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Project against Economic Crime in Kosovo¹ (PECK)

ASSESSMENT REPORT

**on compliance with international standards in the area of anti-money laundering
and combating the financing of terrorism (AML/CFT)**

CYCLE 1

10 June 2013

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence

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PREFACE - INFORMATION AND METHODOLOGY USED FOR THE ASSESSMENT OF KOSOVO

1. This assessment has been prepared by the Joint European Union/Council of Europe Project against Economic Crime in Kosovo (PECK), implemented over a period of 30 months starting from 1 February 2012 to 31 July 2014. This report is the product of the 1st (out of two) assessment cycle which lasted from September 2012 to May 2013. The assessment included two components: anti-money laundering and combating the financing of terrorism (AML/CFT) and anti-corruption (AC) which were assessed in the framework of a single integrated process.

2. The assessment of the anti-money laundering and combating the financing of terrorism regime of Kosovo was based on the FATF Recommendations 2003 and the Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF)² and was prepared using the AML/CFT Methodology 2004³.

3. The evaluation team conducted a focused assessment of Kosovo's compliance with key and core and some other important FATF recommendations, specifically: Recommendations 1, 2, 3, 4, 5, 6, 10, 13, 14, 17, 18, 20 (EC.20.2) 23, 26, 27, 28, 29, 30, 31, 32, 33, 36 and 40, and SR.II, SR.III, SR.IV, SR.VI, SR.VIII, SR.IX⁴. Because of the focused nature of the assessment, the structure of the report does not fully reflect that of the reports produced by FATF or FATF-style regional bodies. Because of the joint nature of the assessment exercise, that covered AML/CFT and anti-corruption measures, the report will cross-reference those findings of the anti-corruption component that are relevant to AML/CFT.

4. Furthermore, the Report also covers a selected range of issues related to the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (hereinafter the "The Third EU Directive") and Directive 2006/70/EC (the "Implementing Directive"), as well as a range of elements of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198). No ratings have been assigned to the assessment of these issues.

5. The evaluation was based on the laws, regulations and other materials supplied by Kosovo authorities, and information obtained by the assessment team during its on-site visit to Pristina from 26 to 30 November 2012, and subsequently. During the on-site visit, the assessment team met with officials and representatives of relevant ministries and agencies and the private sector in Kosovo. A list of the bodies met is set out in Annex 2 to the Detailed Assessment Report.

6. The assessment was conducted by an experts' team of the EU/CoE Joint Project against Economic Crime in Kosovo (PECK), which comprised: Mr. Lajos Korona (legal assessor), Mr. Herbert Zammit LaFerla (financial assessor), Mr. Cedric Woodhall (law enforcement assessor), Mr. Edmond Dunga, PECK Project Advisor and Mr Igor Nebyvaev,

² This report is not based on the revised FATF Recommendations, which were issued in February 2012.

³ As updated in February 2009.

⁴ R.35 and SR.I, which *inter alia* set requirements for the signing and ratification of relevant UN instruments, have been excluded from the assessment due to their inapplicability in the case of Kosovo, which due to its legal status in line with UNSCR 1244 cannot become a party to these instruments. SR.V has been excluded, as it is a cumulative recommendation covering areas related to R.36, 37, 38, 39 and 40, whereas Kosovo was assessed with regard to R.36 and 40 only.

CoE Secretariat Administrator. The experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions, as well as examining the capacity, the implementation and the effectiveness of all these systems.

7. This Report provides a summary of the AML/CFT measures in place and undertaken by local authorities in Kosovo as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, sets out Kosovo's levels of compliance with the FATF Recommendations (see Table 1), and provides recommendations on how certain aspects of the system could be strengthened (see Table 2).

8. Some recommendations made in this Report contain proposed draft legal text to rectify the deficiencies identified. These proposals should be regarded as indicative and may have to be edited or redrafted by authorities in Kosovo to correlate to various aspects of the legislative structure in Kosovo.

9. In the course of the on-site visit there was a draft law amending and supplementing the AML/CFT Law. The proposed amendments are still subject to changes and therefore these are not taken into account in the analysis, comments and recommendations made in this Report although some references for the sake of clarity and consistency may be made but these are not taken into consideration for rating purposes and are not meant to indicate any technical analysis of the Draft Amending Law.

EXECUTIVE SUMMARY

Background information

10. This section provides a summary of AML/CFT measures in place in Kosovo as at the date of the on-site visit (26 - 30 November 2012) or immediately thereafter (up to 31 January 2013). It describes and analyses those measures, and provides recommendations on how certain aspects of Kosovo's AML/CFT system could be strengthened. It describes Kosovo's levels of compliance with a number of the FATF Recommendations.

Key findings

- This is the 1st assessment of Kosovo vis-à-vis international AML/CFT standards. The legislative framework of Kosovo in this area has until recently been largely based on various legal acts adopted by the United Nations Mission in Kosovo (UNMIK) and only in the last several years there has been a transition of the norms to local legislation. The same can be observed with regard to the institutional framework, which was and to some extent remains within the jurisdiction of the EU Rule of Law Mission in Kosovo (EULEX). Specifically the transition of the FIU from EULEX to local ownership has been completed only in 2012. Certain jurisdiction of EULEX remains with the Special Prosecutor's Office of Kosovo (SPRK) which has exclusive jurisdiction in terms of prosecuting money laundering offences. EULEX also maintains specialized judges and police; some EULEX personnel remain within the FIU.
- There is little shared knowledge, recognized information or any publicly available statistical data on the phenomenon of money laundering or terrorism financing in Kosovo. The extent of money laundering is related to the extent of informal black economy (drug dealing, prostitution, smuggling of illegal goods and other criminal activities), excluding, in this context, tax evasion, as part of the grey economy. The threat of terrorism financing has been confirmed by various authorities in Kosovo met in the course of the on-site visit.
- At the policy level the most important development is that of an AML/CFT strategy, that was adopted in September 2012. In September 2012 the Kosovo Government also adopted four related strategies for the period 2012-2017 namely, a strategy against organized crime, a strategy against drugs, a strategy for fighting terrorism and a strategy for protection of borders.
- Overall the anti-money laundering regime, as a multi-level interagency system has been capable of producing an extremely low number of sporadic, inconsequential outputs. Even though it may be incorrect to consider these minor results accidental, overall they confirm rather than deny the general inability of the institutional AML value chain to function in a proper integrated way with the involvement of all of its components: reporting - intelligence/analysis - investigation - prosecution - conviction/confiscation. This is caused by a number of cross-cutting factors, including the lack of systemic cooperation/coordination mechanisms and feedback across *all* segments, as well as a lack of necessary resources in *most*.
- The analysis of various components, undertaken in this Report also produced an extensive list of specific factors at the level of individual institutions which also negatively impact the system as a whole, the most important of them being:
 - The low effectiveness on the preventative side which is significantly hampered by a deficient regulatory regime (significant shortcomings in the AML/CFT Law and related documents) and lack of proper supervision and enforcement/sanctioning regime. This means the preventative system is significantly failing in its main two

- functions: barring criminal proceeds from entering the financial system and ensuring that competent authorities are informed when such facts do take place.
- Insufficient institutional standing of the FIU, which reflects on its capacities to extend cooperation with other domestic authorities, access information and improve the quality of analysis;
 - Reluctance, lack of understanding and capacity of law enforcement/prosecutors to pursue ML investigations/prosecutions and the seizure/confiscation of criminal proceeds;
 - Lack of capacities in the judiciary and its reluctance in taking a proactive approach in issues of seizure/confiscation of criminal proceeds.
- Kosovo authorities have not implemented a risk-based approach with regard to any components of the AML/CFT regime.

Legal system and related institutional measures

11. The criminal offence of ML, which is listed among the offences in the Special Part of the Criminal Code but defined separately within the AML/CFT preventive legislation represents a remarkable level of compliance with the wording of the Vienna and Palermo Conventions particularly as the material (physical) elements of the offence are concerned. Certain provisions, however, that go beyond this scope raise some concerns (e.g. some of them have a redundant character causing overlap with other offences provided in the same article). Likewise, the provisions that define “proceeds of crime” and other similar terms are all in significant overlap which leads to redundancy and confusion (e.g. whether proceeds of criminal activity in general can be subject of ML).

12. The Kosovo legislation applies the principle of the universality of the predicate offences (“all-crime approach”) covering all but one of the 20 categories of predicate offences for ML required by the FATF Recommendations except for the offence of market manipulation. The evaluation team noted an overall uncertainty among practitioners regarding the level of proof for the predicate crime which is likely resulting from the inadequate formulation of the respective legislation and the lack of adequate guidance. Equally, the provision that defines the coverage of self-laundering is unclear and inadequately formulated, which may pose problems to practitioners.

13. The separateness of the ML offence might be the reason why its concept and terminology appear so different from that of the Criminal Code, even in case of generic terms such as the range and scope of ancillary offences or the knowledge standards applicable in case of ML offences which might cause difficulties in concrete cases and should therefore be revisited so that the same terms and concepts can be used in any sources of criminal substantive law. Effectiveness of the application of the ML offence could not be assessed due to conflicting statistics provided to the assessment team and the complete lack of additional information regarding pending cases.

14. While the criminal liability of legal entities is generally provided for, the assessment team found a number of contradictory provisions in the respective pieces of legislation as regards the basics of corporate criminal responsibility (whether or not it depends on the culpability of the natural person and whether a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that). The issue calls for urgent harmonization of the respective legislation. Furthermore, the assessors found the criminal sanctions (fines) applicable to legal persons being ineffectively mild (not proportionate and dissuasive) as compared to the respective sanctions applicable to natural persons.

15. The FT offence as it is provided by the Criminal Code (facilitation of the commission of terrorism) fails to cover the financing of an individual terrorist for any purpose and, from a more general aspect, one can find a rather inconsistent and redundant terminology being applied throughout the FT-related provisions of the CC which raises the risk of confusion. The coverage of “act of terrorism” as required by the FT Convention is deficient, considering the lack of the complete and general notion of the “generic” offence of terrorism as subject of FT as well as the overly restrictive coverage of the “treaty offences” FT by requiring an extra purposive element thereto. Furthermore, it is doubtful whether and to what extent the CC definition of “terrorist act” extends to the terrorism-related offences themselves (e.g. recruitment for terrorism) particularly whether the funding of these offences could be considered a FT offence.

16. The examiners note that the latest Draft Law on Amending and Supplementing the AML/CFT Law (adopted subsequent to the onsite visit) would introduce a “new” FT offence being more in line with the requirements of SR.II but, apparently, it would not have any impact on the “old” FT offence in the Criminal Code. The assessment team has serious concerns that the “new” FT offence would be a “foreign body” within the AML/CFT Law and, furthermore, that the duplicate criminalization will definitely lead to legal uncertainty and to serious problems in effective application of the respective provisions.

17. The Kosovo seizure and confiscation framework is regulated primarily by the Criminal Code (CC) and the Criminal Procedure Code (CPC) and is generally adequate in terms of legislative design and scope, however there are a number of inconsistencies. The Kosovo Criminal Code (KCC) Article 96 5 provides for the confiscation of ‘material benefits acquired through the commission of criminal offences’. This covers all crimes that generate criminal proceeds, including ML, TF and other predicate offences. Article 69 of the CC provides for the general confiscation of objects (instrumentalities) used in the commission of criminal offences. The legislative framework does not however include any standard of proof or procedure for the final confiscation of *instrumentalities intended for use* in the commission of an offence, which raises doubts about the possibility of their final confiscation. While the CC allows for a property of ‘equivalent’ (i.e. corresponding) value to be confiscated this has never happened in practice. Both direct and indirect proceeds can be confiscated. There is a conflict of provisions between the CPC and the CC with regard to confiscation from third parties, whereby the CPC sets a higher standard of proof, which could ultimately impact the effectiveness of law enforcement as and when they undertake confiscation measures. Additionally there is inconsistency of language as regards the definition of provisional measures such as seizure and their confusion with norms relating to confiscation. The provisions allow for property to be confiscated ex parte and without prior notice, however it has not been demonstrated that this has been applied in practice. Even though some law enforcement authorities seem to have the proper tools available to undertake tracing of assets, little is done in practice in this regard. While the steps to be taken by bona fide third parties seem to be clear and transparent in legislation, the onus of proof is perhaps unjustifiably shifted to the bona fide, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property. There is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

18. There is no specific legal framework that would enable the Kosovo authorities to take the necessary preventive and punitive measures to freeze and if appropriate, seize terrorist related funds or other assets without delay, in accordance with the relevant United Nations resolutions. From a more generic point of view, Kosovo meets practically none of the Essential Criteria of SR.III and the evaluation team strongly recommend that the Kosovo

⁵ Art 96 of 2012_04-L-082.

authorities adopt a comprehensive set of rules (either judicial or administrative) that would enable them to adequately implement the targeted financial sanctions contained in the respective UNSCRs relating to the prevention and suppression of the financing of terrorist acts and the freezing of terrorist assets, addressing all requirements under FATF SR.III.

