Since the amending legislation does not affect but paragraph (2) of Article 230 CC all deficiencies related to other parts of the said article (like paragraph (1)) would remain - even if the Draft Amendments to CC were adopted - in its present form. In this context, the main shortcomings are as follows:

- in Article 230 (1) CC the specific purpose or intent requirement set forth in Article 2 (1)(b) of the FT Convention is equally required for all sorts of offences under Article 230 CC, that is, even in case of the conducts specified in the annexed treaties;
- and that Article 230 (1) CC, in the same context as above, sets forth a purpose to compel "Albanian or foreign governmental agencies" rather than such governments themselves in general.

It was also recommended in the Report to consider clarifying whether the Article 230 reference of "actions with terrorist purposes" is coextensive with the Article 230/a use of the term "terrorism" (as for the former, one can find "acts" or "offences" instead of "actions" in the present English versions but all these terms are presumably the same in the original). Notwithstanding this, the Draft Amendments to CC does not bring about any changes in this field: the draft Article 230/a CC maintains the term "terrorism" in its title and the same goes for Articles 230/b, 230/c, 230/ç and others too.

Financing of a Terrorist Organization (EC II.1.a.ii)

The simple and broad wording of Article 230/a (1)(b) is fully identical to that used by the FATF in EC II.1.a.ii. As a consequence, one may assume full compliance in this respect but a more profound analysis reveals some issues.

The term "terrorist organization" is defined by Article 28(2) CC as follows: *"a special form of the criminal organization, composed of two or more persons that have a stable collaboration extended in time, with the purpose of committing acts with terrorist purposes".* Pursuant to Article 234/a of CC the establishment, the organization, the leading and also the financing of a terrorist organization, as well as the mere participation in such an organization, constitutes a criminal offence in itself.

Since Article 28(2) is the sole provision in CC that defines "terrorist organization" it appears to refer to any criminal offences in the CC where this term is applied. At this point, it needs to note that this definition falls short of meeting the standard set by the definition in the Glossary attached to the FATF Methodology[2] which necessarily limits the compliance of Article 230/a (1)(b) as well.

Financing of a terrorist organization is thus a criminal offence under Article 234/a (1) of CC punishable with imprisonment of no less than fifteen years. This CC article appears not to be affected by the Draft Amendments to CC and therefore it is likely to overlap to some extent with Article 230/a (1)(b) as amended, which penalizes a basically similar conduct by threatening it with a more lenient sanction (from four up to twelve years of imprisonment).

Since the coexistence of the two competing or, at least, overlapping provisions in CC (with their current scope and wording) may in itself jeopardize the *nullum crimen sine lege* principle and thus the legal certainty in criminal jurisdiction, this issue needs some urgent legislative

[2] In the context of Special Recommendation II, it refers to any group of terrorists that: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and willfully; (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.

solution – for example, Albanian authorities may wish to consider simply deleting the conduct of "financing" from Article 234/a CC.

Financing of an Individual Terrorist (EC II.1.a.iii)

This aspect of FT activities had entirely been absent in Albanian criminal legislation so its introduction by the Draft Amendments to CC must be considered as an actual development. Legislators had apparently chosen not to use the term "(individual) terrorist" but attempted to describe its content in the draft Article 230/a (1)(c) CC by the phrase "*by a person who commits even an only criminal offence with terrorist purposes".* The apparent grammatical inaccuracy of this phrase implies some issues in English translation – for example "*even an only*" is very likely to mean "even a single" i.e. "at least one". Subsequently, it is not clear whether to understand the verb "commits" in present simple (as it is in the analysed text) or rather in present perfect (like "have already committed" as it would refer to a terrorist act the person committed beforehand). Thorough analysis of the current English version makes it however very likely that in the Draft Amendments, a "terrorist" is considered a natural person who has already committed at least one criminal act pursuant to Article 230 CC.

