

Council of Europe
Conseil de l'Europe



European Union
Union européenne

PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

TECHNICAL PAPER

**ASSESSMENT OF THE REVISED PROPOSED AMENDMENTS TO THE LAW ON
PREVENTION OF MONEY LAUNDERING AND TERRORISM FINANCING**

*Opinion of the Department of the Information Society and Action against Crime
(DGHL), Council of Europe, prepared on the basis of the expertise by
Gent Ibrahimi, PACA Long Term Advisor*

CMU-PACA-4/2011

Table of Contents

EXECUTIVE SUMMARY	3
BACKGROUND AND SOURCES	4
1.1 The findings and remarks of PACA as reported by the PACA Technical Paper of 25 October 2010	4
1.2 The findings of the MONEYVAL preliminary analysis as reported by the PACA Technical Paper of 25 October 2010	5
2. ASSESSMENT OF FULFILMENT OF RECOMMENDATIONS	6
2.1 Assessment of the fulfilment of the PACA recommendations	6
2.1.1 Assessment of the fulfilment of PACA recommendation concerning the proposed judicial police status	6
2.1.2 Assessment of the fulfilment of PACA recommendation concerning the exchange of data with the courts and the prosecution	7
2.2 Assessment of the fulfilment of the recommendations of the preliminary analysis by MONEYVAL	8
2.2.1 Compliance with core recommendation R10	8
3. CONCLUSION	11

For any additional information please contact:

Corruption and Money Laundering Unit
Economic Crime Division
Directorate of Co-operation - DG-HL
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
Web: www.coe.int/economiccrime

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe.

EXECUTIVE SUMMARY

The present Technical Paper provides an assessment of the revised proposed amendments to the 2008 Law “On the Prevention of Money Laundering and Terrorism Financing” (henceforth AML law) as tabled by the Ministry of Finance for consideration by the Council of Ministers of Albania, following the withdrawal of the earlier version of the proposed amendments from parliamentary procedures.

The present paper is a follow up on PACA’s Technical Paper of 25 October 2010, which provided an overall assessment of the Albanian anti-money laundering (AML/CFT) regime and the proposed amendments that were pending approval at that time.

The findings of this follow up paper concern the degree in which the earlier negative comments made by PACA and those findings of the MONEYVAL preliminary report that may be addressed by the AML law have been taken into account¹ by the revised proposed amendments to the law. The main findings of this paper are as follows:

- PACA’s recommendation not to confer judicial police powers to GDPML/FIU² at this time has been observed;
- PACA’s recommendation to base the exchange of information between the GDPML and the Prosecution on a MoU has been observed.
- The regulation concerning the exchange of data with the courts and the GDPML/FIU has not been included in the revised proposed amendments. This solution is deemed satisfactory by PACA.
- Article 10 of the revised proposed amendments (amending current article 16 of the Albanian AML law) does make Albania compliant with core recommendation R10 of MONEYVAL.
- Articles 3, 4, 5, and 7 of the revised proposed amendments, as combined, (amending current articles 4, 8, 9 and 12 of the Albanian AML law) do make Albania compliant with core recommendation R13 of MONEYVAL.
- Article 11 of the revised proposed amendments (amending current article 21 of the Albanian AML law) makes Albania partially compliant with core recommendation R26 of MONEYVAL.

¹ The paper will not discuss the broader findings of the 25 October paper which also assessed the law enforcement component of the AML regime, but only those findings and remarks that may be dealt with in the framework of the AML law.

² General Directorate for the Prevention of Money Laundering or FIU

1. BACKGROUND AND SOURCES

On 25 October 2010, PACA submitted to the Minister of Finance of Albania its Technical Paper assessing the Albanian anti-money laundering regime and the proposed amendments to the Law on Prevention of Money Laundering and Terrorism Financing.