19. The Financial Intelligence Unit was established at the end of 2010 and FIU inherited the building and structures of its predecessor - the Financial Intelligence Centre (FIC), a body established by UNMIK and later run by EULEX to perform the functions of an FIU. It functions as a center for the receipt of STRs, their analysis and dissemination to competent law enforcement authorities. The FIU has issued guidance to reporting entities by means of 'Administrative Directives', which cover the manner of reporting, particulars of risk areas that reporters should pay special attention to. The reporting entities are requested to file STRs and other reports electronically through the UN-developed goAML system, which is used as core software by the FIU. There are apparently some particular drawbacks to this arrangement, resulting in a high resource burden for the private sector. The scope and mode of FIU access to various databases is not fully satisfactory, which negatively impacts the analytical function of the Unit. The procedure to request additional information from reporting entities as described in the AML/CFT Law contains significant ambiguity and is open to legal challenge by the reporting entities, even though the FIU have explained that no problems have occurred in practice. The FIU disseminates materials either to police or the SPRK, however the extent and quality of feedback it receives on the progress and outcomes of these disseminations is very low and unsystemic. The FIU is operationally independent; in terms of general oversight it reports to a Management Board composed of heads of key agencies involved in the AML system in Kosovo. The FIU premises are physically secure. No public reports on FIU activity have been issued thus far. The FIU is attempting to apply for membership in the Egmont group, but states that it has not applied the Egmont Principles for information exchange in its activities. Unfortunately the assessment team has not been provided with sufficient information to comprehensively judge about the effectiveness of the FIU. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the absence of interagency feedback and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort. At the same time the FIU provided at least one example where its information was used in a successful ML investigation. The assessment team has also been provided with sanitized files intended for dissemination to law enforcement authorities. These materials demonstrate the clear ability of analysts in the FIU to perform analysis to the point as to be able to infer the probable predicate offence from available data.

20. All the Kosovo law enforcement agencies have a responsibility for ensuring that money laundering offences are investigated, however there is a specialized unit within Kosovo police – the Financial and Money Laundering Investigation Unit within the Directorate against Economic Crimes and Corruption. Money Laundering prosecutions are a competence reserved for the Special Prosecutors Office (SPRK). Money laundering investigations are prosecutor-led with law enforcement acting as “the right hand” of the prosecutor. Law enforcement must notify the prosecutor of any and all new information discovered in the course on a ML investigation. The Criminal Procedures Code Article 87 describes the range of techniques available to law enforcement. These include amongst others the interception of communications, undercover operations, co-operating agent, the controlled delivery of postal items and the disclosure of financial data. There are no statistics available on the instances where special investigative techniques have been employed in the investigation of money laundering or terrorism finance cases. The postponement of an arrest as a measure when, for example further evidence gathering is required is not fully available to Kosovo law enforcement authorities. Article 119 of the new CPC gives the Prosecutor the right to obtain all documentary evidence including financial records. Article 121 of the CPC lists the non-exclusive range of evidence that can be obtained by the prosecutor at the stage of pre-trial testimony. This provision seems to cover the full range of the types of documents

required under FATF Recommendation 28. Articles 70 - 73 of the new CPC gives the law enforcement agencies the powers to collect information to investigate crime at the initial investigative phase. This includes the interviewing of witnesses and the taking/seizure of evidence. Covert and technical measures of surveillance and investigation can also be undertaken (Articles 86-96 of the CPC) by police at the authorization of a pre-trial judge, or as is in the exclusive case of ML – of a prosecutor, in case the circumstances call for urgency. The evidence and materials gathered with the use of such measures, including financial records are admissible if collected in accordance with criminal procedure. There are significant capacity and staffing issues within the police, as well as instances of political interference.

21. The statistics and records kept by the Police and the Prosecutors do not match, both in terms of the criteria and the ultimate numbers. The statistics given by prosecutors indicate a gradual increase in the case load for ML offences handled by them, and the growing backlog of cases – almost 100 in 2012. Since money laundering crimes belong to the exclusive competence of the SPRK, which deals with a large number of other offences with only 10-15 prosecutors at its disposal, it is apparent that a change in approach should be eventually considered. Also, SPRK lack of capacity to deal with a growing number of ML cases could be demotivating to law enforcement, who would be reluctant to seek out criminal proceeds even when there is an obvious proceeds-generating predicate in play. The increasing case-load of prosecutors coincided with a sharp drop in the number of ML cases reported to them by the Police in 2012 (according to KPC statistics). If one takes the police statistics for ML cases investigated, the same sharp drop in investigations is recorded, but in 2011. Putting aside the issue of conflicting statistics, it can nevertheless be deducted that there has been a drop in police activity to investigate and refer ML cases to prosecution in the recent years. It is unclear what is the cause for this but it is a clear indicator of decreasing effectiveness. This is also confirmed by the fact that there is no rising rate of convictions (which could have pointed to an increase of quality while sacrificing quantity).

22. The Kosovo Customs Service has implemented a system of cross border currency and negotiable instruments control which envisages that every person entering or leaving Kosovo and carrying monetary instruments of a value of € ten thousand (10,000) or more must declare the amount of the monetary instruments and the source of such monetary instruments in writing. A declaration is considered to be false if it contains incorrect or incomplete information. In case this occurs the Customs have the power to seize and detain monetary instruments which have been falsely declared or undeclared. Customs authorities also have the power to question and search natural persons and their baggage. The powers to restrain currency, as well as to question and search persons apply equally when there is a reasonable suspicion that monetary instruments are the proceeds of crime or were used or intended to be used to commit or facilitate money laundering or the predicate criminal offence from which the proceeds of crime were derived or are related to terrorist financing. Customs authorities have not indicated to the assessment team as to how they maintain information obtained as a result of declarations/false declarations/cases of ML/TF suspicions. While such information is reported to the FIU, however the record-keeping regime within Customs is not clear. Kosovo Customs forward copies of all declarations to the FIU. This is done once a month on an electronic carrier, which is uploaded to the FIU database. Customs also report all suspicious ML/TF incidents to the FIU in the form of an STR. Kosovo Customs successfully co-operates with KP, FIU, Integrated Border Management agencies and EULEX. Joint operational exercises are held on all cross border irregularities and all forms of crime which includes cash couriers. These exercises have led to specific results. Kosovo Customs have the power to investigate customs offences and are to be considered as having the competencies and responsibilities of police or judicial police for these investigations. The Kosovo Customs can apply sanctions to persons who make a false declaration or disclosure. These sanctions vary from referral for investigation/prosecution of a criminal offence, confiscation of the entire

sum of currency to an administrative penalty amounting to 25% of the value. There is understaffing in Customs, which negatively impacts its effectiveness.

Preventive Measures – Financial Institutions

23. The prevention of money laundering and the financing of terrorism regime in Kosovo is mainly based on the Law on the Prevention of Money Laundering and the Financing of Terrorism (Law No 03/L-196 of 2009).⁶ The main law is supplemented by Rule X and Advisory Letter 2007-1 of May 2007 both issued by the CBK. The Advisory Letter, providing guidance to the industry, and Rule X are issued on the basis of UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation and based on UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. Both UNMIK Regulations have been repealed with the coming into force of the AML/CFT Law and the Law on Banks. The assessment team therefore questions the current validity of these two documents within the context of the AML/CFT Law. The assessment team however acknowledges that Rule X is more harmonised with international standards than the Law itself and hence considers it appropriate that banks and financial institutions still follow its requirements. Notwithstanding, most of the essential criteria for the key Recommendations – in particular Recommendation 5 - that should be required by law or regulation are however found in Rule X which does not meet the definition of regulation for the purposes of this assessment.

24. The AML/CFT Law is further supplemented by various Administrative Directives and Administrative Guidance issued by the FIC. With the exception of Administrative Directive 014 of December 2011 and Administrative Guidance FICAD 49/2011 issued on the basis of the AML/CFT Law, all Administrative Directives and Guidance were issued on the basis of the now repealed UNMIK Regulation 2004/2. The assessment team questions the legal validity of these Directives since in repealing and replacing UNMIK Regulation 2004/2 the AML/CFT Law does not provide for the continuation of any rules and directives issued there-under.

25. Although the scope of coverage for the financial sector under the AML/CFT Law meets the scope under the FATF standards, the assessment team finds that the term ‘financial institution’ as defined in the respective financial laws is not harmonised and could therefore create an element of ambiguity.

26. Kosovo has not undertaken a national risk assessment of its vulnerabilities and risks to money laundering and the financing of terrorism. The CBK has not undertaken a risk assessment of vulnerabilities within the financial sector while it does not require banks and financial institutions to undertake a risk assessment of their activities, products and services to identify their individual vulnerabilities. Consequently Kosovo has not excluded any financial activity from the obligations under the AML/CFT Law.

27. CDD measures under the AML/CFT Law are subject to various shortcomings the main of which being the absence of a legal obligation to apply the full CDD measures as opposed to the identification and verification processes, and the lack of legal clarity on beneficial owners. Whereas the AML/CFT Law defines what constitutes CDD measures in accordance with international standards it falls short in applying them. This shortcoming impacts negatively on most of the essential criteria for Recommendation 5. In this respect

⁶ Law No 03/L-196 of 2009 was revised and amended after the on-site visit but not within the timeframe allowed for consideration in this Report. Where appropriate the Report makes references through footnotes to these amendments.

financial institutions follow Rule X of the CBK which is more harmonised with international standards.

28. The concept of the beneficial owner is not clear in the AML/CFT Law and hence there are no clear obligations for the industry to follow this concept throughout. Again Rule X is clearer on this issue and although the industry has raised concerns on the implementation of the concept, these are more related to the absence of a threshold in the definition.

29. The AML/CFT Law specifically prohibits the opening or maintenance of anonymous accounts and requires customer identification *before opening an account*. The Law however is silent on opening and maintaining accounts in fictitious names, although the CBK confirmed that such accounts do not exist.

30. The AML/CFT Law requires reporting subjects to apply enhanced due diligence to customers in the presence of a higher risk of money laundering or terrorist financing. It requires this obligation in specific situations in which case it specifies the enhanced measures to be applied. The AML/CFT Law however does not specify the type of enhanced measures to be applied in other situations and relationships that present a higher risk. The lack of guidance and the uncertainty on the application of a risk based approach are concerns expressed by the industry itself and therefore it is clearly shown that this is having a negative impact on the effectiveness of the system.

31. Although the notion of high risk for customers identified as PEPs is addressed by the AML/CFT Law, various shortcomings are identified relating to the definition; the lack of obligation to apply enhanced due diligence in all instances; the absence of identification of PEP status for the beneficial owners in the obligation to have risk management systems; and the lack of an obligation for senior management approval when an existing customer is eventually identified as PEP. The industry informed it needs guidance on the application of PEP obligations in the case of domestic PEPs.

32. Although in principle the provisions of the AML/CFT Law reflect the main criteria for record keeping under Recommendation 10 there are serious weaknesses that, if left unattended, could develop into concerns on the effective implementation of the Law. These include among other inconsistencies in the AML/CFT Law on the commencement period for the retention of identification records and lack of guidance.

33. The reporting obligation is intrinsically linked to the definition of a *suspicious act or transaction*. Consequently the reporting obligation does not cover instances where information available indicates links to money laundering or financing of terrorism and does not cover attempted transactions. More seriously, the obligation does not cover transactions or acts that may be linked to the financing of terrorism. The low number of STRs that are filed with the FIU compared to the number of CTRs raise questions whether transactions reported under the CTR regime are also reported under the STR regime if they are suspicious.

34. The safe harbour and disclosure (“tipping off”) provisions in the AML/CFT Law within the context of FATF Recommendation 14 are inadequate and do not meet the necessary criteria. In most instances the safe harbour provisions are not clearly extended to directors, officers and employees (temporary or permanent) while the disclosure prohibition does not apply to the banks and financial institutions themselves as corporate bodies.

35. The licensing procedures applied by the CBK for the licensing of banks and other financial institutions adequately cover the prohibition for the establishment of shell banks. There is however lack of legal clarity in the AML/CFT Law in distinguishing between correspondent and respondent institutions in the absence of a definition of correspondent banking relationships.

36. The CBK is mandated by the Law on the CBK and the Law on Banks to license, regulate and supervise banks and other financial institutions. The CBK fulfils this responsibility through on-site visits and off-site examinations through its Banking Supervision Department. The Law on Banks adequately provides for the licensing of banks and financial institutions. The CBK carries out thorough due diligence procedures which includes the fit and proper tests for shareholders, directors and senior management. The Department includes a Division that is responsible for ensuring compliance with the AML/CFT Law and regulations. The Division however lacks resources for a full AML/CFT supervisory function.

37. The AML/CFT Law however does not designate the CBK as the supervisory authority for the purposes of the Law. It follows therefore that AML/CFT supervisory power is assumed by the CBK as part of its prudential supervisory mandate under the Law on the CBK and the Law on Banks. While acknowledging the supervisory work undertaken by the CBK in this regard, it is recommended that a proper legal mandate to the CBK or any other authority for monitoring the financial sector for the purposes of the AML/CFT Law complemented with a legal mandate to issue rules, regulations and guidance there-for should be provided for in the AML/CFT Law.

