A POLICY REPORT BY GROUP FOR LEGAL AND POLITICAL STUDIES
NO. 7– MARCH 2016

Reviewing the normative compliance of the Draft Law on the Prevention of Money Laundering with the EU Directive 2015/849 and FATF recommendations

GROUP FOR LEGAL AND POLITICAL STUDIES

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This Policy Report is part of the Project entitled: 'Fighting Corruption in Kosovo through Improving the Policy on the Confiscation of Illicit Wealth', supported by British Embassy in Kosovo.

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Reviewing the normative compliance of the Draft Law on the prevention of Money Laundering with the EU Directive 2015/849 and FATF recommendations

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March 2016

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REVIEWING THE NORMATIVE COMPLIANCE OF THE DRAFT LAW ON THE PREVENTION OF MONEY LAUNDERING WITH THE EU DIRECTIVE 2015/849 AND FATF RECOMMENDATIONS

INTRODUCTION

The aim of this report is to provide a legal analysis of Kosovo's anti money laundering (AML) and countering of terrorism financing (CTF) legislation, particularly the *Draft Law on the Prevention of Money Laundering and Combating Terrorist Financing*[1] *(Draft Law)*. This analysis will be made by comparing the Draft Law to international standards, primarily *EU Directive 2015/849* [2] *(the Directive)* and the recommendations by the Financial Action Task Force[3] (FATF Recommendations).

The legislative framework of Kosovo in the area of AML/CFT was until fairly recently based on various legal acts adopted by the United Nations Mission in Kosovo (UNMIK).[4] The current AML/CFT legislative framework is based on the *Law No. 03/L-196 on The Prevention of Money Laundering and Terrorist Financing*[5]*,* from 2010, which was amended and supplemented by Law No. 04/L-178 in 2013[6]. The current legislation, although improved by the amending law, contains numerous issues which makes it insufficient to comply with FATF Recommendations.[7] In particular, the current law does not contain provisions relating to risk assessment, data keeping, freezing and seizure of funds, administrative sanctions, or the crime of terrorist financing and penalties[8] – all which are necessary in order to be in line with FATF Recommendations, and also the EU Directive. As will be shown below, the Draft Law amends some of these issues but does not completely bring the legislation into line with either the FATF Recommendations or the EU Directive.

This report will make some general comments about the Draft Law, before moving onto analysing the law in relation to the EU Directive and FATF Recommendations and making recommendations on what needs to be improved in order to bring the law more in line with these standards. The provisions of the Draft Law that are not necessarily related to fulfilling the requirements of the Directive or FATF Recommendations will not always be considered, but should also be thoroughly checked by the drafters before the law is passed in parliament. It should also be noted that the EU Directive uses the term 'obliged entities' while the Draft Law uses 'reporting entities'. This report will keep the terminology of the respective texts, but they are to be considered synonymous.

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[1] Law No. (http://www.assembly-kosova.org/common/docs/ligjet/05-L-96.pdf)
[2] Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, 20 May 2015.
[3] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation', the FATF Recommendations, February 2012, Updated October 2015.
[4] PECK Report, para. 16, p. 11.
[5] Law No. 03/L-196 on The Prevention of Money Laundering and Terrorist Financing, 30 September 2010, http://www.assembly-kosova.org/common/docs/ligjet/2010-196-eng.pdf.
[6] Law No. 04/L-178 on Amending and Supplementing the Law No. 03/L-196 on The Prevention of Money Laundering and Terrorist Financing, 11 February 2013, http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20amend%20the%20law%20on%20the%20prevention%20of%20money%20laundering%20and%20preven%20of%20terrorist%20financing.pdf.
[7] For a thorough analysis of the current legal regime, see 'Assessment Report on compliance with international standards in the area of anti-money laundering and combating the financing of terrorism (AML/CFT)', Project against Economic Crime in Kosovo (PECK), 2 December 2014, http://www.coe.int/t/DGHL/cooperation/economiccrime/corruption/Projects/PECK-Kos/PUBLICATIONS/AML%20ENG%20WEB.pdf.
[8] The law does include the definition of terrorist financing, but does not include it as a criminal offense under the law, nor does it provide for sanctions.

ANALYSIS OF THE DRAFT LAW

It is important to note that Kosovo's AML/CTF regime does not,[9] and should not, consist only of AML/CFT legislation, but also of AML/CFT strategies and other legislation covering particular areas relating to money laundering (ML) and terrorist financing (TF). Thus, the Draft Law might not contain all of the FATF recommendations or all of the provisions of the Directive, as these documents contain wide-ranging AML/CTF measures to be implemented by states, but which might not necessarily be appropriate to include in AML/CTF legislation.

The Directive has certain provisions that might not currently apply to Kosovo, as it is not an EU Member State. There are also FATF Recommendations that might not apply to Kosovo or to this legislation. [10] Furthermore, some provisions of the Directive and FATF some Recommendations include more policy based requirements that are difficult and to include in legislation such as the Draft Law, but which should still be considered by the Government of Kosovo as part of the strategy to combat ML/TF. Therefore this analysis will only focus on the provisions of the Directive and the FATF Recommendations that are appropriate and of relevance to the Draft Law. Due to time constraints and the complexity of the issue, the analysis only includes some of the interpretive notes accompanying the FATF Recommendations. The main focus has been on the actual Recommendations. It is however advisable for the drafters to carefully look at the interpretive notes when continuing their work on the draft law.

1. Initial Comments on the draft law

The Draft Law is generally a better piece of legislation than the current law, including the amending law, and is more in line with international standards. The Draft Law has a better and more logical order and structure, which makes it easier to read and follow. This is important to give the law clarity. However, some articles still appear in odd places and do not follow a natural order, such as Articles 22 and 23, on enhanced and simplified customer due diligence (CDD), which do not follow Article 19 on CDD, which would have been more logical. This is something the drafters should pay attention to and amend, so that articles about the same subject or obligation follow each other to the extent possible.

Furthermore, the Draft Law includes many of the provisions missing from the current law, including provisions on simplified due diligence, data keeping, administrative penalties, and freezing of funds and it also criminalizes terrorist financing and contains provisions on sanctions for this crime. This is a clear improvement from the current law, even though not all of the new provisions fulfil the standards of the EU Directive of FATF Recommendations. However, there are a number of issues that are problematic with the Draft Law, some which have sometimes made it difficult to analyse and decide whether the Law is in line with international standards. There are also too many to point to specific articles, but the Draft Law needs to be thoroughly checked.

Firstly, there are some issues with language and punctuation, which may drastically change the meaning of legal provisions. Some of the language issues may be because the Draft Law was

[9] The Government of Kosovo has a National Strategy for the Prevention of and Fight Against Informal Economy, Money Laundering, Terrorist Financing and Financial Crimes 2014-2018, from January 2014, and an Action Plan to accompany the National Strategy, https://mf.rksgov.net/DesktopModules/raportet/files/National%20strategy%20of%20the%20Republic%20of%20Kosovo%20for%20the%20Prevention%20and%20combating%20the%20informal%20economy,%20money%20laundering,%20terrorist%20financing%20and%20financial%20crimes%202014%20%E2%80%93%202018.pdf;https://mf.rks-gov.net/DesktopModules/raportet/files/ANNEX%201%20%E2%80%93%20Action%20Plan%20of%20the%20National%2

0Strategy.pdf.

[10] The FATF Recommendations also deal with financing and proliferation of weapons of mass destruction.

originally drafted in Albanian and then translated into English, which is the version that was used for this report. However, it is important to make sure that the English version of the law is comprehensible and clear. It is also important to make clear which version, Albanian, Serbian, or English, is authoritative and that all three versions should be the same in content and meaning. Native speakers should be consulted to make sure this is the case. Punctuation is also problematic in several provisions, particularly in longer ones, and needs to be checked so that it is comprehensible and actually carries the meaning intended by the drafters – in all language versions of the law.

Secondly, there are issues of consistency which, while not always causing confusion, make the Draft Law appear carelessly drafted. For example, some articles refer to 'Ministry of Finance and Economy' while others refer to 'Ministry of Finance'. Also, sometimes the acronym 'MFE' is used, while other times 'MF' is preferred. Furthermore, there are inconsistencies in the use of personal pronouns where some articles refer to 'he/she' whereas others only use 'he'. While these sorts of inconsistencies are not always sources of confusion, they do give the Draft Law an impression of not being carefully thought through. Therefore, it is important to make sure the text of the law is rid of such inconsistencies, as well as others that appear.

Thirdly, in some provisions of the Draft Law the terminology has changed from that of the current law, or the Directive, in a way that appears as if the drafters simply changed a word for another that they thought were synonymous but which in fact has a slightly different meaning and which may in certain instances change the provision in a way that was not intentional. Again, this might be because the Draft Law was initially written in Albanian and then translated into English, but it is something that needs to be given some attention to make sure that the accurate English terms are used to convey the correct and intended meaning.

2. General provisions

Chapter I of the Draft Law is entitled 'General Provisions' and contains three articles, the purpose and scope of the law (Article 1), definitions (Article 2), and the competencies of the State Prosecutor (Article 3).

Article 1 paragraph 3 of the Draft Law states that it 'shall be in accordance with EU directive No. 2015/849 of European Parliament and Council, dated 20 May 2015 on the prevention of the use of financial system for the purposes of money laundering and terrorist financing.' It is therefore of outmost importance that the drafters consider the recommendations and comments of this report, and other evaluations that may be done, to make sure that the law actually complies with its own provision.

Article 2 of the Draft Law contains a list of definitions, just like the EU Directive in its Article 3. The list in the Draft Law is much more comprehensive than that of Article 2 in the current law and importantly adds definitions for 'criminal activity' and 'terrorist act', and reintroduces a definition for 'politically exposed persons' (PEPs), which was deleted by the amending law. The definition for PEPs introduced in the Draft Law is however much better than before and explains more clearly exactly which categories of people will be considered PEPs. The definition is also much more like the definition of PEPs in the Directive (Article 2 paragraph 9). Article 2 also introduces an important change in its paragraph 1.31 on 'money laundering'. In the current law, there appears to be two definitions of ML, one in Article 2, paragraph 1.23, and one in Article 32 paragraph 2, which lists the criminal offence of ML and provides for a much more detailed definition. As pointed out in another report, this creates a law with two competing definitions, which is not appropriate. The Draft Law however, simply defines ML as 'any conduct specified in Article 56', which is the article defining

the criminal offense of ML. This is a much better solution.

However, there are some things the drafters of the Draft Law might consider amending. At the moment, the definitions in Article 2 of the Draft Law are not listed in alphabetical order, as they are in the current law. For the sake of clarity and ease of those reading the law, it might be advisable to amend this and to list them in an alphabetical order. Furthermore, while the Directive does not require national laws to use exactly the same definitions and national legislators of course are free to choose the terms they believe should be defined, it might be advisable for the drafters of the Draft Law to use the same language for definitions as that in the EU Directive. But of course, the definitions must be appropriate for the Kosovo context and the legal system in the country.

3. AML/CFT Risk Assessment

Both the EU Directive and the FATF Recommendations contain requirements regarding AML/CFT risk assessment. The Draft Law contains some provisions on risk assessment but it appears they do not completely fulfil the standards of the Directive and FATF Recommendations.

3.1 Risk Assessment in the EU Directive

Articles 7 and 8 of the Directive contain provisions relating to requirements of risk assessment for ML/TF.

Article 7.2 of the EU Directive requires countries to designate an authority or establish a mechanism by which to coordinate the national response to the risks of ML/TF. *Article 18.1*of the Draft Law further states that the FIU 'shall ensure periodically and coordinate national risk assessment'. Despite paragraph 1 being strangely worded in English, it seems to be in line with Article 7(2).

Article 7.4(a) of the Directive states that countries 'shall use [risk assessment] to improve its AML/CFT regime, in particular by identifying areas where obliged entities are to apply enhanced measures, and where appropriate, specifying measures to be taken'. *Draft Law Chapter III*, on reporting entities and their legal obligations, contains provisions on assessment and risk prevention, as well as establishes customer due diligence (CDD) measures, including enhanced measures. *Article 18* states that reporting entities shall identify and assess risks of ML/TF to which they are exposed. Furthermore, *Draft Law Article 22* specifies when and how enhanced CDD measures should be taken. The Draft Law therefore seems to be in line with the Directive in this regard.

Directive Article 8 contains numerous requirements, most of which are complied with by the Draft Law. Some articles of the Draft Law however do not obviously comply with the Directive. *Paragraph 1* requires states to ensure that obliged entities take appropriate steps to identify and assess risks of ML/TF, taking into account risk factors including those relating or customers, countries or geographic areas, products, services, transactions or delivery channels. *Paragraph 2* states that the risk assessment referred to in paragraph one shall be documented, kept up-to-date and made available to the relevant competent authorities concerned. *Article 18 of the Draft Law* speaks about assessment and risk prevention, and in *paragraphs 2 to 6* specify what is required by reporting entities in terms of risk assessment and prevention. However, not all risk factors referred to in the Directive are mentioned in relation to each of the paragraphs in Article 18, which makes it seem like the risk factors are not to be taken into account in relation to all situations faced by reporting entities. *Paragraph 2 of Draft Law Article 18* is also the only paragraph of Article 18 that mentions that the risk assessment shall be distributed to competent authorities. These issues make it unclear whether Article 18 of the Draft Law can be said to totally comply with the provisions

of the Directive.