While paragraph (1)(c) avoids using the term "terrorist" it can nevertheless be found in an apparently similar context in paragraph (2) where reference is made to the financing "*of a terrorist organization, of offences with terrorist purposes or of a terrorist...".* Since the term "terrorist" is not defined by the CC (in paragraph (1)(c) it is rather explained than defined) it needs further clarification whether and to what extent the respective terms in the different paragraphs can be considered identical.

Quite similarly to the situation found in case of the draft Article 230/a (1)(b) CC (as discussed above) the presumed definition/description in subparagraph (c) does not meet the standard of the respective FATF Glossary definition[3] either.

The Issue of direct and indirect Financing of Terrorism

As discussed above, the FT definition in Article 230/a (1) as amended by the Draft Amendments to CC embraces both direct and indirect provision and/or collection of funds, in line with the respective standards set in the FT Convention and the FATF Special Recommendation II.

Notwithstanding that, the next paragraph of the draft Article 230/a CC provides for an apparently aggravated case of FT offence based on the directness of the financing activity:

> *The direct financing of a terrorist organization, of offences with terrorist purposes or of a terrorist or their support in any form shall be punishable by not less than fifteen years of imprisonment or by life imprisonment and by a fine from 5 million ALL up to 10 million ALL.*

It is beyond doubt that the latter paragraph was drafted keeping in mind the preceding paragraph of the Draft Amendments, particularly as paragraph (2) reiterates the triplicate approach by which the targets of financing activities (terrorist act, terrorist organization, individual terrorist) are determined by paragraph (1). It appears therefore that whenever the financing of terrorism is committed "directly" it is threatened with a more severe punishment. The basic conducts that establish the offence in paragraph (2) are, on the one hand, the "direct financing" and, on the other, the provision of "support of any form". This approach is, however, suffering from serious controversies and urgently requires reconsideration.

[3] In the context of Special Recommendation II, it refers to any natural person who: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and willfully; (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.

First of all, paragraph (2) uses a terminology significantly different from that of paragraph (1). Namely, it is unclear what is covered by the term "financing" in paragraph (2) considering that the entire offence in Article 230 CC (as amended) is designated as "financing of terrorism". It might easily be an explanation that "financing" in the context of paragraph (2) necessarily encompasses all activities by which the core offence in paragraph (1) is established, but there is no factual ground to confirm this presumption.

It is equally unclear why the conduct of "support in any form" was inserted here. Article 230/a (as amended) supposedly provides for the criminalization of terrorist financing as a whole. Supposing that the first conduct in paragraph (2) namely "financing" apparently embraces all FT activities, it is evident that this second, additional conduct must already fall beyond the notion of terrorist financing. In any case, the analysis of the criminal substantive legislation provides no explanation for this discrepancy.

Finally, paragraph (2) is obviously redundant as compared to paragraph (1) inasmuch as "direct financing of terrorism" i.e. the distinctive aggravated offence in paragraph (2) has already been subject of paragraph (1) which covers both direct and indirect financing of terrorism (that is, provision or collection of funds). Whereas the direct provision or collection of funds clearly makes part of the offence in paragraph (1) one cannot understand how the offence in paragraph (2) may be different in this respect. There is such a significant overlap between the two paragraphs that actually endangers the consistency and applicability of the entire FT offence. It might however be a possible, and quite obvious, solution for this issue to simply delete paragraph (2) or to find some other aggravating circumstances instead of "directness" that could more justify such an enhanced level of severity.

EC II.1.b – Funds as defined in the TF Convention

> Terrorist financing offences should extend to any funds as that term is defined in the TF Convention. This includes funds whether from a legitimate or illegitimate source.
> Article 1(1) of the said Convention defines funds as "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit."

The criminal substantive legislation currently being in force does not clearly provide for the coverage of "funds" as it is defined by the FT Convention. As noted above, the Report also urged enacting amendments to the FT criminalization provisions so as to make it clear that the financing prohibited extends to the full extent of "funds" as that term is defined in the FT Convention.