38. The absence of a supervisory legal mandate carries with it the absence of a legal mandate for the CBK to apply its prudential supervisory powers under the Law on the CBK and the Law on Banks, for AML/CFT purposes. Consequently a legal supervisory mandate to the CBK or any other authority that already has a prudential supervisory mandate under other laws should be accompanied by a mandate to apply such prudential supervisory powers for the purposes of the AML/CFT Law. Moreover, although in general the FIU is provided with supervisory powers under the AML/CFT Law for all other reporting subjects yet it is not provided with the powers to undertake off-site examinations and to demand documents for such purposes.

39. The AML/CFT Law provides for criminal offences within the jurisdiction of the District Courts (now revised) and for sanctions applicable by the FIU to third parties who fail to provide information requested by the FIU. There is therefore no sanctioning regime and consequently no authority designated to apply sanctions. Although the CBK applies its prudential supervisory powers under the Law on Banks, sanctions contemplated by the Law on Banks are not applicable for breaches of the AML/CFT Law. Indeed no sanctions have ever been imposed either by the FIU or the CBK.

40. Money or value transfer (MVT) service providers are subject to the obligations under the AML/CFT Law which further imposes upon them obligations relevant to SR VII. The Law on Banks is not clear on the appointment of agents by financial institutions and therefore there are no obligations for MVT service providers to maintain lists of agents. Moreover, the lack of harmonisation on the definition of a “financial institution” raises questions on the licensing regime.

41. Kosovo has a cash based economy. The Law on Tax Administration requires that *Any transaction in excess of five hundred (500) euro, made between persons involved in economic activity, after 1 January 2009 is required to be made through bank account.* The CBK is in the process of introducing electronic means of payment and other payment systems to reduce the use of cash. Statistics provided by the CBK show huge divergences in cash issued in and cash withdrawn from circulation that indicate possible illegal importation of cash which is placed in the banking system. This raises concerns on Customs checks at the borders and the effective implementation of the provisions under the Law on Tax Administration.

Legal Persons – Access to beneficial ownership and control information.

42. Kosovo applies an upfront system through the business registration system governed by the Law on Business Organisations (Law No 02/L-123) of September 2007 as amended in 2011. Various types of business organisations can be registered in Kosovo. Currently, the Business Registry contains 122,249 companies in total. The KBRA, within the Ministry of Trade and Industry, is the authority responsible for implementing the Law and maintaining the business register. In practice the KBRA aims to provide a ‘one stop shop’ for business registration. To this effect the Agency operates through 28 Municipal Centres. There is no need for intermediaries (lawyers, accountants, etc) to register a business organisation. All forms for registration are available online and registration can be done online.

43. The registration system for business organisations appears adequate although some weaknesses can be identified mainly in relation to the maintenance, updating and timely availability of information, and information relating to beneficial ownership.

44. In the case of joint stock companies and limited liability companies, although the Law requires that any changes in any of the information contained in the registered charter of a joint stock company or a limited liability company is reported to the KBRA, and notwithstanding the obligation of joint stock companies to maintain a list of shareholders, there is no direct obligation to immediately inform KBRA upon changes in shareholders. KBRA informed that in order to try to obtain such information earlier than the annual report, the Agency insists on business organisations to appoint a person with the responsibility to inform the Agency immediately any changes occur.

45. The accuracy of the information available is also questioned due to the provisions under the Law that the registration of a document does not constitute any type of legal determination or presumption on its validity or that any information contained therein is accurate or inaccurate. There is therefore lack of due diligence at least on the founders of a business organisation.

46. The system does not provide procedures for the KBRA or any other person or authority to identify whether a number of business organisations belong to the same individual – except for TAK through the tax registration number. Furthermore, the system does not identify inter-connections between business organisations where, through layers of ownership, some companies might own each other.

47. The Law on Business Organisations provides that all records, documents, filings, forms, rules and other materials required under the Law to be submitted to the KBRA or prepared by the KBRA relating to its operations or procedures or to any business organisation are, without exception, public documents and the KBRA is to have them readily and routinely available to any person, upon such person’s request or demand, for review and copying. In this regard the Agency shall mark any copies requested by any person as ‘true copies’.

48. The Law further requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site the relevant details and information including names of founders, directors and other authorised persons and any changes thereto within one month after the registration of such company or any change to such information. Access to this information is available to the public in general through the web-site of the Agency. In order to access such data a person must have information on either of the business registration number, business name, personal ID of authorised person, owners’ personal ID, main activity or other activities.

49. As changes to shareholders and directors are reported through the annual reports, there is a lag when the information available may not be timely and accurate.

50. The recent amendments to the Law have reduced capital needed for a JSC or a LLC with the registration period being also reduced to three (3) days. Although from an economic perspective the above changes may contribute positively, from an AML/CFT perspective these may raise concerns as they make the registration of business entities easier unless strictly monitored at the registration stage, considering the lack of due diligence.

Non Profit Organisations

51. Non profit organisations (NPOs) or non government organisations (NGOs) as referred to in Kosovo, are governed by the Law on NGOs (Law 04/L-057 of 2011). The Law on NGOs sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs. The Law however does not apply to political parties, trade unions and unions' organisations and religious centres or temples and other fields regulated by special laws. The Department for Registration and Liaison with NGOs (DRLNGO) within the Ministry for Public Administration is the authority competent to implement the Law on NGOs.

52. An NGO registered under the Law may apply for public beneficiary status if it is organized and operated to undertake as its principal activities one or more of the specified operations such as humanitarian assistance and relief, support for disabled persons, and educational, health and charity activities or any other activity that serves the public beneficiary. According to the Law, NGOs with a public beneficiary status shall be entitled to tax and fiscal benefits, except those which are essentially charges for municipal public services.

53. NGOs were for the first time regulated under UNMIK Regulation 1999/22 and later under the law adopted as Law 03/L-134 in 2009 which was reviewed and replaced in 2011 by the present Law 04/L-057. Since then a Regulation on compliance has been adopted by Government while a Regulation on registration is to be adopted soon. Notwithstanding, the review of the law was not intended to assess the AML/CFT vulnerabilities of the sector.

54. Although registration procedures appear adequate, yet there is no due diligence procedures on the founders. Indeed DRLNGO is not in a position to indicate the financing of terrorism risk and vulnerabilities to which NGOs may be exposed to as, according to it, this issue does not fall within its mandate under the Law on NGOs, which mandate is limited to registration. Since 1999 to date 6,926 NGOs have been registered of which 6,428 are domestic and the other international. Up to the time of drafting this Report 88 NGOs ceased to exist.

55. There is no specific legal obligation on any authority to undertake outreach to the NGO sector within the context of AML/CFT. The FIU has informed that in 2007 it had conducted several training sessions for the NGOs regarding their obligations under the AML/CFT Law and regarding compliance inspections. There is however a definite need to identify responsibilities and to better formalise and structure outreach to the sector to strengthen awareness on vulnerabilities and risks to NGOs posed through the misuse of such organisations. To this effect there is a need for more cooperation, coordination and information sharing between the relevant authorities, such as the DRLNGO, the FIU, Tax Administration and other authorities who can contribute to the raising of awareness.

56. In practice adequate supervision or monitoring of any category of NGOs is absent. The Tax Administration undertakes examinations of the sector only for the purposes of tax liabilities which, according to the Tax Administration, are low. DRLNGO claims it has no monitoring mandate under the Law on NGOs and hence it does not undertake oversight of the

sector which, it further claims, should be within the remit of other competent authorities – notwithstanding that the Law provides the DRLNGO with adequate powers to take corrective measures and impose administrative sanctions such as the suspension or withdrawal of the public beneficiary status. The FIU does not have a clear mandate under the AML/CFT Law to monitor NGOs for the purposes of Article 24 of the AML/CFT Law – notwithstanding that paragraph (4) of Article 24 requires NGOs to make available to the FIU and DRLNGO for inspection any documents retained in terms of the said paragraph of the Law. Moreover the AML/CFT Law gives the authority to DRLNGO to suspend or revoke the registration of an NGO for violation of any provision of Article 24 of the AML/CFT Law pursuant to Article 21 of the Law on NGOs, yet it does not provide mechanisms how this can be done in the absence of a supervisory mandate to the FIU or to DRLNGO.

57. There are no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require with the exception of documents retained by NGOs for the purposes of paragraph (4) of Article 24 of the AML/CFT Law.

58. Likewise, and notwithstanding that NGOs are obliged to report any suspicious acts or transactions to the FIU, the AML/CFT Law does not empower the FIU to demand any information from NGOs except for the Annual Reports drawn up under Article 18 of the Law on NGOs and the records maintained under paragraph (4) of Article 24 of the AML/CFT Law.

59. On 16 December 2011 the FIU entered into a co-operation agreement with DRLNGO for the exchange of information. The Memorandum of Understanding establishes the procedures, conditions and criteria for the exchange of information and the obligations of each party on the treatment of information exchanged and compliance functions.

60. Notwithstanding that if an NPO were to be investigated then the normal investigative processes and criminal sanctions would apply, there is a serious problem if NGOs that should be investigated cannot be identified. The absence of due diligence measures on founders at registration stage, the fact that DRLNGO is not in a position to indicate whether an NGO that is being registered could be related to the financing of terrorism and the lack of supervision for AML/CFT purposes negatively impact the investigative process.

National and international cooperation

61. At the policy level the most important development is that of an AML/CFT strategy, that was adopted in September 2012. There is a cross-agency working Group on its implementation. When and if completed, this will have a major impact on Kosovo's ability to organise and inform itself to better tackle the threats from money laundering, economic crime and terrorist financing. Under the strategy a National Office for Economic Crimes Enforcement is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF, however there has been no progress in instituting this Office to date.

62. The Kosovo Prosecutorial Council (KPC) has recently developed a Strategic Plan for Inter-Institutional Cooperation in the Fight against Organized Crime and Corruption for 2013-2015. This document is aimed at improving interagency cooperation and information exchange on cases of corruption and organized crime. It is clear that the KPC and AML/Economic Crime strategies cover a number of the same issues. This leads to a concern as to how the KPC and AML strategies will correlate in terms of practical implementation.

63. As regards operational coordination it is clear that law-enforcement agencies are still at the initial stage of creating proper and systemic mechanisms for interagency information

exchange and cooperation. The Police, Customs, FIU, Prosecutors have signed a number of MoUs to this effect, however several key arrangements, such as an Police-FIU⁷, FIU-Prosecutors MoU are still in the pipeline or have not yet been considered. Some MoUs (FIU-Central Bank) are outdated, as they have been inherited from the time of UNMIK and do not reflect the current regulatory framework. Neither are they properly followed by the participating agencies

64. Kosovo is able to provide a wide range of the possible forms of international cooperation in criminal matters including procedural legal assistance in criminal matters in general, extradition or transfer of proceedings. As for the procedural legal assistance, foreign requests are filed via the Ministry of Justice which forwards them to the local judicial authority (as a general rule, no direct cooperation with foreign judicial authorities is foreseen). No restrictive grounds for refusal were detected in the respective legislation. While cooperation is said to be conducted in a reasonable time and is constructive and effective in its implementation, the assessors were made aware of lengthy delays and long backlogs of proceedings that go through the Courts and therefore urged clear service standards on turnaround times for foreign MLA requests.

65. Non-MLA international cooperation in the AML/CFT area is carried out by the FIU and police. Article 14.1.7 of the AML Law No. 03/L-196 allows the FIU to spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and which are subject to similar obligations in terms of preservation of confidentiality, regardless of the nature of agency which is subject to reciprocity. The information provided shall only be used upon approval by the agency and solely for purposes of combating money laundering, and related criminal offences and terrorist financing. The FIU is able to make enquiries on behalf of foreign counterparts of publically available information and its own databases (STR related information). The FIU is entitled to request and receive from public or governmental bodies, or international bodies or organizations or intergovernmental organizations (in Kosovo), data, information, documents related to a person, entity, property or transaction, and may spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and that is subject to similar obligations for protection of confidentiality, regardless of the nature of the agency which is subject to reciprocity. At the same time, the AML/CFT Law does not allow the FIU to make enquiries to financial institutions for information, based on a request from a foreign FIU. In the case of requests referred to the FIU, Article 37 of the AML law states that professional secrecy cannot be used as a ground for rejecting a request for information that should be provided by law or has been collected in compliance with this law. Kosovo police and Customs must comply with the requirements of the Kosovo Data Protection Agency. Requests for information to be released must comply with the minimum standards.

66. Since 2011 the Kosovo police has created an International Law Enforcement Cooperation Unit (ILECU) within the framework of a regional project aimed at facilitating international information exchange between law enforcement authorities. Exchange with of information with non-counterparts will go via indirect channels. Either ILECU or Interpol will channel the request but in the case of Interpol there must also be a request through diplomatic channels within 18 days – thus an indirect routing. In either case the positioning of ILECU or Interpol means there is an intermediary in the process. Kosovo authorities have not provided statistics with regard to international information exchange by the police, neither through ILECU or otherwise, thus making it impossible to judge about the effectiveness.

⁷ The assessment team was subsequently informed that the FIU and Police signed a MoU on 19 February 2013; however this falls outside the scope of this assessment, as signature took place more than two months after the on-site visit.