Article 8.3 of the Directive requires states to ensure that obliged entities have in place policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified at the level of the Union, the Member State and the obliged entity. This seems to be referred to in *Draft Law Article 17* on 'Actions and Measures undertaken by Reporting Entities', which requires these entities to issue regulations, procedures and controls for the prevention and detection of ML/TF. If one wants this to be more obvious, the article could be renamed 'Actions to Mitigate and Manage Risks'. But the Article seems to be in line with the Directive. *Article 8.4* lists a number of things to be included in the policies, controls and procedures referred to in paragraph 3. These appear covered by *Draft Law Article 17.2.1 to 17.2.9.* However, it is not obvious that *Article 17.2* 'model risk management practices', or 'employee screening' as listed in *Article 8.4*.

The only provision in relation to risk assessment that the Draft Law obviously fails to comply with appears to be *Article 8(5) of the Directive*, which states that obliged entities shall be required 'to obtain approval from their senior management for the policies, controls and procedures that they put in place and to monitor and enhance the measures taken, where appropriate'.

3.2 Risk Assessment in FATF recommendations

Like the EU Directive, *Recommendation 1 (R.1)* requires countries to designate an authority to coordinate actions to assess risk of ML/TF. As seen above, the Draft Law complies with this through Article 18.1. *R.1 also* states that where countries identify higher risks for ML/TF they should make sure that the AML/CTF regime adequately addresses such risks and that where the risks are lower, countries may decide to allow for simplified measures. As seen above, the Draft Law includes measures of enhanced CDD. However, *Interpretive Note to R.1, paragraph 2* states that simplified CDD measures 'should not be permitted whenever there is a suspicion of money laundering or terrorist financing.' *Draft Law Article 23* (simplified CDD) does not contain any such reference. Therefore the Draft Law can only be said to partly comply with R.1

Recommendation 2 (R.2), on national cooperation and coordination in relation to risk assessment, states that countries should have national AML/CFT policies, which should be regularly reviewed, and should designate an authority responsibly for such policies. The Draft Law seems to comply with this Recommendation through *Article 18.1*, as seen above, and through *Article 6.1.7*, which lists one of the competencies of the FIU Board as being responsible for the coordination, for determining the orientation of state policies for the prevention of ML/TF, and for establishing inter-institutional cooperation.

Finally, *Recommendation 15 (R.15)* states that financial institutions should identify and assess ML/TF risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies for both new and pre-existing products. *Draft Law Article 18.3* seems to comply with this R.15.

Recommendations

- Consider amending the language of Article 18.1 to make it clearer. Instead of 'shall ensure periodically and coordinate national risk assessment' the following is suggested: *'shall ensure the periodic review of and coordinate the national risk assessment'*.
- Consider making some amendments to Article 18, paragraphs 2 to 6, to make the language more clear and to make sure all the risk factors referred to in the Directive are covered appropriately by the paragraphs of Article 18.

- Make sure Article 17.2 covers all the items listed in Article 8(4) of the Directive.
- Consider adding a paragraph, or a subparagraph, to Article 17, stating that *'Reporting entities shall obtain approval from their senior management for the policies, controls and procedures that they put in place and to monitor and enhance the measures taken, where appropriate.'*

Consider adding a paragraph to Article 23, stating that *'Simplified customer due diligence measures shall not be permitted whenever there is a suspicion of money laundering or terrorist financing.'*

4. Costumer Due Diligence Measures

Only FATF Recommendation 10 (R.10) specifically mentions CDD, but measures related to CDD is also covered in Recommendations 12 (PEPs), 13 (cross border banking and shell banks), 14 (money or value transfer services), 15 (new technologies), and 16 (wire transfer), some which will be discussed in section 15 below. In the EU Directive, CDD is addressed in Articles 10-29.

4.1 Costumer Due Diligence

Both *EU Directive Article 10* and *Recommendation 10 (R.10)* prohibit credit and financial institutions from keeping anonymous accounts or accounts in fictitious names. These requirements are fulfilled by *Draft Law Article 24.1*.

R.10 lists four circumstances in which obliged entities shall apply CDD. The same circumstances are listed in *Article 11 of the EU Directive*, which also lists an additional two. *Draft Law Article 19.2* appears to mostly cover the same circumstances as *R.10*, with the exception of *19.2.2*, which does not cover wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16. In order to be completely in line with R.10, this should be added to Article 19.2.2. Furthermore, *Draft Law Article 19.2.2* has a lower threshold amount, €10,000, than that listed in R.10 and Article 11(b), which is €15,000. This might not affect the compliance of the Draft Law since it may be reasonable for Kosovo to lower the threshold, given the state of the economy in the country.

While the Draft Law seems to comply mostly with the circumstances for CDD listed in R.10 in relation to the circumstances for applying CDD, there are some issues in relation to Article 11 of the Directive, as well as the last paragraph of R.10. According to *Article 11(b)* CDD measures are also required for transactions defined as transfer of funds as per EU Regulation 2015/847[11] that are over €1,000. This is not included in the Draft Law. The circumstance in *Article 11(c)*, which requires CC measures 'in the case of persons trading in goods, when carrying out occasional transactions in cash amounting to EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked' is similarly not included in the Draft Law. *Article 11(d)*, referring to CDD measures required by providers of gambling services, appears to be covered by *Draft Law Article 30.2*, although the latter is longer and slightly reworded. *Article 11(e) of the Directive* is mostly covered by *Draft Law Article 19.2.4*, except for the last part of

[11] See Regulation (EU) 2015/847 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006, 20 May 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0847&from=EN, Article 3(9): "'transfer of funds' means any transaction at least partially carried out by electronic means on behalf of a payer through a payment service provider, with a view to making funds available to a payee through a payment service provider, irrespective of whether the payer and the payee are the same person and irrespective of whether the payment service provider of the payer and that of the payee are one and the same, including…". The Regulation then lists four

subparagraphs.

the subparagraph (e) 'regardless of any derogation, exemption or threshold', which is not included in 19.2.4.

R.10 also lists four required CDD measures, which are also listed in *EU Directive Article 13.1* and which are mostly complied with by *Draft Law Article 19.1*. It might be worth noting however, that *Article 19.1.2* adds that 'when reporting entities consider that the risk of money laundering or terrorist financing is high they undertake reasonable measures' to verify the identity of the beneficial owner. This seems to mean that if the reporting entities do not consider that the risk of ML/TF is high, there is no requirement to undertake the measures listed in 19.1.2. This might be problematic since neither R.10 nor Article 13 of the Directive has the same requirement of higher risk before undertaking CDD measures.

EU Directive Article 13 also lists additional CDD measures to be taken by obliged entities. Only one of these, paragraph 5, is complied with through *Draft Law Article 19.5*. *Directive Article 13.3* requires that obliged entities take into account at least the variables set out in Annex I[12] of the Directive when assessing the risks of ML/TF. *Article 13.6* states that 'in the case of beneficiaries of trusts or of similar legal arrangements that are designated by particular characteristics or class, an obliged entity shall obtain sufficient information concerning the beneficiary to satisfy the obliged entity that it will be able to establish the identity of the beneficiary at the time of the pay-out or at the time of the exercise by the beneficiary of its vested rights.' No provisions that comply with Article 13.3 or 13.6 appear to have been included in the Draft Law.

EU Directive Article 14.1 states that the verification of the identity of the customer or beneficial owner shall take place before the establishment of a business relationship or a transaction. It is unclear whether the Draft Law includes such a provision. *Draft Law Article 17.1* probably complies with this as it mentions measures to be taken 'by all reporting entities prior to, during and following the execution of transaction or the establishment of business relationship'. However, the measures it mentions are not verification of identity, but 'actions and measures for the prevention and detection' of ML/TF. Consequently it is not completely clear wehther Article 17.1 complies with the Directive.

Both *EU Directive Article 14.4* and *R.10* also state that if an obliged entity is not able to comply with the CDD measures, it shall be required not to open the account, commence business relations or perform the transaction, shall be required to terminate the business relationship, and consider making a suspicious transaction report to the FIU. *Draft Law Article 19.9* mentions the same and appears to comply with the Directive and R.10. However, the article is strangely worded in English and should be revised to be more clear. In particular, the part 'when the reporting entity cannot meet the measures of customer due diligence, beneficial owner or the business beneficiary of life insurance and other associated investments,' is unclear and should be reworded. The last sentence of the paragraph also has unnecessarily complicated language, which makes it unclear. However, *Directive Article 14.4* also states that the CDD measures in Article 13.1 do not apply to 'notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.' The Draft Law seems to not comply with this provision. *Article 31.7 of the Draft Law* is similar, but only applies to lawyers and refers to disclosing information about clients.

Finally, *Directive Article 14.5* requires obliged entities to apply CDD measures 'not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, including at

[12] The non-exhaustive list includes: (i) the purpose of an account or relationship ; (ii) the level of assets to be deposited by a customer or the size of transactions undertaken; (iii) the regularity or duration of the business relationship.

times when the relevant circumstances of a customer change.' A similar requirement is included in *R.10.* No such provision is apparent in the Draft Law.

4.1.1 Recommendations for CDD

- Consider amending the language of Article 17.1 so that the provision is more in line with Directive Article 14.1.
- Consider amending the language of Draft Law articles where this is unclear, particularly to Article 19.9 as explained above.
- Consider making an addition to Article 19.2.2 so that it covers the circumstances covered by the Interpretive Note to Recommendation 16 and is more in line with R.10.
- Consider adding provisions to Article 19 that are similar to Directive Article 11(b)(ii), 11(c), as well as amending Article 19.2.4 of the Draft Law to include the last part of Directive Article 11(c).
- Consider amending Article 19.1.2, so that it does not appear to speak about enhanced CDD.
- Consider adding provisions to Article 19 that are similar to Directive Article 13.3 and 13.6.
- Consider adding provisions to Article 19 that are similar to the second part of Directive Article 14.4 and Article 14.5

4.2 Enhanced Costumer Due Diligence

Enhanced CDD is covered in the EU Directive by Articles 18 to 29, and by FATF Recommendations 12 to 16. In the Draft Law, enhanced CDD is covered primarily by Article 22. According to *EU Directive Article 18.2* 'obliged entities shall be required to examine background and purpose of all complex and unusually large transactions, and all unusual patterns of transactions which have no apparent economic or lawful purpose.' No such provision appears in the Draft Law. *Article 18.3 of the Directive* requires obliged entities, when assessing the risks of ML/TF, to take into account at least the factors of potentially higher risk situations set out in Annex III[13]. No corresponding article appears in the Draft Law.

Directive Article 19 is a rather simple, not very complex article that requires credit and financial institutions, with respect to cross-border correspondent relationships with third country respondent institutions, to take additional measures than those listed as regular CDD. The same measures are listed as requirements in *Recommendation 13 (R.13)*. The content of Article 19 appears to be covered by *Draft Law Article 22.4*; however, the language is different in some of the subparagraphs which could be changed in order for the Article to be more in line with the Directive.

[13] The non-exhaustive list includes: (1) Customer risk factors: (a) the business relationship is conducted in unusual circumstances; (b) customers that are resident in geographical areas of higher risk as set out in point (3); (c) legal persons or arrangements that are personal asset-holding vehicles; (d) companies that have nominee shareholders or shares in bearer form; (e) businesses that are cash-intensive; (f) the ownership structure of the company appears unusual or excessively complex given the nature of the company's business; (2) Product, service, transaction or delivery channel risk factors: (a) private banking; (b) products or transactions that might favour anonymity; (c) non-face-to-face business relationships or transactions, without certain safeguards, such as electronic signatures; (d) payment received from unknown or un-associated third parties; (e) new products and new business practices, including new delivery mechanism, and the use of new or developing technologies for both new and pre-existing products; (3) Geographical risk factors: (a) without prejudice to Article 9, countries identified by credible sources, such as mutual evaluations, detailed assessment reports or published follow-up reports, as not having effective AML/CFT systems; (b) countries identified by credible sources as having significant levels of corruption or other criminal activity; (c) countries subject to sanctions, embargos or similar measures issued by, for example, the Union or the United Nations; (d) countries providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country.

For example, *paragraph 4.3* of Article 22 requires the institutions to obtain approval from the Director General, 'his designated person or employee performing an equivalent functions' [sic] before establishing new banking relationships, whereas *Article 19(c)* of the Directive refers to 'senior management'. The reference in the Directive is a more open category than that of the Draft Law and allows the provision to apply more widely. Furthermore, the language of *paragraph 4.4* of Article 22 is slightly different than that of *paragraph (d)* of Directive Article 19. This does not necessarily mean that it is not in line with the Directive, but the language could be made clearer just to be certain. However, the language of *paragraph 4.5* of Article 22, which supposedly should correspond to that of *paragraph (e)* of Article 19, is much too different and confusing to be in line with the Directive.

Both *EU Directive Article 20* and *Recommendation 12* list additional measures to be taken by obligated entities in relation to transactions or business relationships with PEPs. These measures are by large complied with by *Draft Law Article 22.5*, although like with Article 22.4, paragraph 5 contains some different language which creates some uncertainty. Unless there is a specific reason for the change in language, the drafters could make the language of paragraph 5 more similar with Article 20 to make sure the Draft Law is in line with the Directive. Furthermore, *Article 22(a)* of the Directive appears not to be included in the Draft Law.