Following the latter recommendation, the Draft Amendments to CC clearly address this issue by introducing a definition of "funds" in Article 230/a (3)(a) CC (as amended) which is not only compliant with but also literally identical to that in Article 1(1) of the FT Convention:

> *The provisions of this article shall apply (a) to all funds including assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit and any other similar financial instruments.*

This definition would obviously meet the standards set in EC II.1.b. Having said that, it needs to be noted that EC II.1.b also requires that the FT offence extend to any fund "whether from a legitimate or illegitimate source" which specification cannot be found explicitly in the draft legislation. Considering however that the definition is extremely broad already in itself (covering "all funds including assets of every kind" etc.) the full coverage of both legitimate and illegitimate assets is more than presumable.

EC II.1.c – No specific Terrorist Act required

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

The FT criminalization provisions currently being in force fail to meet this Criterion and hence the Report recommended legislative steps to make Article 230/a CC applicable regardless of whether the terrorist act is actually committed or attempted.

The Draft Amendments to CC addressed this recommendation by inserting paragraph (3)(c) into Article 230/a CC (as amended):

> *The provisions of this article shall apply (c) in the case provided for in the first paragraph of this article, notwithstanding if the funds are in fact used for the commission of the offence with terrorist purposes or if they are related to a specific offence with terrorist purposes.*

This provision is almost fully in line with Criterion II.1.c (where an "offence with terrorist purpose" means an offence of terrorist act as it is specified in Article 230 CC as amended). On the other hand, it appears clearly restricted to the case "provided for in the first paragraph of this article" that is, the general "direct-or-indirect" FT offence in Article 230/a (1) CC (as amended) thus inevitably excluding the aggravated case of "direct financing" in the next paragraph. (Unlike articles and chapters, the paragraphs within an article are not numbered in the CC nevertheless the structure of the articles makes them unmistakably separable).

One can see no apparent explanation for this restriction, considering that even the most direct financing of a terrorist organization or an individual terrorist might easily take place without the actual use of funds for the commission of a terrorist act or without their noticeable relation to a specific terrorist offence. This divergence just adds to the inconsistency of the entire FT offence and particularly the overlapping coexistence of paragraphs (1) and (2) as discussed above.

As far as the financing of a terrorist organization or an individual terrorist is concerned (Article 230/a (1)(b) and (c) CC as amended) there is an aspect where the draft legislation needs further clarification or rather completion, namely, whether and to what extent the financing of terrorist organizations and individual terrorists for any purpose (including legitimate activities) is actually covered.

Certainly, the said paragraphs of the Draft Amendments almost literally follow the wording of EC II.1.a (il) and (iii) and therefore they actually appear to cover any financing activities where the funds are to be used by a terrorist organization or an individual terrorist without any further specification or restriction as to what the funds are actually intended for. Notwithstanding that, it must also be taken into account that in the amended Criminal Code, as discussed above, the notion of both "terrorist organization" and "terrorist" is (or would be) defined by their terrorist activities (see Article 28(2) or the draft Article 230/a (1)(c) respectively) which might be self-evident on the one hand but, on the other, it should incite the legislator to seek to clarify that financing a terrorist organization or an individual terrorist for any <u>other</u> purpose (i.e. for any purpose not related to any perceptible extent to the terrorist activites of the organization of the person) can equally establish the offence of FT. Such purposes may obviously include legitimate activities (e.g. supporting the families of deceased or imprisoned terrorists) as well as the funding of everyday expenses of the organization or the individual terrorist (e.g. accommodiation and subsistence costs) and full compliance with both the wording and meaning of Special Recommendation II can only be achieved if this aspect is also covered by positive law. For the time being, this is not the case for the Draft Amendments to CC which should be completed to adequately address this issue.

EC II.1.d – Attempt to be criminalized

> It should also be an offence to attempt to commit the offence of terrorist financing.

This Criterion has already been met by the criminal legislation being in force (see the general provisions in Articles 22-24 CC on attempt). The respective provisions would not be affected by the Draft Amendments.