AML/CFT DETAILED ASSESSMENT REPORT

1 GENERAL

1.1 General Information on Kosovo and its economy

67. Kosovo is located in south-eastern Europe in the central Balkan Peninsula, and it covers 10,908 km². Kosovo has an estimated resident population of 1,739,825 million according to the last census⁸, of which approximately, 92% is Albanian and 8% from Serb and other minorities. The Kosovo population is one of the youngest in Europe with an estimated 40 percent of its citizens being below the age of 20. The official languages in Kosovo are Albanian and Serbian. At the municipal level, the Turkish, Bosnian and Roma languages have the status of official languages.

68. According to the latest survey conducted by the International Monetary Fund (IMF), there was real GDP growth of 3.8 per cent in 2012⁹, down from 5% in 2011.¹⁰ Robust domestic demand is funded by transfers and capital inflows that originate, to a large extent, with the Kosovo diaspora.¹¹ According to various assessments there is still a high risk of doing business in Kosovo.¹² The informal economy is still large. Kosovo is still an import-based economy; forced to import goods and raw materials not offered by the local market. The main imported goods include manufactured goods, machinery and equipment, prepared foodstuff, beverages and tobacco, and fuels. Kosovo uses the euro as the official currency since 1 January 2002.

69. On 10 June 1999 the UN Security Council adopted Resolution 1244. This resolution, while confirming Serbia's international borders, removed Kosovo from the jurisdiction of Serbia, replacing it with a temporary solution of an internationally supervised administration, aiming to support the development of operational autonomous institutions in Kosovo. Based on UNSCR 1244 the United Nations Interim Administration Mission in Kosovo (UNMIK) was created. It was vested with administrative, legislative and judicial powers in Kosovo.

70. Kosovo declared independence from Serbia on 17 February 2008. In April 2008, Pristina authorities adopted a Constitution, which came into force in June 2008. Kosovo is not a member of the United Nations.¹³

71. Almost 14,000 troops from the Kosovo Force (KFOR) deployed under UNSCR 1244 are still stationed in Kosovo to help maintain a safe and secure environment. KFOR cooperates with and assists the UN and the European Union Rule of Law mission (EULEX) and other international actors, as appropriate, to support the development of a stable, democratic, multi-ethnic and peaceful Kosovo. EULEX, began its operations in the area of rule of law on 9 December 2008 within the framework of UN Security Council Resolution

⁸ <http://esk.rks-gov.net/rekos2011/?cid=2.40>

⁹ According to World Bank (<http://data.worldbank.org/country/kosovo>), the GDP of Kosovo for 2011 amounted around USD 6.5 billion.

¹⁰ <http://www.imf.org/external/pubs/ft/scr/2012/cr12180.pdf>

¹¹ *Ibid.*

¹² Kosovo is ranked at the 126th place out of 183 economies according to Doing Business 2012. However, it is better ranked in Doing Business 2013 (98th rank out of 185 economies).

¹³ Kosovo became a member of the World Bank and the International Monetary Fund on 29 June 2009.

1244 (1999) and under the overall authority of the United Nations. EULEX's central aim is to assist and support the Kosovo authorities in the rule of law area, specifically with regard to the police, judiciary and customs. Currently EULEX is reviewing its mode of presence in Kosovo and is in the process of downsizing, especially in the police and customs components to hand over more of the responsibility to local authorities.

72. Kosovo has a civil law based legal system, where the Constitution is the highest legal act and all other laws and other legal acts must be in accordance with the Constitution.

Transparency, good governance, ethics and measures against corruption (see also PECK assessment report on the anti-corruption component)

73. In recent years, media, civil society and some other stakeholders have often reported about corruption-related issues that are considered to be a serious challenge in Kosovo. There have also been occasional allegations of officials having links with organized criminal activities. Transparency International's 2011 Corruption Perception Index rates Kosovo at 2.9 (with 10 representing the lowest level of corruption), the lowest rating in the Balkans.¹⁴ According to the World Bank's Worldwide Governance Indicators, Kosovo's control of corruption has shown little improvement since 2003, and remains low at more or less 30% (100% representing full control of corruption), with no clear tendency since 2005.¹⁵ Different important legal and institutional interventions have taken place during last years and legal standards have been adopted in relation to corruption-related areas, judicial system, criminal issues, good governance, public administration and transparency.

74. The Council of Europe has carried out in Kosovo and the region during the last 5-6 years a number of interventions through technical assistance and cooperation programmes. These interventions were focused in the field of economic and serious crime i.e. money laundering, financing of terrorism and international cooperation in criminal matters. More specifically, these activities were carried out through PACO Impact, PACO Kosovo, CARDS and PROSECO projects. Other technical assistance projects were provided within IPA Programming of the European Commission. For the purposes of this Report, it is worth mentioning the Strengthening Human Resources and Institutional Capacity of the Kosovo Local Public Administration (IPA 2009), Improvement of IT system in taxation (IPA 2009), Adequate working facilities for the Public Prosecution (IPA 2009). Other projects funded by EU member states and the United States are the CRINIS-Shining a light on money in politics funded by the Norwegian Ministry of Foreign Affairs, and the technical assistance provided by the US Department of the Treasury – Office of Technical Assistance (OTA).

75. Cooperation between the authorities and the private sector is at an early stage. Privatization of strategic economic sectors has been recently initiated under a background of very sound criticism regarding lack of transparency and consultations, alleged abuses and lack of sufficient preparatory economic and financial justifications. There are not yet sound structural reforms to improve the business environment and attract foreign direct investment according to competitive and streamlined processes.

1.2 General Situation of Money Laundering and Financing of Terrorism

Proceeds-generating predicate offences

76. The extent of money laundering is related to the extent of informal black economy (drug dealing, prostitution, smuggling of illegal goods and other criminal activities), excluding, in this context, tax evasion, as part of the grey economy. Various reports have

¹⁴ <http://cpi.transparency.org/cpi2011/results/>

¹⁵ World Bank, <http://info.worldbank.org/governance/wgi/>

calculated Kosovo's informal economy as being in the range of 39%-50% using indicators such as: number of employees in the formal and informal economy, number of enterprises operating in formal and informal areas, analogy with the other countries etc¹⁶. In 2007, the extent of black economy in Kosovo during the period 2004-2006 has been estimated to run up annually more than € 300 million.

77. According to the recent report by Europol on "EU Organized Crime Threat Assessment 2011", Kosovo is still a region of highly active criminal organizations, especially in the area of drugs and weapons trafficking.¹⁷ The income from these criminal sources is subject to money laundering activities.

78. According to the customs service Kosovo has an active black market for smuggled consumer goods and pirated products. Illegal proceeds from domestic and foreign criminal activity are also generated from official corruption, tax evasion, customs fraud, and contraband.

79. The table below contains statistics provided by authorities on the offences that are major sources of illegal proceeds in Kosovo:

Table 1: Offences that are Major Sources of Illegal Proceeds (the economic damage caused by these offences was not specified by Kosovo authorities)

| Type of Crime | Year | Registered crime | Concluded investigation | Persons charged |
|---------------------------------------|------|------------------|-------------------------|-----------------|
| Drug related offences | | | | |
| | 2010 | 314 | | 461 |
| | 2011 | 407 | | 547 |
| | 2012 | 517 | | 575 |
| Robbery | | | | |
| | 2010 | 432 | 516 | |
| | 2011 | 486 | 608 | |
| | 2012 | 152 | 410 | |
| Customs and tax crimes | | | | |
| | 2010 | | 21 | 15 |
| | 2011 | | 14 | 11 |
| | 2012 | | 9 | 14 |
| Theft through abuse of office | | | | |
| | 2010 | | 281 | 142 |
| | 2011 | | 40 | 151 |
| | 2012 | | 37 | 130 |
| Fraud | | | | |
| | 2010 | | 132 | 68 |
| | 2011 | | 12 | 45 |
| | 2012 | | 15 | 37 |
| Circulating falsified currency | | | | |
| | 2010 | | | |
| | 2011 | | | |
| | 2012 | 205 | 108 | 25 |
| Other offences (unspecified) | | | | |

¹⁶ See Friedrich Schneider in "Shadow Economies of 145 Countries all over the World: What do we really know?" (2006); Edward Christie and Mario Holzner in their "Household Tax Compliance and the Shadow Economy in Central and South-eastern Europe" (2004); World Bank in its "Kosovo Economic Memorandum" (2004); IMF publication "Kosovo—Gearing Policies Toward Growth and Development" (2004)

¹⁷ www.europol.europa.eu/sites/default/files/publications/octa_2011.pdf

| Type of Crime | Year | Registered crime | Concluded investigation | Persons charged |
|---------------|------|------------------|-------------------------|-----------------|
| | 2010 | | 21 | 14 |
| | 2011 | | 14 | 11 |
| | 2012 | | 9 | 14 |

Money Laundering

80. There is little shared knowledge, recognized information or any publicly available statistical data on the phenomenon of money laundering or terrorism financing in Kosovo. The Financial Intelligence Unit (FIU) produces statistical reports. No annual reports are produced and no data are published for a wider public¹⁸. At the same time, the quantity and quality of data from law enforcement and judicial authorities has been regarded, in the past, as not sufficient to evaluate the number and characteristics of money laundering crimes investigated, prosecuted and processed in the courts¹⁹.

81. A large amount of money is invested in real estate, restaurants, bars and games of chance operations such as casinos, slot machines and sports betting facilities, and there is no capacity to supervise this movement. There is also a tendency to conduct business and to engage in business transactions on private accounts without business registration. Therefore, it does not come as a surprise that more than 420,000 cash transactions (above € 10,000) are reported to the FIU each year, a number of which is extremely high compared to the size of Kosovo's population and economy.

82. In 2007 Kosovo and international police arrested two people; political adviser to the then Prime Minister, and the director of Kasa Bank on suspicion of money laundering. According to allegations, Kasa Bank was the administrator of the special fund of the former Prime Minister Ramush Haradinaj. The adviser to the then prime minister was accused for having a role in this money laundering affair. To add to the list, the Governor of the Kosovo Bank was arrested for money laundering, as well as the Senior Adviser to the Minister of Health was charged with tax evasion. The Minister of Transportation and Telecommunication has been also accused of money laundering and taking kickbacks from contractors, but these charges were dropped due to the lack of evidence. As recently as August 2012, the Special Anti-Corruption Unit has arrested four persons in the municipality of Klina, suspected of money laundering. According to the police, these arrests resulted from arrests for the same case that occurred in 2009 and 2011, where 26 persons were arrested²⁰. It was alleged that the accused persons benefited €1,257.928 by cheating a rent-a-car company.

Terrorism and terrorist financing

83. The threat of terrorism financing has been confirmed by various authorities in Kosovo met in the course of the on-site visit. The FIU also reports that it has observed several suspicious transactions with regards to financing of terrorism.

84. Within the constraints posed by its financial situation, the Government of Kosovo has expanded its efforts to cooperate with international partners to address the flow of individuals

¹⁸ UNODC, "Technical Assessment Report", April 2010

www.unodc.org/documents/southeasterneurope/Technical_Assistance_Report_Kosovo_UNSCR_1244_final_ENG.pdf, at p.26

¹⁹ B&S Europe, 2007 "Survey on the extent and the prevention of the illegal economy and money laundering in Kosovo. Report prepared for the European Agency for Reconstruction", p.21 www.eulex-kosovo.eu/training/police/PoliceTraining/ORGANIZED_CRIME/DOCUMENTS/2.pdf

²⁰ <http://www.kosovapress.com/?cid=2,85,151119>

illegally transiting Kosovo and to identify and screen potential threats both domestically and from abroad.²¹

85. During 2010, the Kosovo government attempted to extradite a Kosovo national to face criminal prosecution on terrorism-related charges in the United States. The Office of the State Prosecutor and the Special Prosecution Office of Kosovo presented the United States' request for the fugitive's extradition, but a panel of the Kosovo Supreme Court, composed of two EU Rule of Law Mission Supreme Court judges and one Kosovo Supreme Court Judge, denied the extradition request²².

86. Some radical Islamic organizations with links to terrorism, have attempted to recruit followers among Kosovo Albanian Muslims, but these attempts have largely failed. In 2004, authorities in Albania arrested and extradited to Kosovo, a Kosovo citizen suspected for a deadly terrorist attack in 2001 against a bus carrying Kosovo Serbs. This person was later indicted by a local Kosovo District Prosecutor for terrorism and murder²³.

1.3 Overview of the Financial Sector

87. According to the High Level Financial Sector overview performed in October 2011, macro-economic stability in Kosovo is weak by global standards, with particular challenges reflected in the large current account deficit and fiscal deficit. While the financial sector is small and unsophisticated, the banking sector remains sound. It is majority foreign-owned and highly concentrated in a few banks. The depth and sophistication of financial services is poor, with banks and microfinance institutions mainly providing only basic credit products.²⁴

88. The total financial sector assets reached EUR 3.2 billion during 2010 and grew by 13.7 percent compared to 2009. Banking sector assets comprised around 77 percent of total financial sector assets, while pension funds comprised 15.5 percent, microfinance institutions 4.3 percent, followed by insurance companies with 3.1 percent and financial auxiliaries with 0.1 percent.²⁵

89. Currently, there are 9 commercial banks licensed and operational in Kosovo²⁶, 2 licensed pension funds, 13 licensed insurance companies, 14 micro-financial institutions, 4 insurance intermediaries (1 revoked license), 4 non-banks financial institutions (2 registrations have been withdrawn for inactivity), 5 money transfer agencies, and 29 exchange bureaus²⁷.