EU Directive Article 21, regarding obliged entities and beneficiaries of a life or other investment-related insurance policies, seems to be adequately covered by *Draft Law Article 22.6*. *Directive Article 24* and *R.13* both state that credit and financial institutions shall be prohibited from entering into, or continuing, a correspondent relationship with a shell bank. This seems to be adequately covered by *Draft Law Article 22.7*, even though the language could be simpler and more straight forward, like in Directive Article 24.

Lastly, *Directive Articles 22 and 23*, appear not to be covered by the Draft Law at all.

4.2.1 Recommendations for Enhanced CDD

- Although not mentioned above, consider amending Article 22.1 of the Draft Law to include 'high in the first sentence, so that it reads *'define that the risk of money laundering or terrorist financing appears high'* or something similar since Article 22 deals with enhanced CDD and not just regular CDD.
- Amend Article 22 to include the factors to be taken into account that are listed in Annex III, preferably by inserting a new paragraph 2 with the following suggested language: *'When assessing the risks of money laundering and terrorist financing, reporting entities shall take into account at least the following factors of potentially higher risk situations'*. The rest of Article 22 would need to be renumbered accordingly.
- Amend the language of Article 22.4 to be closer to that of the Directive in order to ensure it is in line with Article 19, particularly for paragraph 4.5 which is very confusingly worded in English.
- Consider amending the language of Article 22.5 to be closer to that of the Directive in order to ensure it is in line with Article 20.
- Consider adding a provision, preferably to Article 22.5, to include the language of Directive Article 20(a).
- Consider making the language of Draft Law Article 22.7 more straightforward, like that of Directive Article 24.
- Consider adding a provision to Article 22, to transpose Directive Article 22. The following language is suggested: *'Where a politically exposed person is no longer entrusted with a prominent public function by, whether by domestic institutions, a foreign country or an*

international organisation, reporting entities shall, for at least 12 months, take into account the continuing risk posed by that person and shall apply appropriate and risk- sensitive measures until such time as that person is deemed to pose no further risk specific to politically exposed persons'.

- Consider adding a provision similar to Directive Article 23. The following is suggested: *'The measures referred to in Articles 22.5 and 22.6 shall also apply to family members or persons known to be close associates of politically exposed persons.'*

4.3 Simplified Customer Due Diligence

EU Directive Article 15 and 16 deal with Simplified CDD which is covered by Draft Law Article 23, and which was not included in the current law. *Directive Article 15.1*, stating that when an obliged entity identifies areas of lower risk, they may be allowed to apply simplified CDD measures, is copied almost verbatim by *Draft Law Article 23.1*, which thus complies with the directive.

EU Directive Article 15.2, states that 'before applying simplified CDD measures, obliged entities shall ascertain that the business relationship or the transaction presents as lower degree of risk.' *Draft Law Article 23.2*, seems to mostly comply with Article 15.2, but there is a difference in that the Draft Law article starts with 'prior to asking for exemption', which indicates that the reporting entity has to ask the FIU for permission to apply the simplified measures. It is not certain that this would make the provision not comply with the EU Directive, but it is something to consider, as the Directive gives the obliged entities the power to decide themselves whether or not to apply simplified CDD measures.

Furthermore, *Directive Article 15.3*, stating that obliged entities shall carry out sufficient monitoring of the transaction and business relationship to enable the detection of unusual or suspicious transactions, seems to be complied with by *Draft Law Article 23.3*. However, Article 23.3 has changed the word 'detection'' to 'disclosure'. These words are not synonymous and it would be advisable for the drafters to make sure that they use the appropriate term for what they mean to say.

Finally, *EU Directive Article 16* requires obliged entities, when assessing the risks of ML/TF relating to types of customers, geographic areas, and particular products, services, transactions or delivery channels, to take into account at least the factors of potentially lower risk situations set out in Annex II[14]. There is no provision in the Draft Law that fully complies with this. *Draft Law Articles 23.4,* states that reporting entities 'shall take into consideration at least the factors of low risk potential situation, which shall be defined by FIU-K, in co-operation with the sectorial supervisor'. *Draft Law Article 23.4*, states that the FIU shall issue sublegal acts for reporting entities in relation

[14] The non-exhaustive list includes: (1) Customer risk factors: (a) public companies listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means), which impose requirements to ensure adequate transparency of beneficial ownership; (b) public administrations or enterprises; (c) customers that are resident in geographical areas of lower risk as set out in point (3); (2) Product, service, transaction or delivery channel risk factors: (a) life insurance policies for which the premium is low; (b) insurance policies for pension schemes if there is no early surrender option and the policy cannot be used as collateral; (c) a pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages, and the scheme rules do not permit the assignment of a member's interest under the scheme; (d) financial products or services that provide appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes; (e) products where the risks of money laundering and terrorist financing are managed by other factors such as purse limits or transparency of ownership (e.g. certain types of electronic money); (3) Geographical risk factors:(a) Member States; (b) third countries having effective AML/CFT systems; (c) third countries identified by credible sources as having a low level of corruption or other criminal activity; (d) third countries which, on the basis of credible sources such as mutual evaluations, detailed assessment reports or published follow-up reports, have requirements to combat money laundering and terrorist financing consistent with the revised FATF Recommendations and

effectively implement those requirements.

to risk factors to be taken into account when simplified CDD is suitable and *Article 23.5* states that the Central Bank of Kosovo (CBK) shall do the same for banks and financial institutions. At the very least, these paragraphs would have to refer to the factors of Annex II of the Directive to be in compliance with Article 16 of the Directive. As the list in Annex II is non-exhaustive, the FIU and CBK may of course include additional factors in their sublegal acts.

4.3.1 Recommendations for Simplified CDD

- Consider revising the minor changes of Draft Law Article 23 to make sure it is in line with Directive Article 15.
- Consider amending Draft Law Articles 23.4, 23.5, and 23.6 to include the factors to be taken into account that are listed in Annex II, or include those factors in a separate paragraph of Article 23.

4.4 Performance by Third Parties

EU Directive Articles 25 to 29 and *Recommendation 17 (R.17)* include provisions that allow obliged entities to rely on third parties to perform some CDD measures. This is not covered by the Directive, but as both the Directive and R.17 use the word 'may' states are not required to implement these provisions. The drafters may want to consider adding provisions in this respect if they consider it appropriate for the Kosovo context.

4.5 Additional CDD Measures in the FTAF Recommendations

The FATF Recommendations contain CDD requirements in relation to what the FATF calls 'designated non-financial businesses and professions' (DNFBPs).

Recommendation 22 (R.22) states that the CDD measures set out in R10 (CDD), 11 (record keeping), 12 (PEPs), 15 (new technologies), 17 (third parties), shall also apply to DNFBPs in the following situations:

(a) Casinos – when customers engage in financial transactions equal to or above €3,000 (according to Interpretive Note 22).
(b) Real estate agents – when are involved in transactions for client concerning buying and selling or real estate.
(c) Dealers in previous metals and dealers in precious stones – when engage in any cash transaction w/ customer equal to or above €15,000 (according to Interpretive Note to R.22 and 23).
(d) Lawyers, notaries, other independent legal professionals and accountants – when prepare for or carry out transactions for their client concerning certain activities.[15]
(e) Trust and company service providers – when they prepare for or carry out transactions for a client concerning certain activities.[16]

[15] (i) buying and selling of real estate; (ii) managing of client money, securities or other assets; (iii) management of bank, savings or securities accounts; (iv) organisation of contributions for the creation, operation or management of companies; (v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

[16] (i) acting as a formation agent of legal persons; (ii) acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a company, a

partnership or any other legal person or arrangement; (iv) acting as (or arranging for another person to act as) a trustee

It is not easy to see whether the Draft Law complies completely with R.22. Generally, all reporting entities in the Draft Law have to comply with the requirements of Articles 19 (CDD), 20, (data keeping), 22.5 (PEPs), and 18.3 (new technologies). So far then, the Draft Law seems to mostly comply with R. 22. However, there are some irregularities in the way the Draft Law addresses points (a) to (d) of R.22. Therefore, a thorough analysis by the drafters of compliance with R.22 would be recommended. *Draft Law Article 30.2* addresses casinos in paragraph (a), but the threshold amount is lower than in (a) at '€2,000 or more'. This might be appropriate for Kosovo. Real estate agents in point (b), dealers in previous metals and precious stones in point (c), and trust and company service providers in point (e) are all categories listed as reporting entities in *Draft Law Article 16.1*. Since CDD measures in the Draft Law apply to all reporting entities this seems to comply with R.22. However, R.22 includes particular situations when CDD measures apply to these categories, which is not included in the Draft Law. *Draft Law 31* lists additional CDD obligations of lawyers, notaries, accountants, auditors and tax advisors. *Paragraph 6* lists all the situations in point (d), but in relation to reporting suspicious transactions only, not in relation to all CDD measures as in R22. This makes it difficult to determine whether the Draft Law is in line with R.22.

Recommendation 23 (R.23) states that the requirements set out in R.18 (internal controls, foreign branches and subsidies), 19 (high-risk countries), 20 (reporting of suspicious transactions) and 21 (tipping off and confidentiality) also apply to all DNFBPs, subject to the following qualifications: (a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22; (b) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above €15,000 (threshold in Interpretive Note to R.22 and 23), and (c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to in paragraph (e) of Recommendation 22.

Since generally all reporting entities have to comply with the reporting obligations of the Draft Law, unless otherwise stated, the Draft Law seems to comply with R.23 through Articles 26.1.1, 26.4, 45, and 61. The only provision not currently in the Draft Law is R.19 relating to high-risk countries, as seen below. Whether or not the Draft Law completely complies with R.23 is difficult to say, but any comments about points (a)-(c) are the same as under R.22 above.

4.5.1 Recommendations

Consider performing a thorough analysis of whether the Draft Law complies with R.22 and R.23 make amendments accordingly.

5. Beneficial Ownership Information

EU Directive Articles 30 and 31 contain requirements for corporate, legal entities and trustees of express trusts to obtain and hold accurate and up-to-date information about beneficial ownership. This information shall be made available to the FIU and other competent authorities. Similar requirements are included in *Recommendations 24 and 25*.

The Draft Law does not appear to contain any provisions regarding this. It might be because these requirements and obligations are included in other laws specific to these categories of entities. However, if this is not the case, it would be recommended to consider including provisions

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of an express trust or performing the equivalent function for another form of legal arrangement; (v) acting as (or

arranging for another person to act as) a nominee shareholder for another person.

in the Draft Law that would comply with Directive Articles 30 to 31 and Recommendations 24 to 25. If there are such provisions in other laws, provisions in the Draft Law that refer to these laws could be included.

6. The FIU

EU Directive Article 32 and *Recommendation 29 (R.29)* both address the function and powers of the FIU.

Directive Article 32.1 and *R29* requires countries to establish an FIU which according to *Article 32.3* should be 'operationally independent and autonomous, which means that the FIU shall have the authority and capacity to carry out its functions freely, including the ability to take autonomous decisions to analyse, request and disseminate specific information.' Both *Article 32.2* and *R.29* state that the FIU shall serve as the central national unit and shall be responsible for receiving and analysing suspicious transaction reports and other information relevant to money laundering, associated predicate offences or terrorist financing. *Article 4 of the Draft Law* establishes the FIU in Kosovo and *Article 4.1* states that the FIU is an independent national institution within the Ministry of Finance 'responsible for requesting, receiving, analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering and terrorist financing.' This seems to be in line with paragraphs 1 and 3 of Directive Article 32 as well as R.29. *Article 7* also refers to operational independence in its title, but then only states that the FIU Board shall not interfere with on-going FIU cases. It might be argued that the text of the Article does not completely guarantee the operational independence of the FIU, but only guarantees independence from its Board in certain circumstances and therefore the title of the article is misleading. The drafters could therefore consider either rewording the title to something like 'None-interference by the Board' or make sure that the text of Article 7 includes independence in a broader sense. But because of Article 4.1, the Draft Law still seems to comply with paragraphs 1 and 3 of Directive Article 32.

Paragraph 3 of Article 32 and *R.29* also states the FIU shall be responsible for disseminating the results of its analyses and, according to *Article 32.3,* any additional relevant information to the competent authorities where there are grounds to suspect money laundering, associated predicate offences or terrorist financing. It shall also be able to obtain additional information from reporting entities. *Draft Law Article 14* covers the duties and competencies of the FIU in Kosovo. According to Article 14, the FIU is authorised to disseminate the results of its analyses and reports *(paragraph 1.10)*, and may require information from reporting entities that are necessary for the conduct of its duties *(paragraph 1.4)*. The Draft law therefore seems in line with the Directive and R.29. Furthermore, Article 15 addresses more specifically when the FIU may disclose and disseminate information, even though some provisions are not clearly worded in English, such as 15.2. *R.29* also states that the FIU 'should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly. *Draft Law Article 14.3* states that the FIU and other institutions in Kosovo shall cooperate and assist each other in the discharge of their duties. This might be enough to comply with R.29, but the language could be made more similar to that of R.29 for the sake of clarity.