EC II.1.e – Ancillary Offences under Article 2(5) FT Convention

> It should also be an offence to engage in any of the types of conduct set out in Article 2(5) of the Terrorist Financing Convention. These include participation as an accomplice in a FT offence (5.a) organizing or directing others to commit a FT offence (5.b) and contribution to the commission of one or more FT offences by a group of persons through association or conspiracy (5.c)

Similarly to the provisions on attempt, the ancillary offences are also dealt with in the General Part of the CC. In this field, the Report noted some gaps in the coverage (e.g. in case of facilitating in the absence of an agreement) and urged enacting provisions, either in the General Part or specifically in ML/FT relations so that all required ancillary activity is covered in situations where currently it is not.

It appears, however, that the Draft Amendments to CC would not bring any changes to the ancillary offences regime (either in general terms or specifically for the ML/FT offences) and hence EC II.1.e remains only partially met.

EC II.2 – Predicate Offence for Money Laundering

> Terrorist financing offences should be predicate offences for money laundering.

This Criterion has already been met by the criminal legislation being in force. As it was noted in the Report[4], any offence under Albanian law (including FT acts) may constitute a predicate offence for ML.

EC II.3 – Jurisdiction for Terrorist Financing Offence

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

As it is discussed more in details by the Report[5], this Criterion has already been met by the criminal legislation being in force (the FT criminal provisions can be applied to financing activities as to which Albania has criminal jurisdiction to proceed, regardless of whether the act or organization being financed is located in Albania or elsewhere).

Notwithstanding that, the Draft Amendments to CC now explicitly provides for this rule in paragraph (3)(b) in Article 230/a CC as amended:

> *b) Notwithstanding if the person who is presumed to have committed the criminal offence is situated in the same state or in a state other than the one in which the terrorist organization or the terrorist is situated or other than the state in which the offence with terrorist purposes is or shall be committed;*

[4] *Source*: paragraph 161 page 65 and paragraph 221 page 81 of the same Report

[5] *Source*: paragraph 222 page 81 of the same Report

Although this rule had already been, at least implicitly, applicable to FT offences, it appears expedient to enhance it by rendering it a provision in positive law so as to facilitate its application by practitioners.

It also needs to note in this context that Article 1 of the Draft Amendments renders the FT offence among those criminal offences regarding which the Republic of Albania has criminal jurisdiction even if it was committed outside its territory and the perpetrator was a foreign citizen if he/she is situated (residing) in Albania and cannot be extradited (see Article 7/a paragraph (1)(dh) CC as amended).

EC II.4 – Applicability of EC 2.2 to 2.5 for FT offence

- **EC 2.2 – The Mental Element of the FT Offence**

  The law should permit the intentional element of the offence of FT to be inferred from objective factual circumstances.

As it was acknowledged by the last MONEYVAL evaluation[6] that Article 152 of the Criminal Procedure Code provides that the court evaluate evidence "in their entirety" hence both subjective and objective elements of the criminal offence are to be analyzed. While this was noted as a rule generally applicable for all criminal offences, the Report specifically indicated that it actually applies in ML/FT context too, that is, the intentional element of FT can certainly inferred by the court as it assesses the evidence.

Even if there had been no shortcoming identified in this field, the essence of the above quoted Essential Criterion is now rendered by the Draft Amendments to CC as a separate paragraph (3)(ç) in Article 230/a CC as amended:

> *ç) if the awareness and purpose required by the first paragraph of this article may be revealed from objective circumstances of the fact.*

It needs to be noted that Article 6 of the same Draft Amendments modifies the ML offence in Article 287 CC and the new ML offence provided therein also contains a similar provision in paragraph (4)(dh) so that practically the same rule can be applied both in ML and FT relations.

On the one hand, rendering a previously implicit and, reportedly, generally accepted criminal procedural rule, an explicit legal provision in the CC may be regarded as unnecessary - yet it will likely not have any negative impact on criminal investigations and prosecutions for ML/FT offences. On the other hand, this approach may raise some issues.