90. The following table sets out the types of financial institutions that can engage in the financial activities that are within the definition of “financial institutions” in the FATF Recommendations:

²¹ <http://www.unhcr.org/refworld/country,,USDOS,,SRB,,4e52482332.0.html>

²² *Ibid.*

²³ See “Country Reports on Terrorism 2004”, United States Department of States, April 2005, p.49

²⁴ Kosovo High Level Financial Sector Overview prepared by Partners for Financial Stability Program, Deloitte Consulting LLC for USAID, October 2011

http://www.pfsprogram.org/sites/default/files/Kosovo_High_Level_Financial_Sector_Overview_Oct_15_2011.pdf

²⁵ Investment in Kosovo, KPMG, Edition 2011, p.17.

²⁶ The license of one bank has been revoked in 2006.

²⁷ Source Central Bank of Kosovo (CBK) (<http://www.bqk-kos.org/?cid=2,14>)

Table 2: Types of Financial Institutions that can engage in Financial Activities

| Type of financial activity (See glossary of the 40 Recommendations) | Type of financial institution that performs this activity |
|---|--|
| 1. Acceptance of deposits and other repayable funds from the public (including private banking) | 1. Banks |
| 2. Lending (including consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfeiting)) | 1. Banks 2. Microfinance institutions 3. Non-bank financial institutions |
| 3. Financial leasing (other than financial leasing arrangements in relation to consumer products) | 1. Banks 2. Non-bank financial institutions |
| 4. The transfer of money or value, including financial activity in both the formal or informal sector (e.g. alternative remittance activity), but not including any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds) | 1. Banks 2. Non-bank financial institutions (Money remitters) 3. Postal services that perform payment services |
| 5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders, and bankers' drafts, electronic money) | 1. Banks [2. Any other physical/legal entity that issues/manages payments] |
| 6. Financial guarantees and commitments | 1. Banks 2. Non-bank financial institutions |
| 7. Trading in: (a) money market instruments (cheques, bills, CDs, derivatives etc.); (b) foreign exchange; (c) exchange, interest rate and index instruments; (d) transferable securities; (e) commodity futures trading | 1. Banks 2. (b) Foreign Exchange Offices 3. Non-bank financial institutions |
| 8. Participation in securities issues and the provision of financial services related to such issues | 1. Banks 2. Non bank financial institutions |
| 9. Individual and collective portfolio management | 1. Banks |
| 10. Safekeeping and administration of cash or liquid securities on behalf of other persons | 1. Banks 2. Non-bank financial institutions |
| 11. Otherwise investing, administering or managing funds or money on behalf of other persons | 1. Banks |
| 12. Underwriting and placement of life insurance and other investment related insurance (including insurance undertakings and to insurance intermediaries (agents and brokers)) | 1. Life insurance companies / agents / intermediaries / pension funds |
| 13. Money and currency changing | 1. Banks 2. Non-bank financial institutions 3. Foreign exchange offices |

Banking sector (banks and non-bank financial institutions)

91. At the end of 1999, there were no banks operating in Kosovo. One bank, the Micro-Enterprise Bank of Kosovo (MEB-Kosovo), with EBRD and IFC being equity participants, received approval to commence operations in January 2000. A second financial institution (technically a "non-bank"), the Grameen-Missione AMF, also obtained a license to operate as a micro-finance institution, although it was not active as of the second quarter of 2000. Preliminary licenses were approved by the licensing and supervisory authority in spring 2000 for four banks with a history of operations in Kosovo. In early 2000, deposit mobilization and lending were virtually nonexistent in the banking sector apart from the 2,000 or so accounts that had been opened with MEB-Kosovo. Basic transfers through the banks had been virtually stopped so the payment system could be reorganized. However, in the absence of a functioning banking system, these services were generally provided by travel companies at a 5 to 7 percent charge per transfer.

92. The banking sector in Kosovo consists of two levels where the Central Bank of Kosovo operates as the first level bank and the commercial banks as the second level banks.

93. Banking products and services are grouped into: (1) Deposits; (2) Loans; (3) Other products, (4) services payments and transfers, 5) Securities. Banks in Kosovo offer a considerable number of products and banking services. Although most of these products enter in the group of classical banking services, recently banks have begun expansion of their services, with some innovations for market, such as: leasing, electronic banking services (mobile banking) and other services. In general, products and services offered by banks include:

- Deposit,
- Loans,
- Service of payment /transfers internal and external,
- Business documentary (Guarantees and letter of credit),
- Electronic services,
- Other products²⁸.

94. In 2010 the banking system was characterized by the expansion of infrastructure, the number of branches and sub-branches of the commercial banks reached 303, which denote an annual increase of 16 units. Since 2009, the Kosovo banking market has been operating eight commercial banks, increasing to 9 in 2012, out of which six are owned by foreign capital (Austria, Germany, France, Turkey, Slovenia, Serbia), whereas two of them are in local ownership. The banks owned by foreigners dominate the Kosovo banking system managing 90.2 percent of the total assets of the banking system in December 2010 (91.1 percent in 2009). The remaining part of the assets (9.8 percent in December 2010) is managed by the local ownership. The banking system in Kosovo continues to be characterized by a high level of market concentration, where 77.4 percent of the total bank assets are managed by the three largest banks. The two largest banks, Procredit Bank and Raiffeisen Bank, have a share of 68% in the overall loan market. Based on the Law on Competition Protection, none of these banks have a dominant position since they do not exceed the 40% limit of the market share. However, it should be mentioned that the continuous increase of activities of the smaller banks resulted in the continuous decrease of the concentration level in the banking system as of last year²⁹.

²⁸ http://ak.rks-gov.net/repository/docs/Analysis_of_Monitoring_BSK_311011.pdf

²⁹ *Ibid*,p.9

Table 3: List of Subjects licensed by Central Bank of Kosovo since 2009

| No. | Subjects | 2009 | 2010 | 2011 | 2012 |
|-----|---|------|------|------|------|
| 1 | Banks and foreign branches | 8 | 8 | 8 | 9 |
| 2 | Non-bank financial institutions | 6 | 5 | 5 | 4 |
| 3 | Micro-financial institutions | 14 | 13 | 15 | 14 |
| 4 | Insurance companies/intermediaries | 11 | 11 | 13/3 | 13/4 |
| 5 | Pension funds | 2 | 2 | 2 | 2 |
| 6 | Financial auxiliaries/exchange and transfer bureaux | 23/3 | 26/4 | 30/4 | 31/5 |

95. In addition to commercial banks, Microfinance Institutions (MFIs) represent another important factor in the lending market in Kosovo. In 2010 there were 13 MFI's and five other non banking institutions operating in Kosovo. The portfolio of loans issued by MFI's during 2010 reached EUR 116 million, an annual increase of 6.5 percent compared to 2009. The main beneficiaries of MFI loans are small enterprises and households.

Securities sector and stock-exchange

96. There is no securities market in Kosovo. There are no securities laws and there is no a licensed market where securities can be publicly traded. The first securities' trading in the form of treasury/government bonds has been carried out during 2012. There is no stock-exchange in Prishtina.

Insurance (life insurance) sector

97. Insurance companies (ICs) in Kosovo are relatively small and few, with combined assets worth €70.8 million in 2007. Compared with the level in 2005, the value of those assets had increased by more than 53 per cent (in 2005 the figure was €46.2 million). In 2007, the share of total assets of ICs of the total financial sector assets in Kosovo was about five per cent. Currently Kosovo has 13 insurance companies and 4 insurance intermediaries operating, from which 10 are nonlife insurance companies and 3 are life insurance companies. Ten of the insurance companies in Kosovo are of foreign ownership and manage around 77.4 per cent of total assets of this sector³⁰. Deposits dominated the assets of insurance companies in 2010, representing 63 percent of insurance companies' assets. Life insurance has existed as a product since 2010.

98. The core activity of insurance companies is third party liability (TPL), namely vehicle insurance policies, which generate 57 percent of all premiums, while the remaining part of the received premiums came from voluntary insurance policies.³¹

99. Net profit of insurance companies in 2010 was 1.5 million Euros, compared to the net loss 4.9 million euro in 2009. The number of the insurance policies issued by insurance companies operating in Kosovo in 2010 reached 540,700 which represents an annual increase of 5.7%. The premiums received increased by 5.1%, reaching the amount of 71.3 million Euro in the end of 2010. However the growth rate of the value of the received premiums was lower in 2010 compared to the growth rate of 2009, where the annual growth rate was 20.0%. In 2010 insurance companies generated the largest share of the received premiums (57% of total premiums)³².

³⁰ http://www.eurojournals.com/EJEFAS_45_11.pdf

³¹ Investment in Kosovo, KPMG, Edition 2011, p.21.

³² http://www.bogalaw.com/pdf/Investment_Kosovo_January12.pdf p.31.

100. Despite booming profits, insurance companies in Kosovo continue to be criticized by the industry regulator, the Central Bank of Kosovo, and policyholders for their failure to pay claims swiftly³³.

Money or value transfer sector

101. Financial intermediaries include Kosovo exchange bureaus and Money or Value Transfer Agencies (MVTs). By 2009, there were three money transfer operators, also called financial intermediaries active in Kosovo. These have increased to 5 operators by 2012. Emigrants prefer this payment method for sending financial support to their relatives in Kosovo, because it is made very easy for the customers. It is also very attractive because the users do not need to open an account and because the transfer is made within minutes. Almost 41% of all remittances in 2010 came through this channel. However, its share in total international transfers was only about 4.4%³⁴. The largest part of international transfers (around 78% of total transfers) is carried out through commercial banks.

1.4 Overview of the Designated Non-Financial Businesses and Professions (DNFBP) Sector³⁵

102. The categories of DNFBPs, as defined in the AML/CFT Law are real estate agents and brokers, public notaries, attorneys/lawyers, and other legal representatives; independent certified accountants, licensed auditors and tax advisers and financial consulting offices; dealers in precious metals and stones; entities engaged in the administration of third parties' assets (trusts and company services providers), and casinos, including internet casinos.

Table 4: The number of entities by authorities in each DNFBP sector

| DNFBP | Number of licensed entities | Supervisory Body |
|--|--|--|
| Notaries | 43 | Chamber of Notaries/Ministry of Justice |
| Attorneys (Advocates) | 577 ³⁶ | Chamber of Advocates/Ministry of Justice |
| Independent auditors and auditing firms | 45 auditors 19 auditing firms (out of which 13 local and 6 foreign) | 1. Kosovo Financial Reporting Council ³⁷ /Ministry of Finance |
| Independent accountants and accounting firms | 67 accountants | 2. Kosovo Financial Reporting Council/Ministry of Finance |
| Persons and casinos organizing prize games including persons organizing internet prize games | 155 new or extended licenses for 2011 (9 new licenses, 32 extensions of licenses and 114 extensions of activities) 331 related businesses are registered in the Commercial Register (9 casinos) | Games of chance division / Kosovo Tax Administration |

³³ Source Balkan Insight (<http://www.balkaninsight.com/en/article/insurance-companies-failing-to-pay-out>)

³⁴ https://ritdml.rit.edu/bitstream/handle/1850/13692/FisnikLatifi_CapstoneProject_Report_5-09-2011.pdf?sequence=5

³⁵ This report does not describe the implementation of AML/CFT measures in the DNFBP sector (R.12, 16, 24). The overview provided in Section 1 is given for information purposes only.

³⁶ <http://www.oak-ks.org/cms/data/1680ee750e362bf397b4495fb81332ee.pdf>

³⁷ <http://mf.rks-gov.net/en-us/zyrat/sekretariatiikkrfse/listaeauditorvedhefirmaveaudituese.aspx>

| DNFBP | Number of licensed entities | Supervisory Body |
|--|------------------------------------|--------------------------|
| Real estate agents/agencies | 46 | FIU |
| Trusts; legal person registration service providers | Unknown | |
| Dealers in precious metals; dealers in precious stones | 108 | Metrology Department/MTI |

Casinos (including internet casinos)

103. Games of Chance have been legalized in Kosovo with the entry into force of the Law No 2004/35 on Games of Chance and they are currently regulated by the Law No.04/L-080 of 6 April 2012. The law regulates the method of organization and functioning of Games of Chance, types of games of chance, licensing the subjects and registration of employees of Games of Change, establishment of the Authority of Games of Chance and their supervision. It also regulates the status, governance, management and transferrable and assignable rights of the Lottery of Kosovo. Games of chance in Kosovo are realized through the Lottery of Kosovo which is a public-legal entity and through other legal entities, registered and licensed for the practice of games of chance. The following games of chance are governed by the law:

- Lottery games;
- Casino games;
- Sport Betting;
- Slot-Machine games;
- Tombola Bingo in closed premises.

104. Tax Administration of Kosovo (TAK) is the regulatory authority of Games of Chance.

105. The enactment of the legislation on games of chance was not welcomed by Kosovo citizens, and a number of NGO's organized protests asking government to abrogate the law as it harms family economies which are anyway poor. Even the media published articles alleging that government officials and politicians are owners of many casinos and sport betting facilities in Kosovo. These articles raised concerns that the games of chance in Kosovo are widespread and are becoming a criminal phenomenon³⁸.