Paragraph 5 of Directive Article 32 states that whenever there are objective grounds for assuming that the provision of information 'would have a negative impact on on-going investigations or analyses, or, in exceptional circumstances, where disclosure of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or irrelevant with regard to the purposes for which it has been requested, the FIU shall be under no obligation to comply with

the request for information.' According to *Draft Law Article 15.5,* the FIU may refuse to disclose information but to 'foreign counterpart carrying out similar functions'. No other provision of the Draft Law addresses a right of the FIU to refuse to disclose information and the Draft Law is thus not in line with the Directive on this point.

Paragraph 6 of Article 32 states that competent authorities shall be required to provide feedback to the FIU about the use made of the information provided in accordance with this Article and about the outcome of the investigations or inspections performed on the basis of that information. There is no such provision in the Draft Law. *Paragraph 7* states that the FIU should have the power 'to take urgent action, directly or indirectly, where there is a suspicion that a transaction is related to money laundering or terrorist financing, to suspend or withhold consent to a transaction that is proceeding, in order to analyse the transaction, confirm the suspicion and disseminate the results of the analysis to the competent authorities.' The FIU shall also have the power 'to take such action, directly or indirectly, at the request of an FIU from another Member State for the periods and under the conditions specified in the national law of the FIU receiving the request.' *Draft Law Article 27* gives the FIU-K the right to temporarily, for 48 hours, freeze transactions if there are reasonable grounds to suspect ML/TF. *Article 28* gives the FIU-K the same powers in the event of a written request from a foreign counterpart conducting similar functions to the FIU. These articles seem to be in line with the Directive.

Lastly, according to *paragraph 8 of Article 32* of the EU Directive the FIU's analysis function shall consist of: (a) an operational analysis which focuses on individual cases and specific targets or on appropriate selected information, depending on the type and volume of the disclosures received and the expected use of the information after dissemination; and (b) a strategic analysis addressing money laundering and terrorist financing trends and patterns. It is unclear whether the Draft Law complies with this requirement. It appears that at least point (a) is not covered. *Draft Law Article 14.1* does mention that the FIU is authorised to analyse reports and information, but is not worded in a manner that can be said to be consistent with EU Directive Article 32(8) (a). *Draft Law Article 14.3.1* mentions strategic analysis but the rest of the paragraph is too different from Article 32(8) (b) to fully comply with the Directive on this point.

6.1 Recommendations

- Consider either rewording the title of Article 7 to something like 'Non-interference by the Board', or make sure that the text of Article 7 includes independence in a broader sense.
- Consider amending the language of Article 15.2 as this is not clear in English.
- Consider adding a provision similar to Directive Article 32(5), perhaps as Article 15.2.3, since Article 15.2 addresses when the FIU may disclose the results of analyses.
- Consider adding a provision similar to Directive Article 32(6).
- Consider adding a provision to Draft Law Article 14 that is similar to Directive Article 32(8)(a) and consider amending the language of Draft Law Article 14.3 to be more similar to Directive Article 32(8)(b).
- Consider amending the language of Article 14.3 to ensure it is more in line with R.29, as suggested above.

7. Reporting Obligations

Recommendation 20 states that if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to TF, it should be required, by law, to report promptly its suspicions to the FIU. *Directive Article 33.1* requires obliged entities to

(a) promptly inform the FIU, including by filing report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to TF, and to promptly respond to requests by the FIU for additional information in such cases; and *(b)* provide the FIU, directly or indirectly, at its request, with all necessary information, in accordance with the procedures established by the applicable law. The article further states that all suspicious transactions, including attempted transactions, shall be reported. According to *Draft Law Article 26.1.1* reporting entities shall report to the FIU 'all suspicious acts or transactions within twenty four (24) hours of the time the act or transaction was identified as suspicious'. Although this might comply with *R.20*, it is probably not enough to comply with the requirements in Article 33.1(a). *Draft Law Article 26.2* requires reporting entities to continue to report to the FIU 'any additional material information regarding the transaction(s) that is acquired by the reporting entity after the report under paragraph 1', as well as other information upon request from the FIU. Furthermore, the *Draft Law* does not seem to include a reporting obligation for 'attempted transactions, as required by Directive Article 33.1.

Directive Article 34.2 states that the obligations of Article 33.1 'does not apply to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.' The *Draft Law* contains no such provision. *Article 37.1* is similar, but only refers to lawyers when disclosing information about their clients.

Directive Article 35.1 requires obliged entities to 'refrain from carrying out transactions which they know or suspect to be related to proceeds of criminal activity or to terrorist financing until they have completed the necessary action in accordance with point (a) of the first subparagraph of Article 33(1) and have complied with any further specific instructions from the FIU or the competent authorities in accordance with the law of the relevant Member State.' *Paragraph 2* states that 'where refraining from carrying out transactions referred to in paragraph 1 is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected operation, the obliged entities concerned shall inform the FIU immediately afterwards.' None of these provisions appear in the Draft Law.

4.6 Recommendations

- Consider amending Article 26.1 to be more in line with the Directive. The following language could be used (note that current Article 26.2 would be replaced by the new paragraph 1.2 suggested below):
  '1. All reporting entities shall promptly:
  1.1 inform the FIU, by filing a report, when the reporting entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to TF, and to promptly respond to requests by the FIU for additional information in such cases; and
  1.2 provide the FIU with all additional material information regarding the transaction(s) that is acquired by the reporting entity after the report under paragraph 1.1.'
- Consider adding a provision with language similar to Directive Article 34.2. This could be done as a new paragraph 2 immediately following the above suggested paragraph 1.

- In light of the proposed change above, consider renumbering the rest of Article 26 by making current Article 26.1.2 into Article 26.3 and changing the number of the other paragraphs of the Article accordingly. Article 26.3 could start with something similar to *'Reporting entities shall also report all single transactions…'*, followed by the rest of what is 26.1.2 in the current draft.
- Consider adding a new Article 27, like Directive Article 35. The following language is suggested:
  '1. Reporting entities are required to refrain from carrying out transactions which they know or suspect to be related to proceeds of criminal activity or to terrorist financing until they have completed the necessary action in accordance with paragraph 1 of Article 26 and have complied with any further specific instructions from the FIU or the competent authorities in accordance with the law of the relevant Member State.
  2. Where refraining from carrying out transactions referred to in paragraph 1 is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected operation, the reporting entities concerned shall inform the FIU immediately afterwards.'

8. Disclosure of information

According to *Directive Article 37* 'disclosure of information in good faith by an obliged entity or by an employee or director of such an obliged entity in accordance with Articles 33 and 34 of the Directive shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the obliged entity or its directors or employees in liability of any kind even in circumstances where they were not precisely aware of the underlying criminal activity and regardless of whether illegal activity actually occurred.' *Recommendation 21(a) (R.21(a))* has the same provision with very similar language. The *Draft Law 61* has the title 'exemption from liability' and seems to be in line with Article 37 and R.21(a). However, the language is slightly different and in some parts confusing in English. Clearer language would make it easier to determine whether the article is in line with the Directive.

Directive Article 38 addresses threats in connection with reporting. The Article states that countries 'shall ensure that individuals, including employees and representatives of the obliged entity, who report suspicions of money laundering or terrorist financing internally or to the FIU, are protected from being exposed to threats or hostile action, and in particular from adverse or discriminatory employment actions.' *Draft Law Article 58*, entitled 'threat in relation to reporting activities or suspicious transactions', however it is unclear whether it is in line with the Directive. The article does not speak of protection of the categories of individuals in Article 38, but addresses acts that are prohibited and the possible sanction. Article 58 is also one long sentence and the language in the first part is very confusing in English as it lacks proper punctuation. The article could benefit from being divided into two sentences and having the language revised. Furthermore, Article 58 does not address the issue of adverse or discriminatory employment actions. To make sure the Draft Law is in line with the Directive, Article 58 could be divided into two paragraphs; a first one that addresses the issues of Directive Article 38 and a second one that is the current Article 58, but reworded to be clearer.

Directive Article 39 addresses the prohibition of disclosure of information. *Paragraph 1* states that directors and employees of obliged entities 'shall not disclose to customers that or third parties the fact that information is being, will be or has been transmitted to the FIU according to Articles 33 and 34' of the Directive, or that a MF/TF analysis is being or may be carried out. *Recommendation 21(b)* prohibits the same. *Paragraph 2 of Directive Article 39* further states that the prohibition of paragraph 1 shall not include disclosure to the competent authorities or

disclosure for law enforcement purposes. *Draft Law Article 26.4* seems to be mostly in line with Directive Article 39(1) and R.21 (b). However, it is unclear whether the Draft Law is completely in line with Article 39(2). Article 26.4 mentions that disclosure may not take place 'other than the FIU-K, without written authorisation by FIU-K, Public prosecutor or a Court.' However, this might be an unnecessarily limited interpretation of law enforcement.

Directive Article 39(3), (4), (5), and (6) lists several instances in which the prohibition of paragraph 1 does not apply. No such instances are covered by the Draft Law and should perhaps be added to make the Draft Law more in line with the Directive.

8.1 Recommendations

- Consider amending the language of Article 61 to make it clearer and more in line with the Directive and R.21.
- Consider amending Article 58 to include two paragraphs. The following language is suggested:

'1. All individuals, including employees and representatives of a reporting entity, who report suspicions of money laundering or terrorist financing internally or to the FIU-K, shall be protected from being exposed to threats or hostile action, and in particular from adverse or discriminatory employment actions.

2. Whoever

> *(i)) uses force against, or in any other way seriously threatens, another person who is making, or wants to make, a report of money laundering or terrorist financing internally or to the FIU-K; or*
>
> *(ii) promises any form of benefit to a person who is making, or wants to make, a report of money laundering or terrorist financing internally or to the FIU-K in return for not complying with the reporting obligation under Article 26 or for making a false declaration to the FIU-K, investigative authorities, Prosecution, or Court*

shall be subject to a fine up to € one hundred and twenty-five thousand (125.000) and imprisonment from two (2) up to ten (10) years.'

- Consider amending Article 26.4 to include the language of Directive Article 39(2).

Consider adding provisions to Article 26 similar to Directive Article 39(3), (4), (5), and (6).

9. Data Protection, Record-keeping and Statistical Data

In the area of data protection, record-keeping and statistical data the Draft Law overall does not comply well with the Directive; there are several provisions in the Directive that appear to not have been included in the Draft Law.

According to *Directive Article 40.1* obliged entities shall be required to retain the following documents and information in accordance with national law for the purpose of preventing, detecting and investigating, by the FIU or by other competent authorities, possible money laundering or terrorist financing: *(a)* in the case of CDD, a copy of the documents and information which are necessary to comply with the CDD requirements, for a period of five years after the end of the business relationship with their customer or after the date of an occasional transaction; *(b)* the supporting evidence and records of transactions, consisting of the original documents or copies admissible in judicial proceedings under the applicable national law, which are necessary to identify transactions, for a period of five years after the end of a business relationship with their customer or after the date of an occasional transaction. *Recommendation 11* has similar requirements. *Draft Law 20.1.1* appears to be somewhat in line with Article 40(1)(a), but the language of Article 20.1.1 is different in a way that does not make much sense and which would be made more consistent

with that of the Directive. The same is true of *Draft Law Article 20.1.2*, which seems to be in line with Article 40(1) (b).

Directive Article 40(1) further states that upon expiry of the retention periods referred to in that paragraph, obliged entities shall 'delete personal data, unless otherwise provided for by national law, which shall determine under which circumstances obliged entities may or shall further retain data. Member States may allow or require further retention after they have carried out a thorough assessment of the necessity and proportionality of such further retention and consider it to be justified as necessary for the prevention, detection or investigation of money laundering or terrorist financing. That further retention period shall not exceed five additional years.' This is not entirely complied with by the Draft Law. *Article 20.3* states that the FIU may extend the five-year period on written order, but does not mention a time limit for this extension. It is probably reasonable and advisable to include a limit to the extension of the retention period. Furthermore, the Draft Law does not state that after the retention period, reporting entitles are required to delete the collected data.

Directive Article 41 contains several paragraphs relating to personal data and the protection thereof, none of which are included in the Draft Law. *Paragraph 2* states that obliged entities shall process personal data only for the purposes of the prevention of ML and TF and terrorist financing and shall further process it in a way that is incompatible with those purposes. The processing of personal data on the basis of the Directive for any other purposes shall be prohibited. *Paragraph 3* states that reporting entities 'shall provide new clients with the information required pursuant to Article 10 of Directive 95/46/EC[17] before establishing a business relationship or carrying out an occasional transaction. That information shall, in particular, include a general notice concerning the legal obligations of obliged entities under this Directive to process personal data for the purposes of the prevention of money laundering and terrorist financing.' *Paragraph 4* state that in applying the prohibition of disclosure laid down in Directive Article 39(1), countries 'shall adopt legislative measures restricting, in whole or in part, the data subject's right of access to personal data relating to him or her to the extent that such partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the person concerned to: (a) enable the obliged entity or competent national authority to fulfil its tasks properly for the purposes of this Directive; or (b) avoid obstructing official or legal inquiries, analyses, investigations or procedures for the purposes of this Directive and to ensure that the prevention, investigation and detection of money laundering and terrorist financing is not jeopardised.' This last paragraph could either be added to the Draft Law, or to the Law on the Protection of Personal Data[18] and with a reference in the Draft Law.