The Technical Paper was dispatched to the Minister of Finance of Albania accompanied by a letter from the Council of Europe Director General of Human Rights and Legal Affairs which highlighted the most important findings of the PACA Technical Paper.

Following PACA's comments and recommendations and the release of the preliminary analysis of the Albanian AML regime by the MONEYVAL secretariat, the Government withdrew the bill from parliament.

Following the withdrawal from the Parliament of the proposed amendments to the Law on Prevention of Money Laundering and Financing of Terrorism in November 2010, a working group has been set up under the auspices of the Minister of Finance to analyze and revise the proposed amendments to the AML/CFT in the light of the comments and recommendations from the preliminary analysis of MONEYVAL and the PACA Project.

The working group, which was composed of 12 members representing the Ministry of Finance (3), the General Department for the Prevention of Money Laundering (2), the Bank of Albania (4), the Ministry of Justice (1), the Prosecution Office (1) and the Albanian State Police (1), met three times in the period of time November through December 2010 and finalized a revised draft of proposed amendments. The draft, after being circulated among the stakeholders, is now about to be considered again by the Council of Ministers.

1.1 The findings and remarks of PACA as reported by the PACA Technical Paper of 25 October 2010

The proposed amendments, as they stood before submission of comments by PACA and the completion of the preliminary analysis by MONEYVAL, which eventually led to the withdrawal of the bill from Parliament, intended to achieve the following outcomes:

- confer to the General Department for the Prevention of Money Laundering the status of judicial police (former article 5);
- enhance the exchange of data between GDPML on one side and the courts and the prosecution on the other (former article 3);
- strengthen GDPML's role/standing in the procedures for the suspension/revocation of licenses of the obliged entities by their supervisory authorities (former article 7);

- set up a unique database of bank accounts and their owners (former article 1);
- introduce a range of fines (as against the thus far fixed ones) in cases of failure of obliged entities to report, distinguishing between the different types of violators (physical or legal persons) and the different kinds of the unreported transactions (former article 8.1);
- introduce a 5 years statute of limitation for the investigation of administrative contraventions under the AML/CFT (former article 8.3).

On the face of these proposals PACA recommended giving up the propositions to confer judicial police status to GDPML and to regulate the exchange of data between the GDPML on one side and courts and prosecution on the other through the AML law. PACA commended the rest of the proposed amendments

1.2 The findings of the MONEYVAL preliminary analysis as reported by the PACA Technical Paper of 25 October 2010

Whereas the assessment of Albania by MONEYVAL (and the preliminary analysis of the status of compliance vis-à-vis the recommendations) concerns all facets of the country's AML regime, this paper will only discuss those findings of the preliminary analysis that concern the prevention component of the regime and that may be tackled by the AML law. In other words, the paper assesses the degree of fulfilment of those findings of the preliminary analysis concerning the status of compliance that urge regulatory action by Albanian authorities in the framework of the AML law. Since this paper is poised to comment only the revised proposed amendments to the AML law, it can not assess those other MONEYVAL recommendations which urge for effectiveness measures and strategies to be adopted by the government of Albania. Clearly those recommendations and the findings as to their status can not be assessed by looking at the AML law.

Regarding the findings of the recent preliminary analysis by MONEYVAL³ of Albania's progress on past non compliant and partially compliant ratings, the 25 October Technical Paper noted that Albania risked being rated partially compliant (PC) or non compliant (NC) with regard to the following Core Recommendations⁴ that may be addressed in the framework of the AML law:

- Core recommendation R10 (PC) which deals with record keeping.
- Core recommendation R13 (PC) which deals with the width of STRs (suspicious transactions reports)⁵.

³ Again only those findings that are relevant to the prevention pillar and that may be tackled in the framework of the AML law. Other recommendation which concern the effectiveness of the regime or a strategic failure of the Albanian authorities will not be dealt with in this paper.

⁴ The Core recommendations are defined in the FATF procedures.