106. Out of 331 games of chance's operators that are registered in the Business Registry, 261 are personal business enterprises or general partnerships, 70 others include 56 limited liability corporations, 6 joint stock corporations and 8 casinos. The Games of chance's division within TAK has issued 9 new licenses during 2011 as well as 114 new units functioning under already licensed operators due to extension of activity. A total of 1,606 visits have been carried out during 2010 and 957 during 2011. The total of fines imposed has been 25,000 EUR during 2010 and 40,000 EUR during 2011.

Real estate agents

107. The AML/CFT Law covers the residential and commercial real estate sector. The real estate sector in Kosovo is regulated by: Law No. 03/L-154 dated 25.06.2009 "On property and other real rights"; Law No. 2003/25 dated 18.02.2009 "Law on cadastre" (as amended); Law No. 2002/05 dated 17.10.2002 "On the establishment of an immovable property rights register" (as amended); Law No. 03/L-139 dated 26.03.2009 "On expropriation of immovable property". The land in Kosovo and relevant transactions should be notarized and subsequently

³⁸ <http://www.botasot.info/lajme/169028/RaJOKaH/>

registered with respective Municipal Cadastral Offices (MCOs). The Kosovo Cadastral Agency (KCA) has the authority for overall administration of the register in Kosovo.

108. It is not possible to perform any transaction regarding real estate electronically or to electronically access the information on the ownership of registered real estate.

109. As mentioned above the real estate sector is considered as high risk for ML. In addition, use of cash is very common in real estate transactions.

Lawyers, notaries, other independent legal professionals and accountants

110. Lawyers in Kosovo are organized through the Kosovo Chamber of Advocates (Bar) which has a total of 577 registered lawyers. There are 6 societies/common offices and 54 junior lawyers under the internship period. The activity of the chamber and its organization is governed by the Law on Bar No. 03/L-117, Statute of KCA and Code of Ethics for Lawyers.

111. The Ministry of Justice is responsible for ensuring that the legal profession is exercised normally and in compliance with the law. The Chamber of Advocates supervises advocates for AML/CFT purposes.

112. In the time of Yugoslavia there was no notary system and consequently there has been no notary expertise available in Kosovo. Simple transactions, such as buying and selling of property have been overseen by municipal courts. In beginning of November 2011, MoJ certified the first 48 Kosovo notaries³⁹. The Law on Notary (03/L-10) approved on in 2008, and the administrative instructions governing application procedures and territorial expansion of notary services comprise the legislative framework for notary services in Kosovo. Notaries in Kosovo are organized through the Kosovo Chamber of Notaries that is a very recent body.

113. The Minister of Justice determines the general number of notaries and the relative coverage for each municipality. Notaries are involved in all transactions related to the sale of moveable and immovable property including real estate or goods such as cars. The Ministry of Justice supervises notaries for AML/CFT purposes.

Accounting, financial reporting and auditing

114. Accounting, financial reporting and auditing in Kosovo is governed by the Law on Accounting, Financial Reporting and Auditing (Law No. 04/L-014). The law governs the accounting and financial reporting system of business organizations, competences and responsibilities of Kosovo Council for Financial Reporting, audit requirements, qualifications for professional accountant, licensing of auditors as well as foreign and local audit firms. Accounting and Financial Reporting for Financial Institutions is regulated by the Central Bank of Kosovo. Society of Certified Accountants and Auditors in Kosovo is a non-governmental and non-profitable association that provides trainings in the field of accounting⁴⁰.

115. Based on this Law, large business organizations and all business organizations registered as limited liability companies or shareholder companies in Kosovo, should apply International Financial Reporting Standards (IFRS), including International Accounting Standards (IAS) as well as interpretations, recommendations and guidance issued by the International Accounting Standard Board, which shall be approved by the Kosovo Council for Financial Reporting (KCRF).

³⁹ http://www.swisscooperation.admin.ch/kosovo/en/Home/Domains_of_Cooperation/Rule_of_Law_and_Democracy/Establishment_of_a_Notary_System_in_Kosovo_Phase_III

⁴⁰ http://www.scaak.org/index.php?option=com_content&view=article&id=2&Itemid=2

116. The Law requires that financial statements of large business organizations be audited by statutory audit firms that are licensed to carry out statutory audits in Kosovo, while the financial statements of medium-sized organizations are required to be audited either by statutory audit firms or auditors that are licensed to carry out statutory audits in Kosovo. Large business organizations are those that fulfill two out of three of the following criteria: (1) Net annual turnover higher than EUR 4 million; (2) Gross Assets at balance sheet date higher than EUR 2 million; and (3) Average number of employees during the financial year higher than 50.

Dealers in precious metals and stones

117. Dealers in precious metals and stones are individuals or legal entities. According to the Commercial Register there are 108 registered dealers from this sector. Their activity is specifically regulated among other common laws by the law No 2004/28 on Precious Metal Products. According to this law precious metal products undergo obligatory examination and marking prior to being placed into the market. They should be certified by the Legal Metrology Institute of Kosovo (LMIK) sign – currently the Metrology Department under the Ministry of Trade and Industry. The examination is done in the Precious Metal Products Laboratory.

Trust and company service providers

118. Although these providers are considered as reporting subjects for AML/CFT purposes by the law, it seems that trusts do not currently exist in Kosovo. However, some company formation services such as acting as the formation agent of legal persons, providing a registered office, business address or accommodation for companies are offered by lawyers, notaries or accountants. However even this legal possibility is very limited in practical terms.

1.5 Overview of Commercial Laws and Mechanisms Governing Legal Persons and Arrangements

119. The following profit making entities can be registered under the Kosovo Law No. 02/L-123 on Business Organization (LBO), and the Law no. 04/L-006 amending and supplementing Law No. 02/L-123 on Business Organization. Business entities that may be registered with the Business Registry in Kosovo are: personal business enterprises, general partnerships, limited partnerships, limited liability companies and joint stock companies.

120. Apart from the above entities, foreign entities may also register a branch office in Kosovo (it must be registered with the Registry as a foreign business organization according to the law). A branch office is not a separate legal entity. Consequently, its rights and obligations pertain to the “parent” company and not to the branch office.

121. Individual Business (“IB”) – is an entity that can be formed and owned by only one natural person and does not have a separate legal status. The owner of such an entity has unlimited personal liability for the debts and obligations of the IB. Although the IB is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner. A personal business enterprise for the purpose of conducting an economic activity may choose to register or not with the Registry.

122. General Partnership (“GP”) – is a partnership formed by two or more natural or legal persons, who undertake business activity for profit pursuant to the partnership agreement. The owners of such entities are jointly and severally liable for the debts and obligations of the GP. Such liability is unlimited. The GP is not a legal person, but may be formed by legal persons who become general partners of the GP. The GP is managed by its general partner(s).

Although the GP is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner.

123. Limited Partnership (“LP”) – is a partnership formed by at least one general partner and at least one limited partner. The LP may be formed by natural persons or business organizations, who can serve either as general or limited partners. Although similar to the GP, the LP has at least one limited partner, whose personal liability is limited to the investment made by him/her into the LP. The limited partner is also limited as to his ability to manage or represent the LP. The LP is managed by its general partner(s). Although the LP is not a legal person, it may contract, hold property and sue or be sued in its own name or in the name of its owner. The Registry has no authority to review a limited partnership agreement for legal or formal sufficiency and/or to refuse to register a limited partnership for any reason that relates to the form, content or terms of the limited partnership agreement.⁴¹

124. Limited Liability Company (“LLC”) – is a legal person formed and owned by one or more natural or legal persons, excluding NGOs. The LLC is legally separate and distinct from its owners. The personal liability of the owners is limited to the capital they invested in the LLC. The LLC is governed by the Shareholders Assembly and the Managing Director (or a Board of Directors). The shares of a limited liability company are distributed only to its founders and the company cannot conduct a public offering of its shares. Previously the number of the shareholders could not exceed 50 while the charter capital of a limited liability company was set at least at EUR 1,000. With the coming into force of Law No 04/L-006 amending Law No 02/L-123 on Business Organisations the minimum capital of EUR 1,000 and the limit on shareholders have been removed. Foreign entities are permitted to own and participate in a limited liability company. Registration in the Registry is mandatory for a LLC to come into existence.

125. Joint Stock Company (“JSC”) – is a legal person owned by its shareholders but is legally separate and distinct from its shareholders. Thus, the shareholders have limited personal liability for the debts and obligations of the JSC. An initial capital of at least €25,000 was required to form a JSC which has now been reduced to €10,000 with the coming into force of Law No 04/L-006 amending Law No 02/L-123 on Business Organisations. The JSC’s shareholders may be natural persons, business organizations and/or other organizations. A joint stock company may have a single shareholder. The shares of a joint stock company may be transferred by the owner(s) without the approval of other shareholders or the company. Shareholders elect the Board of Directors, which manages the JSC. The Board of Directors hires the officers, namely the senior managers of the JSC. A JSC may come into existence only by registering with the Registry.

126. The address of a business organization's registered office and the name and address of its registered agent must be clearly specified in a business organization’s registration documents. Every business organization shall have a continuing and strict obligation to ensure that (i) a registration document is updated within ten (10) calendar days of an event affecting its accuracy – now reduced to three (3) days with the coming into force of Law No 04/L-006 amending Law No 02/L-123 on Business Organisations, and (ii) the person or business organization named as its registered agent is routinely available at the physical premises identified as its registered office.⁴²

127. A foreign business organization, as defined in the Law on Business Organizations, may engage in business activity in Kosovo to the same extent as a local business organization. First it has to register with the Registry as a “foreign business organization” and comply with the requirements of the Law. A foreign business organization is subject to the registration if it,

⁴¹ *Id.* Article 31.

⁴² *Id.* Article 23.

or any agent, employee or representative acting on its behalf, engages in any type of business activity in Kosovo. It shall not be required by Law to register in the Registry if its business activities are exclusively limited to exporting products or services to Kosovo that are imported by a consumer or purchaser established or residing in Kosovo. To establish a branch, an authorized person of the foreign business organization must sign and submit a standard application form, a “foreign business organization memorandum”, containing information and details about the organization, capital structure and purpose of the parent company, structure and purpose of the branch, the registration certificate of the parent company in the jurisdiction of incorporation and the charter of the parent company.

128. In the case of a wholly owned subsidiary in Kosovo, a new company incorporated under the provisions of the country’s legislation must be established.

129. The Business Registry is a central register that maintains the records of all registered companies. The Business Registry is responsible for: registration of new companies; registration of trade names; registration of branch offices of foreign companies; receipt of a copy of the annual financial statements and business reports of LLCs and JSC. Following the coming into force of Law No 04/L-006 amending and supplementing the Law No 02/L-123 on Business Organisations, a copy of the financial statements is also filed with the Ministry of Finance.

130. Currently, the Business Registry contains 122,249 companies in total. Of these, 108,022 are registered IBs, 3,461 GPs, 86 LPs, 9,540 LLCs, 390 JSCs 607 foreign business organizations, 77 agricultural cooperatives, 23 Social Enterprises, 10 Public Enterprises, with 33 companies under the jurisdiction of the Kosovo Privatisation Agency.

1.6 Overview of Strategy to Prevent Money Laundering and Terrorist Financing

AML/CFT Strategies and Priorities

131. At the policy level the most important development is that of an AML/CFT strategy, that was adopted in September 2012. There is a cross-agency Working Group on its implementation. When and if completed, this will have a major impact on Kosovo’s ability to organise and inform itself to better tackle the threats from money laundering, economic crime and terrorist financing. Most particularly the Strategy foresees the establishment of a National Office for Economic Crimes Enforcement, which is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF (see also Section 6.1 of this report).

132. In September 2012 the Kosovo Government also adopted four related strategies for the period 2012-2017 namely, a strategy against organized crime, a strategy against drugs, a strategy for fighting terrorism and a strategy for protection of borders. These four strategies were approved in the meeting of the cabinet of the Government, and were sponsored by the Ministry of Internal Affairs.

133. A strategic plan for inter-institutional cooperation in the fight against organized crime and corruption has been prepared and adopted by the KPC. Its main aim is to improve the cooperation of the prosecutorial system with other institutions, particularly law enforcement authorities (see also Section 6.1 of this report).

The Institutional Framework for Combating Money Laundering and Terrorist Financing

134. There are several institutions that are involved in the fight against economic and financial crime whose responsibilities, duties and legal framework are summarized hereunder.

Joint Rule of Law Co-ordination Board

135. Priorities in the fight against economic crime are regularly discussed at the Joint Rule of Law Co-ordination Board which co-ordinates national policies and initiatives on the between Government Departments. This Board is co-chaired by the Deputy Prime Minister/Minister of Justice H. Kuçi and the EU Special Representative in Kosovo. The Board meets quarterly and minutes are released to participating parties.