The last article to deal with these issues is *Directive Article 44. Paragraph (1)* states that countries shall ensure that they are able to review effectiveness of their systems to combat ML/TF

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[17] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML,
Article 10: Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:
(a) the identity of the controller and of his representative, if any;
(b) the purposes of the processing for which the data are intended;
(c) any further information such as
- the recipients or categories of recipients of the data,
- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
- the existence of the right of access to and the right to rectify the data concerning him
in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

[18] Law No. 03/L-172 on the Protection of Personal Data, 29 April

2010, http://www.kuvendikosoves.org/common/docs/ligjet/2010-172-eng.pdf.

by maintaining comprehensive statistics on matters relevant to effectiveness of such systems. This is also included in *Recommendation 33 (R.33). Draft Law Article 39.1* states that the FIU-K, CBK, sectorial supervisors, other competent authorities, reporting entities, etc. 'shall keep relevant comprehensive statistical data on their area of responsibility.' *Article 39.4* mentions that all statistical data kept pursuant to that Article shall be made available to the FIU-K to enable the review of effectiveness of the national system. These two provisions seem to be in line with the Directive and R.33. *Paragraph (2)* lists what the statistics referred to in paragraph 1 shall include.[19] Some of these requirements are also included in *R.33.* However, none of them appear to be included in the Draft Law, but could be added to Article 39 as a new paragraph. Finally, *paragraph (3) of Directive Article 44* states that countries 'shall ensure that a consolidated review of their statistics is published.' This is also not included in the Draft Law. The only article mentioning publication is Article 55, but only in relation to administrative penalties. The Draft Law could include a paragraph to Article 39 that would give the responsibility to publish a review of statistics to the FIU-K and other competent authorities mentioned in Article 39.1.

9.1 Recommendations

- Consider amending the language of Article 20.1.1 to make the paragraph more in line with the Directive. The following is suggested: *''in the case of customer due diligence, a copy of the documents and information which are necessary to comply with the customer due diligence requirements laid down in Articles 19, 22, and 23 for a period of five years after the end of the business relationship with their customer or after the date of an occasional transaction.'*
- Consider amending the language of Article 20.1.2 to make the paragraph more in line with the Directive. The following is suggested: *'the supporting evidence and records of transactions, consisting of the original documents or copies admissible in judicial proceedings under Kosovo law [alternatively insert name of appropriate legislation], which are necessary to identify transactions, for a period of five years after the end of a business relationship with their customer or after the date of an occasional transaction.'*
- Consider adding the following to Article 20.3: *'This extension shall not exceed five (5) years.'*
- Consider adding a provision to Article 26 obliging reporting entitles to delete personal data after retention period. The following language is suggested: *'Reporting entities shall, after the period of five (5) years, delete personal data, unless otherwise provided in Kosovo law [alternatively insert reference to such law] or otherwise requested by the FIU in accordance with subparagraph 1.3 of this Article.'*
- Consider adding a provision on data protection, similar to Directive Article 41. The following language is suggested:

'1. Personal data shall be processed by reporting entities for the purposes of the prevention of money laundering and terrorist financing as defined in Article 56 and 57 of this Law and shall not be further processed in a way that is incompatible with those purposes. The processing of personal

[19] '(a) data measuring the size and importance of the different sectors which fall within the scope of this Directive, including the number of entities and persons and the economic importance of each sector; (b) data measuring the reporting, investigation and judicial phases of the national AML/CFT regime, including the number of suspicious transaction reports made to the FIU, the follow-up given to those reports and, on an annual basis, the number of cases investigated, the number of persons prosecuted, the number of persons convicted for money laundering or terrorist financing offences, the types of predicate offences, where such information is available, and the value in euro of property that has been frozen, seized or confiscated; (c) if available, data identifying the number and percentage of reports resulting in further investigation, together with the annual report to obliged entities detailing the usefulness and follow-up of the reports they presented; (d) data regarding the number of cross-border requests for information that were made,

received, refused and partially or fully answered by the FIU.'

data on the basis of this Law for any other purposes, such as commercial purposes, shall be prohibited.

- *2. Reporting entities shall, before establishing a business relationship or carrying out an occasional transaction, provide new clients with the following information:*

  (a) the identity of the reporting entity; (b) the purposes of the processing for which the data are intended; (c) any further information such as
  - the recipients or categories of recipients of the data,
  - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
  - the existence of the right of access to and the right to rectify the data concerning him.

The information shall, in particular, include a general notice concerning the legal obligations of reporting entities under this Law to process personal data for the purposes of the prevention of money laundering and terrorist financing as referred to in Article 56 and 57 of this Law.

- If the Law on Data Protection does not contain a provision similar to that of Article 41, consider adding the following, as a third paragraph to the new article proposed in the previous recommendation:

'A person's right of access to personal data relating to him or her shall be wholly or partially restricted only to the extent that it is necessary and proportionate, with due regard for the legitimate interests of the person concerned, in order to:

(a) enable the reporting entity or competent national authority to fulfil its tasks properly for the purposes of this Law; or

(b) avoid obstructing official or legal inquiries, analyses, investigations or procedures for the purposes of this Law and to ensure that the prevention, investigation and detection of money laundering and terrorist financing is not jeopardized.'

- Consider adding a paragraph to Article 39 to include the list of information to be included in the statistics similar to Directive Article 44(2).
- Consider adding a paragraph to Article 39 similar to Directive Article 44(3). The following language is suggested: *'The FIU-K, CBK, sectorial supervisors, other competent authorities, reporting entities, etc. shall ensure that a consolidated review of their statistics is published.'*

10. Internal procedures, Training and Feedback

Recommendation 18 (R.18) states that financial institutions should be required to implement programmes, including group programmes, against ML/TF. They should also be required to ensure that their foreign branches and majority owned subsidiaries apply AML/CTF measures consistent with the home country requirements implementing the FATF recommendations through the groups' programmes against ML/TF. *Directive Article 45* similarly requires obliged entities that are part of a group to, among other things, implement group-wide policies and procedures for AML/CFT purposes (paragraph 1), requires entities that operate in another state to ensure that those establishments respect the national provisions of the home country (paragraph 2), etc. *Draft Law Article 24.5* requires banks and financial institutions to 'implement programmes within the group covering their external branches and majority affiliates owned, against money laundering and terrorist financing, including policies and procedures for exchange of information within the group for the purposes of this law.' This seems to be somewhat in line with R.18 and also Article 45(1). However, it should be noted that the English version of Article 24 mentions 'external branches' which is slightly confusing

although supposedly is meant to refer to foreign branches. However, the Draft Law does not seem to be in line with the rest of Directive Article 45. Furthermore, the Directive Article 45 applies to 'obliged entities, whereas Draft Law Article 24 is specifically about additional obligations on banks and financial institutions. *Draft Law Article 17* does mention measures to be taken by reporting entities to provide trainings of employees etc. but does not otherwise comply with Directive Article 45 or R.18.

Directive Article 46 addresses training of employees and feedback of ML/TF reports. *Paragraph 1* states that 'obliged entities shall be required to take measures proportionate to their risks, nature and size so that their employees are aware of the provisions adopted pursuant to this Directive, including relevant data protection requirements. Those measures shall include participation of their employees in special on-going training programmes to help them recognise operations which may be related to money laundering or terrorist financing and to instruct them as to how to proceed in such cases.' According to *Draft Law Article 17.2.5* reporting entities shall provide the 'programme organisation and financing for training and qualification of employees on the liabilities set forth under this Law.' The Article does address training of employees but is otherwise more limited than Directive Article 46.1 and should probably be amended in order to comply better with the Directive. *Paragraph 1* also states that 'where a natural person falling within any of the categories listed in point (3) of Article 2(1) [auditors, external accountants, tax advisors, notaries and other independent legal professionals where they participate in any financial or real estate transaction etc.] performs professional activities as an employee of a legal person, the obligations in this Section shall apply to that legal person rather than to the natural person.' This is not covered by the Draft Article.

Paragraph 2 of Directive Article 46 states that countries should ensure that obliged entities have access to up-to-date information on the practices of ML/TF and on indications leading to the recognition of suspicious transactions. No such provision exists in the Draft Law, but could be considered a policy issue and not appropriate for inclusion in the Law. However, there could be a provision stating the rights of reporting entities to this information, e.g. from the FIU.

Paragraph 3 of Directive Article 46 states that countries shall ensure that, where practicable, timely feedback on the effectiveness of, and follow up to, reports of suspected ML/TF is provided to reporting entities. *Recommendation 34* also states that competent authorities shall establish guidelines, provide feedback to assist financial institutions and designated non-financial businesses and professions in applying national measures to combat ML/TF, and in particular in detecting and reporting suspicious transactions. Like with paragraph 2 above, this is not addressed in the Draft Law, but could be included as a provision to make the FIU responsible for feedback on the effectiveness of reports of suspected ML/TF and guidelines to all reporting entities. This would make the Draft Law more in line with the Directive.

Paragraph 4 of Draft Article 46 states that reporting entities shall be required to, where applicable, 'identify the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Directive.' This is not mentioned in the Draft Law, but could be added as a new paragraph to Draft Law Article 17.

10.1 Recommendations

- Consider adding an article that applies generally to all reporting entities and which is in line with Directive Article 45, particularly paragraphs 1, 2, 3, and 5. The following language could be considered, if appropriate to the Kosovo context:

'1. Reporting entities that are part of a group shall implement group-wide procedures, including data protection policies and policies and procedures for sharing information within the group for

AML/CFT purposes. Those policies and procedures shall be implemented effectively at the level of branches and majority-owned subsidiaries in EU Member States or third countries.
2. Reporting entities that operate establishments in an EU Member State shall be required to ensure that those establishments respect the national provisions of that EU Member State transposing EU Directive 2015/849.
3. Where reporting entities have branches or majority-owned subsidiaries located in other countries where the minimum AML/CFT requirements are less strict than those of this Law, their branches and majority-owned subsidiaries located in the other country implement the requirements of this Law, including data protection, to the extent that the other country's law so allows.
4. Where another country's law does not permit the implementation of policies and procedures required under paragraph [X], reporting entities shall ensure that branches and majority-owned subsidiaries in that country apply additional measures to effectively handle the risk of money laundering or terrorist financing, and inform the competent Kosovo authorities. If the additional measures are not sufficient, the competent Kosovo authorities shall exercise additional supervisory actions, including requiring that the group does not establish or that it terminates business relationships, and does not undertake transactions and, where necessary, requesting the group to close down its operations in the country in question.'

- Consider amending Article 17.2.5 to be more in line with the language of Directive Article 46.1, including adding the last section of paragraph 1.
- Consider adding a provision similar to Directive Article 46.2. The following language could be considered, if it is thought to be appropriate to make it the FIU's responsibility: *'The FIU-K shall ensure that reporting entities have access to up-to-date information on the practices of money laundering and terrorist financing, and on indications leading to the recognition of suspicious transactions.'*
- Consider adding a provision similar to Directive Article 46.3. The following language could be considered: *'The FIU-K shall ensure that, where practicable, timely feedback on the effectiveness of and follow-up to reports of suspected money laundering or terrorist financing is provided to reporting entities.'*
- Consider adding a new paragraph to Article 17 similar to Directive Article 46.4. The following is suggested: *'Reporting entities shall also, where applicable, identify the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Law.'*

11. Supervision

The FATF Recommendations also contain some requirements regarding supervision. *Recommendation 26 (R.26)* states that countries should ensure that financial institutions should be subject to adequate regulation and supervision and are actively implementing FATF Recommendations. *Draft Law Articles 16 to 33* address reporting entities and their obligations, as seen above, and *Articles 34 to 39* address compliance supervision of reporting entities. While R.26 could be considered to be more policy oriented, the Draft Law seems to do its part to comply with the recommendation. *Recommendation 27 (R.27)* addresses the powers of supervisors and states that they should be able to compel the production of any information from financial institutions that is to monitoring compliance with the requirements to combat ML/TF. They should be able to impose sanctions for failure to comply including financial sanctions and the power to withdraw, restrict, or suspend the financial institute's license where applicable. The Draft Law addresses sanctions and sanction procedures in Articles 40 to 49, which will be discussed below in section 14. *Draft Law Article 35.2* gives the FIU-K the power to demand and inspect documents of reporting entities. *Draft*

Law Article 34.6 states that the CBK and other sectorial supervisors shall take into account the risk of ML/TF when taking into consideration the approval, renewal or refusal of licences and other authorisations. The Article does not explicitly state that supervisors can withdraw, restrict, or suspend licenses, but it seems implied. It might however be advisable to make this power explicit. The Draft Law seems to otherwise comply with R.27. *Recommendation 28 (R.28)* contains a lot of requirements that appear to be more relevant for policy makers than for legislation. However, the requirement that competent authorities should ensure that casinos are effectively supervised for compliance with AML/CFT requirements and that countries should ensure that the other categories of DNFBPs are subject to effective systems for monitoring and ensuring compliance with AML/CFT requirements are relevant for the Draft Law. *Draft Law Chapter IV on compliance supervision*, which applies to all reporting entities, appears *prima facie* to comply with R.28.