⁵ The preliminary analysis also noted that the number of STRs remains low, but since that part of the assessment is

As far as those Key Recommendations⁶ relevant to the prevention pillar that may be addressed in the framework of the AML law, the preliminary analysis of MONEYVAL found that Albania is likely to be rated partially compliant with regard to the following key recommendations:

- Key recommendation R26 which deals with the FIU.

The preliminary analysis contained several other findings concerning Albania's progress on the Enforcement Component of the AML Regime and on the so-called other recommendations. These findings are not analysed in this paper for the above mentioned reasons.

2. ASSESSMENT OF FULFILLMENT OF RECOMMENDATIONS

2.1 Assessment of the fulfilment of the PACA recommendations

2.1.1 Assessment of the fulfilment of PACA recommendation concerning the proposed judicial police status

The proposed amendments that were pending approval by the Assembly before the bill was withdrawn by the government purported to confer to GDPML/FIU judicial police status in addition to its current analytical role. The sought result was to empower the GDPML/FIU to gather evidence on ML/FT offences as a formal actor in the criminal prosecution, engage in the criminal investigation of these offences and perform all kinds of investigative actions such as protecting the evidence, identifying the suspect and possible witnesses, use special investigative techniques and other related tasks as specified in the Albanian Criminal Procedure Code.

At that time PACA recommended that GDPML/FIU should not be conferred judicial police status on 2 sets of arguments:

Firstly, the PACA expert noted that the proposed acquisition of judicial police powers runs against a recommendation by the 2009 MONEYVAL progress assessment of Albania which supports the option that GDPML/FIU be confined to an analytical body generating possible ML and FT cases for further review, and eventually prosecution by the police and prosecutorial bodies.

Secondly, the PACA expert argued against the acquisition of judicial police status by the GDPML on the following grounds:

about the effectiveness of the implementation of the system (not the quality of the regulation), its fulfillment will not be considered in this paper.

⁶ The Key recommendations are defined in the FATF procedures

- Criminal investigation powers are constitutionally vested with the prosecution service.
- Certain criminal investigation powers are also conferred by statute (Criminal Procedure Code, Law on Prosecution Service, Law on Judicial Police etc) to police.
- In those rare cases when criminal investigative powers are awarded to administrative agencies (most notably in Albania the case of the tax authority and the customs authority), this is done to enable such bodies to collect perishable evidence on the spot, bearing in mind that evidence of the commission of crime in these cases is traced in the course of routine administrative process (unlike in the case of murder, theft, car accident etc).
- Money laundering and terrorism financing are derivate crimes which originate in other crimes whose investigation is already under the remit of the various existing police departments;
- Flagrance is never involved in ML and FT crimes. Evidence only surfaces in later financial transactions and is always of a documentary type. Such evidence is already reported to GDPML by the numerous obliged entities;
- The acquisition of judicial police status could have been acceptable if GDPML would have had a broader mandate on serious and organized crime (like the UK SOCA for example) which would give it first hand exposure to evidence of the original crimes such as illegal traffics, and then spot correlation with certain banking operations aimed at laundering the proceeds of the original crime.

Following the assessment of the revised proposed amendments, the expert notes that PACA's recommendation not to confer judicial police powers to GDPML/FIU at this time has been observed.

2.1.2 Assessment of the fulfilment of PACA recommendation concerning the exchange of data with the courts and the prosecution

The second most important proposal in the bill that was withdrawn by the government purported to enhance the cooperation and exchange of data between the GDPML on one side and courts and the prosecution on the other. Apparently that proposal originated in actual difficulties faced by FIU in getting information by the latter. In the 25 October paper, the PACA expert expressed doubts on the proposed regulation from a constitutional viewpoint as it stipulated the obligation of independent agencies to report to the executive.

The expert expressed the opinion that the proposed should go into a Memorandum of Understanding between the concerned agencies.