Management Board of the Financial Intelligence Unit

136. The Management Board of the Financial Intelligence Unit is established pursuant to the Law on Prevention of Money Laundering and Terrorist Financing. Its mandate is to oversee and ensure independence of FIU. The Board has no executive or enforcement powers with respect to the FIU. The Management Board is comprised of the Minister of Finance who serves as Chair, the Minister of Internal Affairs, the Chief Prosecutor of Kosovo, the Director General of the Kosovo Police, the Director of the Tax Administration, the Director General of the Customs of Kosovo, the Managing Director of the Central Bank of Kosovo (see also Section 2.6 of this report)

Ministry of Finance

137. The Ministry of Finance (MoF) formulates and implements the policy of the Government regarding the financial, tax and customs matters. Its primary functions related to AML/CFT include the overall responsibility for legislation in the AML/CFT area as well as the chairmanship of the Management Board of the Financial Intelligence Unit. The MoF also carries out the licensing and supervision of activities of private auditing companies, auditors and accountants as well as operators of games of chance through the specific division under the Kosovo Tax Administration.

138. The Ministry sponsored the drafting of the new law on prevention of money laundering and financing of terrorism which was adopted by the Kosovo Assembly on 30 September 2010. However, this law has been criticized as flawed by stakeholders, prompting the Ministry to initiate amendments.

Ministry of Justice

139. The Ministry of Justice was established in 2006 pursuant to UNMIK Regulations 2005/53 and 2006/26. Its structure is an amalgamation of structures from other ministries and from UNMIK structures. The above mentioned UNMIK regulations laid down the legal mandate of MoJ. Additionally, a number of regulations and laws promulgated by the Kosovo Assembly before and after the declaration of independence i.e. the one related to the Bar Exam, Notary, Mediation, Legal Aid, Judicial Institute, as well as the law on Courts, Prosecutors, KJC and KPC have expanded the Ministry's legal mandate. The Ministry has different structures that in other countries are organized as separate agencies i.e. Correctional and Probation services, Forensics etc.

140. The MoJ is responsible for the development of policies, the facilitation, preparation and the implementation of the legislation in the field of judiciary, including the prosecutorial system, as well as for the system of free legal professions, penitentiary system and international judicial cooperation. In the meantime, the law explicitly excludes the possibility for the Ministry to be involved in any way on the matters related to the administration of the judiciary and courts. The competence for harmonization and improvement of legislation does not belong to the MoJ but to the Prime Minister's Office (Office for legal assistance services).

141. The Ministry is responsible for providing support services to the Office of the Public Prosecutor of Kosovo to ensure the effective functioning of the prosecutorial system. In the meantime the KJI is responsible to provide training, including professional and vocational training, of prosecutors and judges and organizes examinations for qualification of prosecutors and judges, lawyers (including trial attorneys) and other legal professionals.

142. The MoJ through its Department of international legal cooperation performs its responsibilities respectively on legislation drafting, supporting the judiciary and acting as a coordination authority in international judicial cooperation on criminal matters, including mutual legal assistance (MLA) and extradition. As mentioned above the MoJ is also responsible for licensing and supervision of Notaries.

Financial Intelligence Unit

143. The Financial Intelligence Unit is established pursuant to the Law on Prevention of Money Laundering and Terrorist Financing. The director of FIU has been appointed by the Management Board of the Financial Intelligence Unit and all the roles, responsibilities and competences have been transferred from EULEX to the FIU by the virtue of an agreement signed on 15 July 2012. The FIU does not conduct its own investigations, but rather provides other investigative bodies with intelligence/information to be used to initiate or proceed with investigations (see also Section 2.6 of this report)

Kosovo Police

144. Kosovo Police (KP) is responsible *inter alia* for ensuring public order and safety, fighting organized crime and guaranteeing the integrity of borders. Kosovo Police has established within the Investigation Department a Directorate against Economic Crime and Corruption Investigation (DECCI). DECCI deals with all types of financial crime and includes three units: Anti-corruption Unit, Financial Crimes Unit and Money Laundering Unit (see also Section 2.7 of this report). EULEX Police component is assisting KP through monitoring, mentoring and advising. EULEX Police officers are co-located with their KP counterparts, however EULEX police officers act mainly in a supportive role, with KP being operationally in lead⁴³.

145. The Kosovo Police is overseen by the Ministry of Internal Affairs (MIA). Other structures within the Investigation Department are: the Directorate against Organised Crime, Directorate of Crime Analysis and Directorate of Forensic Services. There are also the Border Department, Forensic laboratory and other supporting structures.

146. The KP Counterterrorism Unit (CTU), formerly in the Investigation Department shed some of its personnel and responsibilities and was renamed the Department of Counterterrorism (DCT). The DCT is also operational on an intelligence-gathering level.

State Prosecutor's Office

147. The State Prosecutor is a constitutional independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts or other acts as specified by law. The State Prosecutor's Office is a unified system empowered to: initiate criminal proceedings, ensure the investigation and prosecution of criminal offences in a timely manner against persons suspected or accused of committing criminal offences; represent charges before the court; exercise regular and extraordinary legal remedies against court decisions; protect the legal rights of victims, witnesses, suspects, accused and convicted

⁴³ www.eulex-kosovo.eu/en/police/

persons; cooperate with police, courts, and other institutions; undertake all other actions specified by law.

148. The Chief State Prosecutor is appointed and dismissed by the President of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven years, without the possibility of reappointment. The Chief State Prosecutor is the head of the State Prosecutor and has overall responsibility for the management of the State Prosecutor and the supervision of all prosecutors.

149. A Special Prosecution Office (SPRK) within the office of State Prosecutor has been established by the Law on the SPRK No. 2008/03-L-052 that governs its territorial jurisdiction, scope, powers, composition and appointment of its Chief Prosecutor. The SPRK has exclusive competence to investigate and prosecute inter alia money laundering, terrorism offences, organized crime (article 5) as well as a subsidiary competence for offences defined in Article 9 of the law (trafficking offences, counterfeiting money, corruption and fraud offences and other serious offences)

Kosovo Customs

150. Kosovo Customs Service is competent for collecting customs duties such as customs duty, value added tax; control of import and export, protection of intellectual property rights, and provision of trade statistics. Besides the collection of revenues, Kosovo Customs carries out measures to prevent the smuggling of drugs and other prohibited goods by the prejudicial effect of economic crime and evasion in revenue.

151. Customs Service of UNMIK was established in August 1999 by the pillar of the EU, to ensure the application of fair and uniform customs regulations and other provisions applicable to goods, which are subject to customs supervision. On 12 December 2008 Customs Service of UNMIK became Kosovo Customs. The new Customs Code was adopted on 11 November 2008 by the Kosovo Assembly.

152. Since 2004, Kosovo Customs has started to implement the system for cross-border transportation of currency and bearer negotiable instruments. Customs services conduct searches for cash transit at the border. Citizens submit a completed standard form defined by Customs providing information and any transferred amount over 10.000 EUR. The data collected is recorded and forwarded to the FIU. Customs are also a subject to the AML/CFT law and cooperate with the FIU and other enforcement authorities.

Kosovo Tax Administration

153. Kosovo Tax Administration (TAK) was established on January 17, 2000 under the guidance and administration of UNMIK. The first TAK director was an international expert employed by a USAID contractor. From October 2001 until February 2003, there were two co-directors in the TAK with USAID and a local representative sharing the role. On February 18, 2003 authority for tax administration was transferred from UNMIK to the Ministry of Finance (former Ministry of Economy and Finance), and the local director assumed the duties of the Director of TAK.

154. TAK has a centralized document processing center through which all returns are processed, although VAT processing is being decentralized to facilitate earlier compliance intervention. A large taxpayer unit has been established to deal with the largest taxpayers in Kosovo.

155. The tax administration cooperates closely with the Customs, Police, Ministry of Trade and Industry, prosecution service, Statistics Entity and the FIU.

156. TAK is responsible for the control and monitoring of games of chance in Kosovo (there is a Division of the Games of Chance within it). It supervises and manages the registration process for organizers of interconnected systems, contracted independent laboratory for testing slot machines and employees of Games of Chance. It also issues and manages the licensing process of operators of Games of Chance in accordance with the law. The TAK is entitled *inter alia* to supervise and control the activities of entities that organize games of chance in Kosovo, to decide the amount of fines in case of infringement, to check and verify the certification of games of chance's equipment, to maintain the register of entities that exercise in this sector, to determine the list of persons who are excluded from the locations of games of chance, to force the closure of entities operating without license and/or to confiscate all the associated devices.

157. In carrying out its duties, the TAK co-operates with other institutions, especially with the Kosovo Police and Customs, prosecution service and the FIU.

Kosovo Intelligence Agency

158. The Kosovo Intelligence Agency (KIA) is established pursuant to the Law on the Kosovo Intelligence Agency (Law no. 03/L-063) as the security and intelligence service in Kosovo. It has a legal personality and has a mandate to operate throughout the territory of Kosovo. Financial means for the operation of KIA are provided from the Kosovo consolidated budget. KIA collects information concerning threats to the security in Kosovo i.e. terrorism, organized crime, trafficking etc. KIA has no executive powers.

159. The Director of KIA is jointly appointed and dismissed by the President and the Prime Minister. The Director can have a deputy Director, and the President and the Prime Minister appoint an Inspector General for KIA who is mandated to conduct inspections of KIA activities⁴⁴.

Central Bank of Kosovo

160. The Central Bank of Kosovo (CBK) is the supervisor and regulator of financial institutions in Kosovo. The Central Bank of Kosovo, a successor to the Banking and Payments Authority of Kosovo (BPAK) since 1999 and to the Central Banking Authority of Kosovo (CBAK) since 2006 was established on June 2008 with the approval of the Law No. 03/L-074 on "Central Bank of Kosovo" by the Kosovo Assembly.

161. The CBK is an independent legal entity with full authority as a legal person according to law in force in Kosovo, and reports to the Kosovo Assembly.

162. The CBK monitors and ensures AML/CFT compliance by banks, micro-financial institutions, non bank financial institutions (including foreign exchange bureaus and money transfer agencies) as well as insurance, securities, private pension funds markets and operators and other non-banking financial activities (see also analysis of Recommendation 23 and Recommendation 29 in this Report).

Kosovo Chamber of Advocates

163. The Kosovo Chamber of Advocates (KCA) is a self-governing organization of Kosovo advocates which acts independently from state bodies. It is responsible for the regulation and control of the legal profession in Kosovo.

⁴⁴ Law on the Kosovo Intelligence Agency (Law No. 03/L-063)
(http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=150&Itemid=56&lang=en)

164. The KCA is responsible to monitor the compliance of the law, KCA Statute and Code of Professional Ethics by lawyers and to impose disciplinary sanctions when applicable. In regulating and controlling the law practice, the KCA may issue normative acts aiming to regulate and organise the law practice. It also defines measures for continuous vocational training for lawyers. The KCA is organised in seven branches.

165. KCA is the only authority for the licensing of advocates in Kosovo as an integral part of the legal system. Before the conflict in 1999, KCA had around 600 members. After the establishment of the UN Mission in Kosovo, it had 106 members and this number increased in 2001, 2004 and 2007 and 2011. In 2011, KCA had 603 licensed advocates who passed the bar exam which is one of the preconditions for becoming KCA member⁴⁵.

166. The KCA is responsible for ensuring compliance with AML/CFT requirements in the legal profession but does not undertake AML/CFT examinations.

Agency for Managing Seized and Confiscated Assets (AMSCA)

167. The Agency for Managing Seized and Confiscated Assets (AMSCA) has been established in June 2010 as a body attached to the Ministry of Justice, following the promulgation of the Law on Management of Sequestrated and Confiscated Assets (Law No. 03/L-141). AMSCA's mandate is purely administrative and involves among other responsibilities: managing, administering, and/or selling seized or confiscated assets. The functional and organizational Structure of the Agency is regulated with special sub-legal acts issued by the Ministry of Justice.

168. The Agency exercises its activity in cooperation with other institutions involved in the process of administration of the seized confiscated assets, such as the courts, prosecutor's office, banks, municipalities as well as the Municipal Cadastral Offices (Cos).

Ministry of Trade and Industry (MTI)

169. The Ministry of Trade and Industry (MTI) is responsible for the establishment and supervision of the Registry of Business Organisations and Trade Names. This function is ensured through the Kosovo Business Registration Agency (KBRA) since 2011 – former Registry Office - that is attached to the MTI in accordance with requirements of law No 02/L-123 on business organisations. The KBRA maintains the Registry, establishes and publishes relevant forms and procedures for operations in the Registry and ensures registrations, publication and free of charge access through internet to the data contained in the Registry in accordance with the law. All records, documents, filings, forms, rules and other materials required by law that are submitted to the Registry or prepared by the KBRA in the Registry are public documents (see also section 4 of this report).

Kosovo Cadastral Agency

170. Kosovo Cadastral Agency (KCA), established by UN-Habitat in 2000, is the government agency under the Ministry of Environment and Spatial Planning. KCA is the highest authority of Cadastre, Geodesy and Cartography in Kosovo whereas Municipal Cadastral Offices (MCAs) operate at the municipal level. KCA and MCAs perform their duties in accordance with the law No 04/L-013 on cadastre and the law No. 2002/5 on the establishment of the immovable property rights register.

⁴⁵ <http://www.oak-ks.org/historiku-78-0-1>

171. Now, KCA is implementing the Information System of Land and Cadastre as well as Registry of Immovable Property Rights in Kosovo.

172. In this context, the Kosovo Cadastral Agency is established in the Support Program for Kosovo Cadastre-SPKC (2000-2003), financially supported by Sweden, Norway and Switzerland. SPKC main goal has been to develop and manage the registration of cadastre and land at the central level⁴⁶.