As it was reported, this is a procedural rule that had apparently been applicable for all criminal proceedings related to any sorts of criminal offences. Now the Draft Amendments explicitly provide for the applicability of this rule as far as the articles that criminalize FT and ML are concerned while no such explicit provision is brought as regards any other criminal offences. One might therefore perceive a differentiation between ML/FT offences (where the intentional element can certainly be inferred) and the other offences (where no such possibility is provided for explicitly) hence one may draw the wrong conclusion that this rule only applies to criminal offences where it is expressly provided for. This would definitely have a negative impact on evidencing procedures in criminal proceedings related to non-ML/FT criminal offences.

Taking all these into account it would be worth reconsidering, first, the insertion of this purely procedural rule into the centerpiece of criminal substantive legislation and second, its attachment only to two criminal offences therein while apparently excluding all the other offences.

[6] *Source*: paragraph 176 page 68 and paragraph 221 page 81 of the same Report

- **EC 2.3-2.4 – Liability of Legal Persons**

> Criminal liability for FT should extend to legal persons. Where that is not possible (i.e. due to fundamental principles of domestic law), civil or administrative liability should apply.
> Making legal persons subject to criminal liability for FT should not preclude the possibility of parallel criminal, civil or administrative proceedings in countries in which more than one form of liability is available.

As it is discussed in the Report[7], this Criterion has already been met by the criminal legislation being in force (the Legal Persons Liability Law was enacted in 2007 by virtue of which the criminal liability is extended to legal persons and this applies with respect to all offences including FT). The Draft Amendments do not foresee any changes in this field.

- **EC 2.5 – Sanctions for FT**

> Natural and legal persons should be subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions for FT.

The Criminal Code being in force applies punishments of different severity for the two main offences by which FT is currently being criminalized (the offence in Article 230/a is threatened with minimum 15 year of imprisonment or life imprisonment while the one in Article 230/d with 4 to 12 years of imprisonment, let alone the fines applicable). As it was noted in the Report[8] these sanctions are substantial and exceed the sanctions many countries have established but the lack of actual court practice prevents the assessment of their dissuasiveness and effectiveness.

The new, single FT offence in Article 230/a CC (as amended) combines the above mentioned ranges of punishment and renders the core FT offence punishable by 4 to 12 years of imprisonment while the aggravated offence by not less than fifteen years of imprisonment or life imprisonment. Apart from this modification, the Draft Amendments have nothing else to add to the findings of the fourth round MONEYVAL Report as quoted above.

OVERALL COMMENTS ON THE DRAFT AMENDMENTS

The Draft Amendments to CC clearly aim at bringing the existing FT and ML offences more or fully in line with the respective international standards. As far as the FT offences in Articles 230/a and 230/c in the Criminal Code currently being in force are concerned, this was achieved by abandoning the pre-existent structure of the related offences and replacing them by a single, separate, autonomous FT offence in Article 230/a CC together with certain changes carried out as regards the offence of terrorist act in Article 230 CC, both in light of the relevant standards set in Special Recommendation II (and the underlying FT Convention) as well as the recommendations made by the Report.

Adoption of the triplicate approach of penalizing the financing of terrorist acts, terrorist organizations and individual terrorist is a definite step forward taken by the Draft Amendments. It appears however that the visible intention to meet the above-mentioned standards as close as possible made the lawmakers pay less attention to the harmonization of the new rules both in terms of their inner harmony and their coexistence with older provisions of CC. On the one hand, there we have a legal text being almost identical to the wording of the respective standards while, on the other hand, there is an apparent ignorance towards issues such as the duplicate/overlapping criminalization of direct FT activities in Article 230/a paragraph (1) versus (2) or the same issue regarding the financing of terrorist organizations in Article 230/a (1)(b) versus Article 234/a (1) CC.

[7] *Source*: paragraph 224 page 81 of the Report
[8] *Source*: paragraphs 225-227 pages 81-82 of the Report

Such shortcomings, together with the definitional deficiencies mentioned above ("terrorism" "terrorist" "terrorist organization" etc.) may in itself pose such an obstacle to the practitioners that may easily endanger the actual applicability of the FT offence. In order to adopt a criminal legislation that not only appears to meet, on the face of it, the wording of the relevant international standards but it is actually applicable, in a comprehensible and consistent way, to achieve the goals foreseen by these standards, the Albanian authorities should revisit the problematic issues discussed above and listed in the table below so as to eliminate all obstacles in due time. Having done so, the new legislation will not only conform but it will actually become a powerful instrument in the fight against terrorist financing.