Additionally, the experts advised that the GDPML should explore the potential of article 23 of the law that establishes the Coordination Committee for the Fight against Money Laundering. Bearing in mind that both the Prosecutor General and the Minister of Justice sit in this committee, it may be the right forum to seek and obtain the necessary cooperation by the courts and the prosecution. Whereas the cooperation with the prosecution may be further enhanced by entering a MoU between the Minister of Finance and the Prosecutor General, the case with the courts may be solved by having the Minister of Justice direct court statistics in a way that FIU's needs for information would be satisfied.

Based on the arguments above PACA recommended that the effort to enhance exchange of data between the GDPML on one side and the courts and the prosecution service on the other be pursued in the following way:

- The Minister of Finance and the Prosecutor General enter a MoU with the aim of facilitating the flow of information from the prosecution towards FIU;
- The Ministry of Justice tailors court statistics in a way that would fit FIU's and the Government's need for significant information in this important subject matter.

Following the assessment of the revised proposed amendments, the expert notes that PACA's recommendation to base the exchange of information between the GDPML and the Prosecution on a MoU has been observed. The regulation concerning the exchange of data with the courts has not been included in the revised proposed amendments. This solution is deemed satisfactory by PACA.

2.2 Assessment of the fulfilment of the recommendations of the preliminary analysis by MONEYVAL

2.1.1 Compliance with core recommendation R10

In the last MONEYVAL assessment of Albania the country has been rated partially compliant (PC) on the MONEYVAL's core recommendation R10 which deals with record keeping. Moreover, the MONEYVAL preliminary analysis of October 2010 indicated that Albania may be rated PC again on this core recommendation because the language of the applicable AML law (article 16/1) fails to capture the entire scope of the recommendation. Namely, the Albanian AML law stipulates that "records should be kept by the obliged entities for five years from the date of the execution of the financial transaction". On the other hand, core recommendation R10 stipulates that "account files and business correspondence should be maintained for at least five years following the termination of an account or business relationship". Clearly current article 16 of the

Albanian AML fails to fully cover the field of R10. It seems to refer to financial businesses only as it only mentions “financial transactions”. Even though the banks and other financial services are admittedly the most important among the obliged entities, the array of such entities under the AML regime is much larger as it includes also DNFBPs⁷ such as private attorneys, notaries, accountants etc. Hence the term “business relationship” (as against “financial transaction” in the Albanian law) used by core recommendation R10. Article 10 of the revised draft proposes to amend the current article 16/1 as follows: “the obliged entities shall keep records for the identification, accounts and correspondence with the client for 5 years following the termination of an account or business relationship between the client and the obliged entity. Upon a request by the Responsible Authority the records shall be kept for longer than 5 years”.

In conclusion, the expert assesses that article 10 of the revised proposed amendments (amending current article 16 of the Albanian AML) does make Albania compliant with core recommendation R10 of MONEYVAL.

2.2.2 Compliance on core recommendation R13

In the last assessment Albania was rated partially compliant on core recommendation R13 of MONEYVAL which deals with the STRs on 2 grounds: firstly, because the regulation of the STRs by the law is not wide enough to capture the entirety of the manifestations of money laundering and terrorism financing mechanisms; and, secondly, because the number of STRs is low. The preliminary analysis released in November 2010 argues that deficiencies remain as regards the width of the STRs obligation⁸. It appears that the revised proposed amendments to the AML attempt to respond to this concern, as identified by the preliminary analysis, by proposing amendments to several articles of the applicable AML law as follows:

1. Article 3 of the revised proposed amendments (amending current article 4 of the law “Customer Due Diligence”) rewords point 2 of article 4 as follows: “The obliged entities shall identify and verify the identify of the beneficial owner”. The expert is of the opinion that this regulation, although not directly related to issue of the width of the STRs, is bound to widen the scope of STRs because it requires the obliged entities to collect information on a very sensitive facet of money laundering policies which will inevitably result in more informative STRs.