The Directive also contains many provisions on supervision. *Directive Article 36.1* states that 'if, in the course of checks carried out on the obliged entities by the competent authorities referred to in Article 48, or in any other way, those authorities discover facts that could be related to money laundering or to terrorist financing, they shall promptly inform the FIU.' *Draft Law Article 38.2* seems to be in line with the Directive on this point. However, *paragraph 2 of Directive Article 36*, stating that countries 'shall ensure that supervisory bodies empowered by law or regulation to oversee the stock, foreign exchange and financial derivatives markets inform the FIU if they discover facts that could be related to money laundering or terrorist financing', does not appear to be covered by the Draft Law. This could be amended to be included in Article 38 as a new paragraph.

The provisions of *Directive Article 47* do not appear to be included in the Draft Law at all, and should probably be added in order for the Law to adequately comply with the Directive.

Directive Article 48.1 states that competent authorities shall be required to monitor effectively, and to take the measures necessary to ensure, compliance with the Directive. This seems to be complied with by *Draft Law Articles 34 to 38* which address supervision of reporting entities. *Directive Article 48.2* states that competent authorities shall have adequate powers, including the power to compel the production of any information that is relevant to monitoring compliance and perform checks, and have adequate financial, human and technical resources to perform their functions. *Draft Law Articles 35.1* and *35.2* give FIU-K officials the power to show up with or without notice at the premises of reporting entities and to demand access to records or documentation. The same powers are given to the CBK and other sectorial supervisors in *Draft Law Article 36.* These provisions seem to largely comply with Article 48.2, at least as far as what can be legislated (whether the FIU will have adequate financial, human and technical resources to perform their functions might be an issue for the government).

Directive Article 48.3 states that in the case of 'credit institutions, financial institutions, and providers of gambling services, competent authorities shall have enhanced supervisory powers.' There seems to be no mention of enhanced supervisory powers in the Draft Law, which thus does not comply with this provision of the Directive. It might be advisable therefore to add such a provision to the Law.

Paragraphs 4 and 5 of Directive Article 48 address supervision of obliged entities of EU Members where they operate establishments in other Member States and cooperation between these states. This is not obviously applicable to Kosovo. However, it might be appropriate to add similar provisions to the Draft Law, addressing the supervision of establishments in Kosovo by reporting entities of EU Member States, and cooperation between Kosovo and these states.

Directive Article 48.6 states that when applying a risk-based approach to supervision, the competent authorities shall: (a) have a clear understanding of the risks of money laundering and terrorist financing present in their country; (b) have on-site and off-site access to all relevant

information on the specific domestic and international risks associated with customers, products and services of the obliged entities; and (c) base the frequency and intensity of on-site and off-site supervision on the risk profile of obliged entities, and on the risks of ML/TF. Compliance with subparagraph (a) is difficult to evaluate, since this cannot be legislated. *Draft Law Article 34.2* states that compliance supervision by the FIU-K, CBK or other sectorial supervisors may happen *in situ* or from a distance (this is strangely worded in English). However, the draft law does not mention anything in relation to subparagraph (c), and can therefore only be said to partly comply with Directive Article 48.6.

Directive Article 48.7 requires that the assessment of the ML/TF risk profile of obliged entities, including the risks of non-compliance, be reviewed both periodically and when there are major events or developments in their management and operations. *Draft Law Article 18.2* states that reporting entities shall periodically set out the risk for ML/TF to which they are exposed in the delivery of their services and products, the geographical location and dissemination mechanisms and channels. The risk assessment shall be distributed to FIU-K and banks and financial institutions, and CBK, on demand. However, it is doubtful whether this can be seen to fulfil Article 48.7, since Article 18.2 focuses on the duties of reporting entities in this case, whereas Article 48.7 states requirements to be taken by the competent authorities.

Lastly, *Article 48.8* states that countries shall ensure that competent authorities take into account the degree of discretion allowed to the obliged entity, and appropriately review the risk assessments underlying this discretion, and the adequacy and implementation of its internal policies, controls and procedures. The Draft Law does not seem to contain a provision that addresses this issue at all and cannot be said to comply with the Directive in this regard.

11.1 Recommendations

- Consider amending Article 34.6 to explicitly state the power of supervisors to withdraw, restrict or suspend licenses, or consider adding a new provision in the Draft Law to this effect, in line with R.27.
- Consider adding a new paragraph to Article 38 similar to Directive Article 36.2.
- Consider adding a new provision to ensure that the Draft Law is in line with Directive Article 47.
- Consider adding a new provision similar to Directive Article 48.3 on enhanced supervisory powers of competent authorities, and to set out what these powers should entail.
- Consider adding provisions that address the issues in paragraphs 4 and 5 Directive Article 48. Something similar to the following might be considered, if deemed appropriate:

'In the case of reporting entities from EU Member States operating establishments in Kosovo, the FIU-K, CBK, and other sectorial supervisors shall ensure that they supervise that these establishments respect this Law'; and
'In the case of reporting entities from EU Member States operating establishments in Kosovo, the FIU-K, CBK, and other sectorial supervisors shall ensure that they cooperate with the competent authorities of the Member State in which the reporting entity has its head office, to ensure effective supervision of the requirements of this Law.'

- Consider amending the language in the Draft Law, Articles 34, 35, 36, 37, from 'in situ' and 'from a distance' or 'distance, to 'on site' and 'off site'. This sounds better in English. The title of Article 35, for example, would then be 'On-site Compliance Inspection by the FIU-K'.
- Consider adding a subparagraph 2.3 to Article 34.2, or make a new paragraph, that is similar to Directive Article 48.6(c). The following language is suggested: *'The FIU-K, CBK, and other sectorial supervisors shall base the frequency and intensity of on-site and off-site*

supervision on the risk profile of reporting entities, and on the risks of money laundering and terrorist financing.'

- Consider adding a paragraph to Article 34, similar to Article 48.7. The following language is suggested: *'The assessment of ML/TF risk profile of reporting entities, including the risks of non-compliance, shall be reviewed by the FIU-K, CBK and other sectorial supervisors both periodically and when there are major events or developments in their management and operations.'*

Consider adding a paragraph to Article 34, similar to Article 48.8. The following language is suggested: *'The FIU-K, CBK and other sectorial supervisors shall take into account the degree of discretion allowed to the reporting entity, and appropriately review the risk assessments underlying this discretion, and the adequacy and implementation of its internal policies, controls and procedures.*

12. Cooperation

Directive Article 49 addresses national cooperation and states that countries 'shall ensure that policy makers, the FIUs, supervisors and other competent authorities involved in AML/CFT have effective mechanisms to enable them to cooperate and coordinate domestically concerning the development and implementation of policies and activities to combat money laundering and terrorist financing, including with a view to fulfilling their obligation under Article 7.' Whether they are effective or not is difficult to say, but *Draft Law Article 38* states that the FIU-K, CBK and other sectorial supervisors shall cooperate and coordinate their activities and lists a number of ways this shall be done (paragraph 1). The Article also states that the CBK and other sectorial supervisors shall report to the FIU-K if they suspect or identify activities that may be associated with ML/TF (paragraph 2), and shall inform the FIU-K on measures taken for implementation of compliance supervision (paragraph 3).

Most of *Directive Articles 50 to 57* address the exchange of information between the FIUs of EU Member States, and may therefore not apply to Kosovo as a non-EU Member State. *Directive Article 53.1* might however be appropriate to apply to Kosovo. The Article states, in its first part, that FIUs shall 'exchange, spontaneously or upon request, any information that may be relevant for the processing or analysis of information by the FIU related to money laundering or terrorist financing and the natural or legal person involved, even if the type of predicate offences that may be involved is not identified at the time of the exchange. *Recommendation 37 (R.37)* also addresses cooperation between states, holding that 'countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings. Countries should have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation.' *Recommendation 40 also* states that countries should ensure that their competent authorities can rapidly, constructively and effectively provide the widest range of international cooperation in relation to money laundering, associated predicate offences and terrorist financing. Countries should do so both spontaneously and upon request, and there should be a lawful basis for providing cooperation.

Draft Article 15.4 states that the FIU-K 'may internationally exchange all information that may be achievable and accessible, spontaneously or upon a request, with any foreign counterpart carrying out similar functions and who is subject to similar obligations for preserving confidentiality, irrespective of the nature of the counterpart, subject to reciprocity and within the domestic legal framework of each party. The information exchanged is used according to requests only, with the

prior consent of the agency providing the information, and only for the purposes of combating money laundering, predicate criminal offences and terrorist financing. For this purpose, FIU-K may enter into an arrangement or memorandum of understanding.' The Article seems to at least partly comply with Directive Article 53.1, R.37 and R.40. However, the language is quite different from Article 53.1 and could be amended to make sure the Draft Law is in line with the Directive and to make it clearer. Particularly confusing English is the reference to 'achievable' information. Also, the second and third parts of Article 53.1 are not included in the Draft Law.

Directive Article 53.3 states that and FIU may refuse to exchange information only in exceptional circumstances where the exchange could be contrary to fundamental principles of its national law. Those exceptions shall be specified in a way which prevents misuse of, and undue limitations on, the free exchange of information for analytical purposes. *Draft Law Article 15.5* gives the FIU-K the right to refuse a request for information by a foreign FIU, 'if it assesses, on the basis of facts and circumstances defined in the request, that there are no grounds to suspect for money laundering or terrorist financing, and if the exchange of such records jeopardises or may jeopardise the flow of criminal proceedings in Kosovo and shall inform in writing his foreign competent counterpart who filed the request, by presenting the reasons for refusal.' It is questionable whether this complies with Directive Article 53.3, since the Draft Law does not list exceptional circumstances as a requirement for refusal, but rather simply the assessment that no suspicion of ML/TF exists.

Finally *Article 53.2* requires countries to ensure that 'the FIU to whom the request is made is required to use the whole range of its available powers which it would normally use domestically for receiving and analysing information when it replies to a request for information referred to in paragraph 1 from another FIU. The FIU to whom the request is made shall respond in a timely manner. Furthermore, when an FIU seeks to obtain additional information from an obliged entity established in another Member State which operates on its territory, the request shall be addressed to the FIU of the Member State in whose territory the obliged entity is established. That FIU shall transfer requests and answers promptly.' This does not seem to be included in any form in the Draft Law.

Recommendation 38 (R.38) requires countries to ensure they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate laundered property; proceeds from ML, predicate offences and TF; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. *Draft Law Article 28* gives the FIU-K the power to temporarily freeze a transaction if there are reasonable grounds to suspect ML/TL, in the event of a written request from a foreign counterpart conducting similar functions to the FIU. However, due to the fact that the power to freeze is only temporary and only in relation to transactions, Article 28 can probably not be said to comply with R. 38.

Recommendation 39 (R.39) addresses the issue of extradition and requires countries to 'constructively and effectively execute extradition requests in relation to money laundering and terrorist financing, without undue delay. Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations.' In particular countries should: (a) ensure money laundering and terrorist financing are extraditable offences; (b) ensure that they have clear and efficient processes for the timely execution of extradition requests including prioritisation where appropriate. To monitor progress of requests a case management system should be maintained; (c) not place unreasonable or unduly restrictive conditions on the execution of requests; and (d) ensure they have an adequate legal framework for extradition. The Draft Law does not contain any reference to

extradition. The Law on International Legal Cooperation in Criminal Matters[20] addresses extradition in Chapter II. It is important for the drafters to investigate whether this law complies with R.39. Furthermore, the Draft Law should contain a reference to extradition and the Law on International Legal Cooperation.

12.1 Recommendations

- Consider amending the language of Article 15.4 to make it clearer and more similar to Directive Article 53.1.
- Consider revising Article 15.5 to be more in line with Article 53.3, particularly looking at whether Article 15.5 places 'undue limitations' on the exchange of information for analytical purposes.
- Consider adding provisions similar to Directive Article 53.2, if considered applicable to Kosovo. The language could be something similar to the following:

'If a request for information is made by an FIU in a foreign country, the FIU-K shall use the whole range of its available powers which it would normally use domestically for receiving and analysing information when it replies to the request, and shall respond in a timely manner'; and
'If the FIU-K seeks obtain additional information from a reporting entity established in another state but which operates in Kosovo, a request shall be made to the FIU of the state on whose territory the reporting entity is established.'

- Consider adding a provision that addresses the requirements of R.38.
- Review the Law on International Legal Cooperation in Criminal Matters to ensure that complies with R.29.

Add a provision in the Draft Law that appropriately addresses the issue of extradition for ML/TF offences.

13. Criminal Offences

Directive Article 1.2 requires countries to criminalise ML and TF, as does *Recommendation 3 (R.3)*. *Draft Law Articles 56* and *57* do this, although they could be drafted better and more clearly.

R.3 states that countries should criminalise ML on the basis of the Vienna Convention[21] and the Palermo Convention[22], and should apply the crime of ML to all serious offences, with a view to including the widest range of predicate offences. *Directive Article 1.3* defines the crime of ML in the same way as the aforementioned conventions.[23] *Paragraph 4 of Article 1* states that ML shall be regarded as such, 'even where the activities which generated the property to be laundered were

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[20] Law No. 04/L-213 on International Legal Cooperation in Criminal Matters, 31 July 2013, http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20international%20legal%20cooperation%20in%20cri minal%20matters.pdf.

[21] UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988, http://www.unodc.org/pdf/convention_1988_en.pdf.