Equally, the Albanian authorities seem to have so far missed this perfect opportunity to remedy all deficiencies indicated in the Report, particularly as regards some aspects of the offence of terrorist act in Article 230 CC. Since these shortcomings appear to be rather technical thus they are unlikely to require major, if any, conceptual reconsideration on the legislative side, it would not take much effort to add their correction to the current draft legislation so as to achieve compliance even in this, indirect aspect of Special Recommendation II.

COMPLIANCE WITH THE ESSENTIAL CRITERIA AND SUB-CRITERIA FOR FATF SPECIAL RECOMMENDATION II

The following Comparative Table summarises the compliance of the relevant Albanian provisions of criminal substantive law (Criminal Code as amended by the Draft Amendments thereto) with the relevant Essential Criteria and their sub-criteria for FATF Special Recommendation II. The references to article and paragraph numbers for Criminal Code are indicated according to the amended version of the text, taking into account any renumbering brought about by the current Draft Amendments.

FATF Essential (Sub-Criterion)	Relevant factors	CC provision (as amended)	Main issues of compliance
EC II.1.a	main structure of the core FT offence	230/a (1) and (2)	issue of distinction caused by duplicate/overlapping criminalization of "direct" FT activities in para (1) compared to para (2)
EC II.1.a.i	financing of a terrorist act	230/a (1)(a)	(see below)
	coverage of treaty offences	230 (2) (a) to (l)	• the specific purpose / intent requirement still required for treaty offences • deficient coverage of offences prescribed by the Convention on the Physical Protection of Nuclear Material in subpara (gj) and (h) • potential mistranslation in subpara (l)
	coverage of the generic terrorist act	230 (1) and (2)(n)	subpara (1) still refers to governmental agencies rather than governments

EC II.1.a.ii	financing of a terrorist organization	230/a (1)(b)	• lack of harmonization with the pre-existent offence in Article 234/a CC • definition in Art 28(2) does not meet FATF standard
EC II.1.a.iii	financing of an individual terrorist	230/a (1)(c)	definition is either unclear or does not meet FATF standard
EC II.1.b	definition of funds	230/a (3)(a)	(compliant)
EC II.1.c	no specific terrorist act required	230/a (3)(c)	only applicable to the core FT offence (para (1)) thus excluding the aggravated offence in para (2)
EC II.1.d	attempt	n/a	(had already been compliant)
EC II.1.e	ancillary offences	n/a	gaps in the coverage remained
EC II.2	FT predicate to ML	n/a	(had already been compliant)
EC II.3	jurisdiction	230/a (3)(b)	(compliant)
EC II.4 / 2.2	inference of mental element	230/a (3)(ç)	structural/systemic issues
EC II.4 / 2.3-2.4	liability of legal persons	n/a	(had already been compliant)
EC II.4 / 2.5	sanctions	n/a	(had already been compliant)

CONCLUSION

The objective of this review was to ensure that the legislative provisions for Albania with respect to the requirements for FATF Special Recommendation II are better harmonised and consequently more in compliance. The proposed Draft Amendments to CC have taken into account most of the recommendations made in the MONEYVAL Fourth Round Mutual Evaluation Report and provides for an incomparably higher level of compliance with Special Recommendation II.

On the other hand, one can detect a number of significant deficiencies in harmonizing the new provisions, both among each other and in the context of the pre-existent CC articles that are likely to pose an obstacle to the efficient application of the new legislation. It is therefore highly recommended to carry out all the necessary changes, the soonest possible, to remedy the shortcomings identified as above so as to ensure higher harmonisation and compliance with the relevant FATF Essential Criteria for Special Recommendation II.