2. Article 4 of the revised proposed amendments (amending current article 8 of the law “Categories of clients subject to enhanced due diligence”) introduces a much more complex regulation of the way in which banks should deal with their PEP⁹ clients. Again, whereas this regulation is not directly relevant to the issue of the width of the

⁷ Designated non financial businesses and professions

⁸ As noted above the finding on the low number of STRs will not be discussed in this paper because this problem can not be possibly tackled by the amendments to the AML law (being it and effectiveness/implementation problem) which are the object of this Technical Paper.

⁹ Politically exposed persons

STRs, the expert believes that by empowering the banks to know more on their PEP clients, the regulation of the proposed article 4 should enable the obliged entities (banks in this case) to provide more informative STRs

3. article 5 of the revised proposed amendments (amending current article 9 of the law “Categories of transactions subject to enhanced due diligence”) also introduces certain important changes which the expert believes shall be conducive towards the achievement of compliance regarding the recommendation on the width of the STRs. The following proposed amendments seem to be more relevant:

- points 3 and 5 of article 9 are reformulated to direct the obliged entities to pay particular attention to complex transactions of high and unusual value, which do not have an obvious economic or legal purpose. The obliged entities are also directed to analyse the reasons and the goal of such transactions and to keep records of the respective conclusions which should be kept for a period of five years and be put at the disposal of the Responsible Authority and the auditors as needed.
- Point 7 of article 9 is reworded with a view to guide the obliged entities to identify all those cases when their clients are acting on behalf of another person and secure sufficient information on the identify of the represented persons;
- Five new points are inserted after current point 8 of article 9, guiding the obliged entities on how to deal with legal persons, how to manage risk, how and when to terminate a business relationship and to send a SAR to the Responsible Authority etc.

4. Finally, and most relevantly, article 7/1 of the revised proposed amendments (amending current article 12 of the law “Reporting to the Responsible authority”) makes a more detailed regulation of the obligation of the obliged entities to submit STRs as follows: “ The obliged entities shall submit a report to the Responsible Authority in which they lay down their suspicions in all cases when they know or suspect that money laundering or terrorism financing is being done, has been done or is attempted to be done.....”. Clearly, the drafters have sought to put in place a regulation of the notion of STRs that is able to cover all possible phases and manifestations of money laundering and terrorism financing and instructive enough to the obliged entities.

In conclusion, the expert assesses that articles 3, 4, 5, and 7 of the revised proposed amendments, as combined, (amending current articles 4, 8, 9 and 12 of the Albanian AML) do make Albania compliant with core recommendation R13 of MONEYVAL.

2.1.2 Compliance on core recommendation R26

Key recommendation R26 deals with the FIU. The last assessment of Albania by MONEYVAL rated Albania partially compliant on this recommendation on the ground that the operational autonomy of the GDPML has not been strengthened by providing for a term in office for the Director General and grounds for his dismissal.

Moreover, the preliminary analysis heralded again partially compliant rating on this recommendation. Article 21 of the revised proposed amendments (amending article 21 of the law “Organization of the competent authority”) does provide for a 4 years term in office for the Director of GDPML. The grounds for his/her dismissal though are not specified in the law but are delegated to the Council of Ministers decision “On the appointment and dismissal of the heads of the institutions under the authority of the government”

In conclusion, the expert assesses that article 11 of the revised proposed amendments, as combined, (amending current article 21 of the Albanian AML) makes Albania partially compliant with core recommendation R26 of MONEYVAL because whereas the term in office for the GDPML Directors is provided for in the AML law, the grounds for his/her dismissal are not dealt with in the law but in a government decree, which by definition offers less legal certainty than a law adopted by Parliament.

3. CONCLUSION

The revised proposed amendments to the Albanian AML law respond satisfactorily to the concerns, remarks and recommendations raised by PACA and the assessment of Albania’s compliance with MONEYVAL recommendations as indicated by the preliminary analysis.