[22] UN Convention Against Transnational Organized Crime, 15 November 2000, http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

[23] The following conduct is considered ML, when committed intentionally:
(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;
(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;
(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

carried out in the territory of another Member State or in that of a third country.'

Draft Law Article 56 defines the crime of ML and *paragraph 1* seems to include the provisions of Directive Article 1.3 as well as some other ones. However, Article 56.1 is organised and worded slightly differently to Article 1.3, which makes it confusing. There is no apparent reason for the language to be so different, and the drafters might consider changing it to be worded more exactly like Article 1.3 for the sake of clarity. For example, while Article 1.3(a) covers both the act of conversion etc. of laundered property *and* assisting any person involved in such activity, the Draft Law divides this into two subparagraphs, 1.1 and 1.2. It is difficult to understand the reasoning for this as it does not provide more clarity. If anything, this makes the article more cumbersome to read and understand. Furthermore, *Draft Law Article 56.3.3* is an attempt to comply with Directive Article 1.4, but seems to be overly complicated in its language compared to Article 1.4. However, the crime of ML would be more appropriately included in the Criminal Code of Kosovo, and with a reference in the Draft Law. Currently the Criminal Code makes a reference to the current law on ML/TF in Article 308[24]. It could be more appropriate to instead amend the Criminal Code to include an appropriate definition, which should be in line with the Directive, of the crime of ML.

Paragraph 5 of Directive Article 1 defines the crimes of TF, as the 'provision or collection of funds, by any means, directly or indirectly, with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA[25].' *Draft Law Article 57* criminalises TF and contains some of the language of Directive Article 1.5, but is unnecessarily complicated which makes the Article difficult to understand. Furthermore, there is no definition in the Draft Law, or a reference to such a definition, of a 'terrorist act'. This should be included, and could be done with a reference to the appropriate provision in the Criminal Code, for example Articles 135 to 137, which seem to be in line with the Council Framework Decision references in the Directive. However, like with the criminal offences of ML, it might be more appropriate to amend the Criminal Code to be in line with the Directive and with a reference in the Draft Law, two pieces of legislation dealing with the same offence.

Lastly, *Directive Article 1.6* states that knowledge, intent, or purpose required as element of ML/TF may be inferred from objective factual circumstances. The same is also included in *Interpretive Note to R.3, paragraph 7(a)*. This not included in either Draft Law Article 56 or 57. If the Criminal Code is amended to include the offences of ML/TF that are in line with the Directive, this needs to be added as well.

13.1 Recommendations

- Consider amending the Criminal Code of Kosovo to include the offence of ML and ensure that this is in line with the structure and language of Directive Article 1.3(a) to (b). The following language is proposed:

  '1. For the purposes of this Law, the following conduct, when committed intentionally, shall be regarded as money laundering:

  (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is

[24] 'Whoever commits the offense of money laundering shall be punished as set forth in the Law on the Prevention of Money Laundering and Terrorist Financing.' Code No. 04/L-082, Criminal Code of the Republic of Kosovo, 20 April 2012, http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf.

[25] Council Framework Decision 2002/475/JHA on combatting terrorism, 13 June 2002, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=EN, Articles 1-4 on 'Terrorist offences and fundamental rights and principles', 'Offences relating to a terrorist group', 'Offences linked to terrorist activities', and 'Inciting, aiding or abetting, and attempting' respectively.

involved in the commission of such an activity to evade the legal consequences of that person's action;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;

(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;

(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

2. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another state.

3. Knowledge, intent, or purpose required as element of the activities referred to in paragraph 1 may be inferred from objective factual circumstances.'

- If the above recommendation is accepted, consider amending Draft Law Article 56 to include a reference to the offence as listed in the Criminal Code, for example *'Money laundering means the conduct listed in Article [X] of the Criminal Code of the Republic of Kosovo.'*
- Consider amending Article 57.1, in order to simplify the language and make it more in line with Directive Article 1.5. The following language is suggested: *'For the purposes of this law, 'terrorist financing' means the provision or collection of funds, by any means, directly or indirectly, with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 135 to 137 of the Kosovo Criminal Code.'* Drafters will have to make sure these are the appropriate articles and that they refer to the conduct of the Council Framework Decision referred to in Article 1.5.
- Consider adding a paragraph to both Article 57 similar to that of Directive Article 1.6, with the following language: *'knowledge, intent, or purpose required as element of the activities referred to in paragraph 1 may be inferred from objective factual circumstances.'*
- The drafters should also carefully consider FATF Recommendation 3 and 5 and the Interpretive Notes in relation to criminalising ML/TF to make sure the Draft Law is in line with these Recommendations.

If instead the drafters consider that the offence of TF is more appropriately defined solely by the Criminal Code, consider amending the Criminal Code to include the changes proposed above in relation to the offence of TF.

14. Sanctions

Recommendation 35 (R.35) states that 'countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons' who fail to comply with AML/CFT requirements. It further states that these sanctions should also be applicable to directors and senior management. *Directive Article 58, paragraphs 2 and 3* state similar requirements. The *Draft Law* addresses administrative sanctions in *Articles 40 to 47* and criminal sanctions in *Articles 56 to 61*. It is difficult to say how 'effective, proportionate and dissuasive' the sanctions are, but otherwise the Draft Law seems to comply with most of R.35 and at least Article 58 paragraph 2. *Draft Law Article 47* addresses administrative liability of directors and managers. First of all, the Article does not cover criminal liability of the same persons, nor is there such a provision in the Draft Law, which means that the Law does not completely comply with either R.35 or paragraph 3 of Article 58. Furthermore, the language of

Article 47 is quite confusing in English and could be made clearer.

Directive Article 58 also states that competent authorities shall have all the supervisory and investigatory powers that are necessary for the exercise of their functions *(paragraph 4)* and that they shall exercise their powers to impose administrative sanctions and measures in accordance with the Directive, and with national law, *in any of the following ways:* (a) directly; (b) in collaboration with other authorities; (c) under their responsibility by delegation to such other authorities; (d) by application to the competent judicial authorities *(paragraph 5)*. These paragraphs seem to be covered by *Draft Law Articles 48 and 49*, which seem to comply with the Directive.

Directive Article 59 addresses which breaches shall be followed by which sanctions. *Paragraph 1* states that Member States shall ensure that the articles apply at least to breaches on the part of obliged entities that are serious, repeated, systematic, or a combination thereof, of the requirements laid down in several other articles relating to due diligence.[26]. *Draft Law Articles 41 and 43*, on very severe and serious violations respectively, list sanctions for all of the areas referred to in paragraph 1 and also adds sanctions for other breaches categorised as 'very severe or 'serious' violations. The Articles seem to comply with Directive Article 59.1, although they are structured in an unnecessarily complicated way, by mentioning each Article that refers to one of the areas paragraph 1, instead of doing it by area of requirement as is done in the Directive.

Paragraph 2 of Directive Article 59 states that in the cases referred to in paragraph 1, the administrative sanctions that can be applied shall include *at least the following* (meaning they should all be included in the Draft Law in order to comply with the Directive): '(a) a public statement which identifies the natural or legal person and the nature of the breach; (b) an order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct; (c) where an obliged entity is subject to an authorisation, withdrawal or suspension of the authorisation; (d) a temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities; and (e) maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1 000 000.' *Draft Law Article 42.1.1 and 44.2.2* seems to comply with subparagraph (a), except that they do not contain the words: 'which identifies the natural of legal person and the nature of the breach'. This would be useful to define what 'public remarks', as mentioned in the Draft Law, actually entails. *Draft Law Article 42.1.3* seems to comply with subparagraph (c). *Draft Law Article 42.2.2, 42.2.3 and 44.2.4* might comply with subparagraph (d), but the language used is different than that in the Directive. Subparagraph (e) does not seem to be addressed by the Draft Law. There are provisions in Article 42 and 44 which mention pecuniary sanctions. However, these either seem to adopt the language of Directive Article 59.3, see Articles 42.1.2 and 44.1.2, which is only applicable as a derogation of subparagraph (e), or they apply pecuniary sanctions that do not at all follow the format of subparagraph (e). Finally, the Draft Law does not seem to contain a provision that complies with subparagraph (b).

Paragraph 3 of Directive Article 59 states that, by way of derogation from paragraph 2(e), where the obliged entity concerned is a credit institution or financial institution, additional sanctions shall also be applied. These are listed in subparagraphs (a) and (b).[27] *Draft Law Articles 42.1.2 and*

[26] (a) Articles 10 to 24 (customer due diligence, Articles 19, 22, and 23 in the Draft Law); (b) Articles 33, 34 and 35 (suspicious transaction reporting, Article 26 in the Draft Law); (c) Article 40 (record-keeping, Article 20 in the Draft Law); and (d) Articles 45 and 46 (internal controls, Articles 14, 17, and 24 in the Draft Law).

[27] (a) in the case of a legal person, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or 10 % of the total annual turnover according to the latest available accounts approved by the management body; where the obliged entity is a parent undertaking or a subsidiary of a parent undertaking which is required to prepare consolidated financial accounts in accordance with Article 22 of Directive 2013/34/EU, the relevant total annual turnover shall be the total

44.1.1 have similar language to the first part of subparagraph (a). However, these Articles do not apply only to credit or financial institutions but to anyone who commits a very severe or a serious violation of the requirements of the Draft Law. Furthermore, the language of the Draft Law is confusing in English and does not contain all the requirements of the Directive. It is doubtful whether the Draft Law complies with subparagraph (b), since *Articles 42.2.1 and 44.2.3*, the only Articles that apply a set fine, apply not only to credit and financial institutions but also do not contain the same language as subparagraph (b).

Directive Article 60 addresses the publication of decisions of administrative sanctions. *Paragraph 1* states that a decision imposing an administrative sanction or measure for breach of the national provisions transposing the Directive against which there is no appeal shall be published by the competent authorities on their official website immediately after the person sanctioned is informed of that decision. The publication shall include at least information on the type and nature of the breach and the identity of the persons responsible. *Draft Law Article 55.1* seems to comply with Paragraph 1, but the language could be made clearer at least in the English version, as this does not use the same language as the Directive, to make sure it is in line with the Directive.

Paragraph 1 also requires competent authorities to take certain measures in cases 'where the publication of the identity of the persons responsible as referred to in the first subparagraph or the personal data of such persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an on-going investigation.' [28] *Draft Law Article 55.2* appears to attempt to address these requirements. However, the language of this paragraph of the Draft Law is quite confusing. Furthermore, the paragraph is structured differently and in a way that is less explanatory and contains less information than the Directive. This should probably be amended in order for the Draft Law to be clearly in line with the Directive.

Paragraph 3 of Directive Article 60 states that 'competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of five years after its publication. However, personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.' *Draft Law Article 55.3* complies with this in so far as it mentions a time limit for the requirement of publications. However, it fails to include 'other sectorial supervisors' as is one in paragraphs 1 and 2 of Article 55.

Paragraph 4 of Directive Article 60 states that when determining the type and level of administrative sanctions or measures, the competent authorities shall take into account all relevant

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annual turnover or the corresponding type of income in accordance with the relevant accounting Directives according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;
(b) in the case of a natural person, maximum administrative pecuniary sanctions of at least EUR 5 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 25 June 2015.

[28] According to the paragraph, the competent authorities shall:
(a) delay the publication of the decision to impose an administrative sanction or measure until the moment at which the reasons for not publishing it cease to exist;
(b) publish the decision to impose an administrative sanction or measure on an anonymous basis in a manner in accordance with national law, if such anonymous publication ensures an effective protection of the personal data concerned; in the case of a decision to publish an administrative sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is foreseen that within that period the reasons for anonymous publication shall cease to exist;
(c) not publish the decision to impose an administrative sanction or measure at all in the event that the options set out in points (a) and (b) are considered insufficient to ensure:
(i) that the stability of financial markets would not be put in jeopardy; or

circumstances.[29] *Draft Law Article 49.2* lists most of the requirements of Paragraph 4, except for subparagraph (d). Furthermore, the Article could be written in a language that is more like that of the Directive, for the sake of clarity, and could offer more extensive explanations to some of the requirements as is done in the Directive.

Paragraph 5 of Directive Article 60 requires states to ensure that legal persons can be held liable for the breaches referred to in Article 59.1 (CDD, reporting, etc.) committed for their benefit by any person, acting individually or as part of an organ of that legal person, and having a leading position within the legal person based on any of the following: (a) power to represent the legal person; (b) authority to take decisions on behalf of the legal person; or (c) authority to exercise control within the legal person. Finally, *Paragraph 6* requires states to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 5 of this Article has made it possible to commit one of the breaches referred to in Article 59(1) for the benefit of that legal person by a person under its authority. These provisions appear to not be included in the Draft Law.

Lastly, *Directive Article 61* requires states to ensure that competent authorities establish reliable mechanisms to encourage the reporting to competent authorities of potential or actual breaches of the national provisions transposing the Directive. The Article presents a non-exhaustive list of mechanisms that should be established and also requires obliged entities to have in place appropriate procedures for their employees to report breaches internally. None of this appears to be included in the Draft Law and should be added in order for the Law to comply better with the Directive.

14.1 Recommendations

- Consider amending Article 47 to include both administrative and criminal sanctions of directors and senior management, as required by R.35 and the Directive.
- Ensure that the language of amended Article 47 is clarified and made understandable.
- Consider adding 'which identifies the natural or legal person and the nature of the breach', to Articles 42.1.1 and 44.2.2.
- Consider adding provisions to Article 42.1 and 44 with the same language as Directive Article 59.2(b): *'an order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct'*.
- Look closely at the language of Article 42.2.2, 42.2.3 and 43.2.4 to make sure the Articles are in line with Directive Article 59.2(d).
- Consider amending Articles 42 and 44 to ensure that provisions that comply with Directive Article 59.2(e) are added. Any provisions which impose a pecuniary sanction that is made superfluous or overlaps with the new provision. The minimum amount cited in subparagraph (e) (EUR 100,000) may be adjusted to be at an appropriate level for Kosovo.
- Consider amending Articles 42 and 44 to ensure that provisions that comply with Directive Article 59.3 are added to the Articles. Any provisions which impose a pecuniary sanction that is made superfluous or overlaps with the new provision. The minimum amount cited in

(ii) the proportionality of the publication of the decision with regard to measures which are deemed to be of a minor nature.

[29] These include, where applicable: (a) the gravity and the duration of the breach; (b) the degree of responsibility of the natural or legal person held responsible; (c) the financial strength of the natural or legal person held responsible, as indicated for example by the total turnover of the legal person held responsible or the annual income of the natural person held responsible; (d) the benefit derived from the breach by the natural or legal person held responsible, insofar as it can be determined; (e) the losses to third parties caused by the breach, insofar as they can be determined; (f) the level of cooperation of the natural or legal person held responsible with the competent authority; (g) previous breaches by the natural or legal person held responsible.

subparagraph (b) (EUR 5 000 000) may be adjusted to be at an appropriate level for Kosovo.

- Consider amending the language of Article 55.1 to make it clearer and more understandable.
- Consider amending Article 55.2 by changing the structure and language to be more explanatory and clearer so that the paragraph is more in line with Directive Article 60.1
- Consider amending Article 55.3 to include 'other sectorial supervisors'.
- Consider amending Article 49.2 to include the requirement of subparagraph (d) of Directive Article 60.4. The Drafters might also consider amending the language to be more similar to that of the Directive, for the sake of clarity, and might consider structuring Article 49.2 in a way that is more like Article 60.4, including adding the explanatory language that is missing.
- Consider adding provisions like Directive Article 60.5 and 60.6.

Consider adding provisions, perhaps to Article 18 or as new articles in Chapter V, similar to Directive Article 61.

15. Other Standards and Requirements

The FATF Recommendations include some additional requirements, not mentioned above.

Recommendation 4 (R.4), on confiscation and provisional measures, requires countries to adopt 'measures to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, w/ property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value.' The measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures. Furthermore, countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

As seen above, *Draft Law Article 27* gives the FIU-K the right to temporarily freeze transactions if there are reasonable grounds to suspect ML/TF and *Article 28* gives the FIU-K the same powers in the event of a written request from a foreign counterpart conducting similar functions to the FIU. However, it is doubtful whether these Articles are enough to comply with R.4. The Articles only mention the freezing of transactions, not assets in general. They also do not clearly list any right to seize or confiscate assets. The Drafters might therefore want to consider adding provisions to the Draft Law that completely complies with R.4.

Recommendation 6 (R.6) requires countries to implement targeted financial sanctions to comply with UN Security Council (UNSC) resolutions relation to prevention & suppression of terrorism and TF. These resolutions require countries to freeze without delay funds or assets, and to ensure that no funds and other assets are made available to or for the benefit of: (i) any natural or legal person or entity designated by the UNSC under Chapter VII of the UN Charter, as required by

Security Council resolution 1267 (1999) and its successor resolutions[30]; or (ii) any person or entity designated by that country pursuant to Security Council resolution 1373 (2001). The Draft Law does not contain any provision on targeted financial sanctions, which would comply with R.6. While this might be understandable as Kosovo is not a member of UN, it is probably advisable to include such a provision in the Draft Law, to give the competent authorities the powers to properly implement CTF measures. It would also be advisable since a major goal for Kosovo is membership in the United Nations.

Recommendation 14 (R.14) to take measures to ensure that natural or legal persons that provide money or value transfer services (MVTS) are licensed or registered and subject to effective systems for monitoring and ensuring compliance with relevant measures called for in the FATF Recommendations. Countries should also take action to identify natural or legal persons that carry out MVTS without a licence or registration, and to apply appropriate sanctions. The Draft Law does not appear to comply with R.14. The Law does mention in Article 34.6 that the CBK and other sectorial supervisors shall take into account the risk of ML/TF when taking into consideration the approval, renewal or refusal of licences and other authorisations. However, it is doubtful whether this is enough to comply with R.14. It might be that R.14 would be more appropriately included in legislation that deals particularly with natural or legal persons that provide MVTS. However, the Draft Law could then at the very least make reference to such legislation in a provision.

Recommendation 16 (R.16) requires financial institutions to include required and accurate originator information, and required beneficiary information, on wire transfers and related messages, and the information shall remain with wire transfer or related message throughout the payment chain. *Draft Law Article 24, paragraphs 6 and 7* seem to comply with R.16 as well as paragraphs 6 and 7 of the Interpretive Note to R.16.

However, *R.16* also requires financial institutions to monitor wire transfers for the purpose of detecting those which lack required originator and/or beneficiary information, and take appropriate measures. *Draft Law Article 24.10* states that 'if banks or financial institutions receive bank transfers which do not contain the full information on the author, they shall take measures to ensure and verify the information missing from the institution making the order or the beneficiary. In case they fail to obtain the information missing, they shall refuse the acceptance of transfer and shall report on this to FIU-K.' This seems to comply with R.16 except for the fact that the Article mentions 'bank transfers' instead of 'wire transfers' which might not be synonymous. It might therefore be appropriate to amend the Article to include the latter.

Finally, *R.16* requires financial institutions, in the context of processing wire transfers, to take freezing action and to prohibit conducting transactions with designated persons and entities as per obligations set out in relevant UNSC resolutions relating to prevention and suppression of terrorism and TF. As mentioned above, the Draft Law does not include provisions in relation to freezing of funds in connection to UNSC resolutions. *Draft Law Article 24.10* does mention refusal of transactions, but not because of any UNSC resolutions. Consequently, R.16 is not fully complied with by the Draft Law.

Recommendation 19 (R.19) requires financial institution to apply CCD measures to business relationships and transactions with natural or legal persons and financial institutions from countries for which this is called for by the FATF. No provision in the Draft Law mentions this and it

[30] Recommendation 6 is applicable to all current and future successor resolutions to resolution 1267(1999) and any future UNSCRs which impose targeted financial sanctions in the terrorist financing context. At the time of issuance of the Interpretive Note to R.6 (February 2012), the successor resolutions to resolution 1267 (1999) were resolutions: 1333 (2000), 1363 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011), and 1989 (2011).

could be appropriate to amend the Law accordingly.

The Draft Law seems to comply quite well with *Recommendation 32 (R.32)*, which requires countries to have measures to detect physical cross-border transportation of currency and bearer negotiable instruments, including though a declaration system and/or disclosure system. *Draft Article 33*, on the obligation to declare, establishes a declaration system in Kosovo. The *Interpretive Note to R.32* states that 'all persons making a physical cross-border transportation of currency or bearer negotiable instruments (BNIs), which are of a value exceeding a pre-set, maximum threshold of USD/EUR 15,000, are required to submit a truthful declaration to the designated competent authorities. Countries may opt from among the following three different types of declaration system: (i) a written declaration system for all travellers; (ii) a written declaration system for those travellers carrying an amount of currency or BNIs above a threshold; and (iii) an oral declaration system.' *Draft Law Article 33, paragraphs 1 and 2,* states that everyone crossing border with or sends to/from Kosovo monetary instruments in value of €10,000 or more must make *written declaration* to Kosovo Customs. While the threshold is lower than in R.32, this might be appropriate for the Kosovo context and probably complies with R.32.

R.32 also requires competent authorities to have legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to TF/ML or predicate offences, or that are falsely declared/disclosed. *Draft Law Article 33.7*gives the authorities the power to seize or retain 25% of the monetary instruments if a fine for non-compliance with the obligation to declare is not paid. *Article 33.15*gives the authorities the power to seize monetary instruments in the value of over €10,000 that were not declared.

Furthermore, *R.32* requires countries ensure effective, proportionate and dissuasive sanctions against people who make false declarations or disclosures. *Draft Law Article 33.5* imposes a fine of 25% of the value of the monetary instruments that were not declared. Whether this is an effective and dissuasive sanction remains to be seen, but otherwise it seems to comply with R.32. Lastly, *R.32* requires countries to adopt measures that would enable the confiscation currency or bearer negotiable instruments that are elated to ML/TF or predicate offences. *Draft Law Article 33.15.2* allows for the seizure of monetary instruments if there is a reasonable suspicion that they are proceeds of crimes, were used or intended to be used to commit or facilitate ML/TF or a predicate crimes. Furthermore, *Article 33.19* states that within 10 days of seizure under paragraph 15, the prosecutor shall submit a motion of confiscation or temporary seizure of the monetary instruments. This seems to comply with R.32.

15.1 Recommendations

- Consider adding a provision that properly complies with R.4.
- Consider adding a provision that addresses targeted financial sanctions in relation to TF and the UNSC resolutions, as required by R.6.
- Consider adding a provision that addresses the issues in R.14, as suggested above.
- Consider amending Article 24.10 by replacing 'bank transfer' with 'wire transfer', which is used in R.16.
- Consider adding a provision to the Draft Law that includes the last section of R.16, relating to the freezing of wire transactions due to requirements of UNSC resolutions relating to TF.
- Consider adding a provision to comply with R.19. The following language is suggested: *'Financial institutions, including banks and credit institutions, shall also apply customer due diligence measures to business relationships and transactions with natural or legal persons and financial institutions from countries for which this is called for by the Financial Action Task Force.'*

16. Other recommendations for the Draft Law

The Draft Law contains some additional provisions that should be amended in order to make it a better AML/CTF framework. Therefore the following recommendations are made:

- Draft Law Article 11 currently lists, in paragraph 3, the criteria to be met by the person appointed as Director of the FIU-K. However, paragraph 3 should include additional requirements. The drafters should consider amending the paragraph to state the following:
  '3. The Director of the FIU-K is appointed by the Board after a public vacancy advertisement. The proposed candidate must meet the following criteria:
  3.1. Be a citizen of the Republic Kosovo;
  3.2. Have a university degree in the field of law, economics or finance;
  3.3. Have at least five (5) years of relevant professional experience in finance;
  3.4. Should not be the subject of an investigation for a criminal offense, under the Criminal Procedure Code and not be convicted of an offense punishable by more than six (6) months in prison;
  3.5. Be unbiased, neutral, honest and worthy of performing the job function;
  3.6. Have not held a political position in the Government of the Republic of Kosovo, the Assembly, local government, political party or trade union;
  3.7. Not have a direct or indirect interest in a reporting entity; and
  3.8. Be free from conflict of interest in accordance with the Law on Prevention of Conflict of Interest.
- In order to provide greater transparency of the selection process of the FIU-K Director, Draft Law Article 11.8.2 should be amended to add the following: *'Civil society organisations shall be invited to monitor the selection process of the Director of FIU-K.'*

Draft Law Article 29.2 currently limits the amount of money an NGO may receive or pay in cash a single day an in a year. While some limits to the amount of cash allowed to be received or paid out by NGOs might be advisable, the limit of €500/day or €1,000/year proposed in the Draft Law might be too low. The drafters may therefore want to consider deleting the provision imposing this limit, or at least increase the threshold of cash that may be accepted and paid by NGOs.

CONCLUSION

The Draft Law is a far more comprehensive than the current legal framework for the prevention of money laundering and terrorist financing. Both the structure and the content of the Draft Law is better in terms of compliance with the EU Directive and the FATF recommendations. The Draft Law consists of many provisions that are missing in the current legal framework, including important provisions on data keeping, administrative penalties, freezing of funds, and the criminalisation and sanctions of terrorist financing.

However, there are still some gaps in the compliance with these standards, which need to be amended if the Government of Kosovo intends to have a law that is as much in line with the FATF recommendations and the EU Directive as possible. Recommendations on what needs to be amended in and added to the Draft Law have been provided above. This is particularly important as the Draft Law states in Article 1 that it 'shall be in accordance with EU directive No. 2015/849'. The Government should therefore ensure that the drafters thoroughly analyse the FATF recommendations and particularly the EU Directive. In order for this analysis to be conducted appropriately and with the necessary expertise, the drafters should have the possibility of engaging with international experts on AML/CFT standards and legislation.

There are also some issues with the language and punctuation of the Draft Law, at least of the English version, which as used for this report. Many times the language was so confusing that it was difficult to decide whether the provision in question complies with the EU Directive or FATF Recommendations. As all legislation in Kosovo is produced in Albanian, Serbian, and English, it is important to ensure that all versions are comprehensible and have the same meaning. It is therefore recommended that the drafters have access to language experts or native speakers for each language. Lastly, there are some issues with consistency and changes in terminology, discussed in section 1, which need to be addressed before the Draft Law can be passed.

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POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.