EULEX - European Rule of Law mission in Kosovo (see also section 1.1)

173. EULEX became fully operational in April 2009. The EU Joint Action of February 2008 and Council Decision of June 2010 and June 2012 provide the legal basis for the Mission. EULEX works within the framework of UN Security Council Resolution 1244.

174. The Mission is divided into two 'divisions'; the 'Executive Division' and the 'Strengthening Division'. The Executive Division investigates, prosecutes and adjudicates sensitive cases using its executive powers. The Strengthening Division monitors, mentors, and advises local counterparts in the police, justice and customs fields. EULEX has a total of around 2,250 international and local staff

175. The mandate and powers of EULEX prosecutors and judges is regulated by the law No. 2008/03-L053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo. According to this law, EULEX prosecutors are competent to investigate and prosecute the crimes that fall under the exclusive competence of the Special Prosecutor's Office of Kosovo (SPRK).

Approach concerning risk

176. Kosovo authorities have not implemented a risk-based approach with regard to any components of the AML/CFT regime.

⁴⁶ <http://mmph.rks-gov.net/?cid=2,54,194>

2 LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

2.1 Criminalization of Money Laundering (R.1)

2.1.1 Description and Analysis

Criminalisation of money laundering – Physical and material elements of the offence (FATF R.1: Essential Criterion 1.1)

177. In the criminal substantive law applicable in the territory of Kosovo, let it be a legislation issued in a UNMIK regulation or the one adopted by the Assembly of Kosovo, the criminal offence of ML has always been provided separately from the body of the respective Criminal Code, being specifically defined within the AML/CFT preventive legislation. ML was first rendered a criminal offence by Art. 10.2 to 10.4 of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, being in force as from March 2004 up to November 2010. This UNMIK Regulation was then replaced by Law No. 03/L-196 (2010) on the Prevention of Money Laundering and Terrorist Financing (hereinafter - AML/CFT Law) which has since been providing for the criminalization of ML in its Art. 32.2 to 32.4 quite similarly, if not identically, to the definition previously provided by the UNMIK Regulation (the main improvement being the addition of two new paragraphs to cover the various factors of concealment/disguise and the ancillary offences applicable to ML).

178. The fact that the offence of ML is defined in the preventive legislation is thus to be acknowledged as a legal tradition in Kosovo, which in itself cannot be considered a deficiency as long as the location of the ML offence does not cause any difficulty for the practitioners in applying other, general provisions of the criminal substantive or procedural legislation to this specific criminal offence. In this respect, the tendency is positive.

179. In the beginning, the UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related Criminal Offences, the forerunner of the current AML/CFT Law, contained a specific set of provisions on ML-related confiscation and provisional measures (Art. 11 to 12) regardless of the existence of similar provisions in the Provisional Criminal Code (UNMIK Regulation 2003/25 hereinafter - Prov.CC) and Provisional Criminal Procedure Code (UNMIK Regulation 2003/26 hereinafter - Prov.CPC) then in force. This duplicative approach was then abandoned in the new AML/CFT Law which no longer provides for confiscation and related temporary measures as these can be found in the respective Codes. (On the other hand, Art. 34 of the AML/CFT Law still provides for the criminal liability of legal persons specifically for the offence of ML even if this issue has since been regulated in a general sense by virtue of Law No. 04/L-030 (2011) on Liability of Legal Persons for Criminal Offences.)

180. Finally, the offence of ML was formally included among the other “ordinary” criminal offences listed in the Specific Part of the new Criminal Code (Law 04/L-082 (2012) being in force from 01 January 2013 hereinafter - CC). As a result, the offence of ML is officially criminalized by Art. 308 within Chapter XXV of the CC (Criminal Offences against the Economy) but this article only provides that “*whoever commits the offence of money laundering shall be punished as set forth in the Law on the Prevention of Money Laundering and Terrorist Financing*” and hence the actual definition of the ML offence as well as the criminal sanctions applicable thereof continue to be regulated exclusively by the AML/CFT Law.

181. While the anti-money laundering criminal legislation of Kosovo had always been significantly in line with the wording of the Vienna and Palermo Conventions, this standard

has been followed even more closely since the adoption of the new AML/CFT Law in which the core ML offence can be found in Art. 32.2 as follows:

“Money Laundering

2. Whoever, knowing or having cause to know that certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime, or whoever, believing that certain property is proceeds of crime based on representations made as part of a covert measure conducted pursuant to Chapter XXIX of the Criminal Procedure Code of Kosovo:

2.1. converts or transfers, or attempts to convert or transfer, the property for the purpose of concealing or disguising the nature, source, location, disposition, movement or ownership of the property;

2.2. converts or transfers, or attempts to convert or transfer, the property for the purpose of assisting any person who is involved in, or purportedly involved in, the commission of the criminal offence that produced the property to evade the legal consequences, or apparent legal consequences, of his or her actions;

2.3. converts or transfers, or attempts to convert or transfer, the property for the purpose of avoiding a reporting obligation under this Law;

2.4. converts or transfers, or attempts to convert or transfer, the property for the purpose of promoting the underlying criminal activity; or

2.5. acquires, possesses or uses, or attempts to acquire, possess or use, the property;

2.6. conceals or disguises the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, or from an act of participation in such activity;

2.7. participates in, associates to commit and aids, abets, facilitates and counsels the commission of any of the actions mentioned in sub-paragraphs 2.1 to 2.6 of this paragraph,

2.8. commits a criminal offence punishable by a term of imprisonment of up to ten (10) years and a fine of up to three (3) times the value of the property which is the subject of the criminal offence.”

182. As opposed to the definition of the offence in UNMIK Regulation 2004/2, the main development was the addition of paragraphs 2.6 and 2.7 above, as a result of which the ML offence now reflects much of the inner structure and terminology of the model ML offence as defined in Art. 6(1) of the Palermo Convention. The main types of laundering activities listed in subparagraphs (a/i) (a/ii) and (b/i) of Art. 6(1) of the Palermo Convention are addressed and adequately covered by the following paragraphs of Art. 32.2 above:

- subparagraph (a/i) is met by paragraphs 2.1 and 2.2
- subparagraph (a/ii) is met by paragraph 2.6
- while subparagraph (b/i) is met by paragraph 2.5.

183. These paragraphs represent a remarkable level of similarity with the wording of the Convention which, at certain points, amounts to full identity particularly as the conducts themselves (i.e. the activities that may establish the ML offence) are concerned. This aspect of the material (physical) elements of the offence thus adequately reflects the international requirements defined by Art. 6(1) of the Palermo Convention as well as Art. 3(1) subpara (b) and (c) of the Vienna Convention.

184. In addition to that, however, the ML offence in Art. 32.2 does contain a number of provisions that apparently go beyond the scope defined by the above mentioned Conventions. Certainly, in general terms, it should not be objectionable if a national legislation exceeds the minimum requirements when implementing international standards as long as these extra provisions have no negative impact on the compliance with the standards themselves.

185. The first of these provisions can be found in paragraph 2.3 which criminalizes the (completed or attempted) conversion or transfer of proceeds of crime specifically “*for the purpose of avoiding a reporting obligation under this Law.*” This is beyond doubt a unique sort of ML offence in which the specific mental element is formulated quite clearly but, on the other hand, the actual implementation of this provision might be more problematic.

186. In the AML/CFT Law, the basic rules on the obligation to report to the FIU can be found in Art. 22 (in relation to banks and financial institutions). The reporting obligation might arise in case of any suspicious acts or transactions (paragraph 1.1) or cash transactions meeting or exceeding the amount of 10.000€ in a single day (paragraph 1.2). Nonetheless, the offence in Art. 32 paragraph 2.3 above does not specify which sort of reporting obligation is relevant in this context. If it refers to the obligation to report suspicious transactions, the offence will necessarily be in overlap with the one in paragraph 2.1 considering that in this case, the conversion or transfer would serve to conceal or disguise the true (that is, suspicious) nature of the property involved in the transaction. If it refers to the avoidance of reporting large-scale cash transactions (e.g. by performing such a money transfer in multiple transactions below the threshold or in a timeframe of more than one day to avoid the daily summary of the transferred amounts) it will also come back to the offence in paragraph 2.1 as such transactions would serve to conceal or disguise the location, disposition or movement but, eventually, also the ill-gotten nature of the respective property. That is, the offence in paragraph 2.3 appears redundant.

187. The second “extra” ML offence is provided by paragraph 2.4 by which the (attempted) conversion or transfer of proceeds of crime is penalized also if it is committed “*for the purpose of promoting the underlying criminal activity.*” In fact, such an act should not be classified as the criminal offence of ML which would normally consist of the legalisation of proceeds derived from an underlying predicate offence that had previously been committed (hence its commission could result in material gain that constitutes proceeds). In other words, the predicate offence must be committed and completed before the related laundering activity can take place. Once the predicate offence has already been committed, it cannot be further “promoted” by a subsequent laundering activity.

188. Notwithstanding that, there might indeed be cases where there is not a single predicate offence but a continuous criminal activity the proceeds of which are to be laundered so that the legalised assets can be used to promote the criminal activity. Even in such cases, however, the main goal of the laundering activity must be the legalization of the proceeds i.e. the concealment or disguise of their ill-gotten origin, nature or source – which, again, leads to the offence in paragraph 2.1.

189. Another country-specific characteristic of the ML offence in Art. 32.2 is the recurrent reference to “covert measures” that is, the explicit extension of the ML offence to laundering activities attempted or committed as a result of covert measures where the assets subject to laundering were not actual proceeds of crime and hence it is only the perpetrator who believes (or has been made to believe) that the assets were obtained from a criminal offence. Reference to such cases can be found in the preliminary part of paragraph 2 (“...*or whoever, believing that certain property is proceeds of crime based on representations made as part of a covert measure conducted pursuant to Chapter XXIX of the Criminal Procedure Code of Kosovo*”) as well as in paragraph 2.2 (“...*for the purpose of assisting any person who is (...)*”)

purportedly involved in the commission of the criminal offence that produced the property to evade the (...) apparent legal consequences of his or her actions”).

190. This issue clearly goes beyond what is required by the relevant AML standards that constitute the scope of the present evaluation and therefore it is not necessarily a subject of assessment. Nonetheless, the evaluation team needs to note that whereas Art. 32.2 is *per definitionem* a provision of criminal substantive law (defining the basis of criminal accountability) the reference to covert measures mixes it with a component of criminal procedural law which may be, from the aspect of legal dogmatics, a rather unfortunate combination. Beyond the fact that it is not made clear exactly which sort of covert measures listed in Chapter XXIX of the Prov.CPC are meant here (only a few of them appear applicable in this context) it is not clear why the offence of ML is the only one where such a direct reference to representations made as part of covert measures can be found while such representations (as a result of which the perpetrator will somehow be deceived by the authorities) may take place in respect to other criminal offences too (reference can be made, for example, to the covert measure of “simulation of a corruption offence” defined in Art. 256.8 Prov.CPC or 87.9 of the new CPC). The evaluation team has the opinion that covert measures should ideally be regulated exclusively in criminal procedural legislation however, as noted above, this issue has no impact on the outcome of the present assessment.

191. It needs to note that the AML/CFT Law provides, for reasons unknown to the evaluation team, two alternative definitions for money laundering. The first is the criminal offence itself in Art. 32.2 that is discussed more in details above but there is another one in Art. 2 (“Definitions”) under paragraph 1.23 as follows:

“1.23. Money laundering- any conduct for the purpose of disguising the origin of money or other property obtained by an offence and shall include:
1.23.1. conversion or any transfer of money or other property derived from criminal activity;
1.23.2. concealment or disguise of the true nature, origin, location, movement, disposition, ownership or rights with respect to money or other property derived from criminal activity.”

192. The evaluation team could not find the actual reason why the lawmakers deemed it necessary to introduce two alternative definitions for “money laundering” in the very same law. It occurs in other jurisdictions that while the offence of ML (as the basis of criminal accountability) is defined in criminal substantive legislation (typically in the CC) one can find another definition for ML in the preventive legislation that serves for the purposes of the preventive (reporting) regime (what is to be reported etc.) and indeed, in many cases the latter definition is more in line with the respective international standards than the offence itself.

193. This is not the case in Kosovo. Here, there are two definitions for ML in the very same piece of preventive legislation – and while it can be assumed that the definition in Art. 2.1.23 serves for the purposes of reporting suspicious transactions, one cannot make sure about that considering, that both this definition and the one in Art. 32.2 are equally labeled as “money laundering” without any clear provision as to which one should be used under which circumstances. Furthermore, the definition in Art. 2.1.23 is rather incomplete or deficient as compared to the ML offence in Art. 32.2 both in terms of conducts and purposive elements. Application of such “duplicate definition” has always been a point of criticism in every country involved and this particularly refers to this case where the scope of the “additional” definition is significantly narrower than that of the ML offence.

Laundered property (FATF R.1: Essential Criterion 1.2, CETS 198 Art. 9(6))

194. Turning to the object of the ML offence, that is, the property that represents proceeds of crime, the AML/CFT Law provides for detailed definitions as regards “proceeds of crime” and “property or funds” in Art. 2 paragraph 1.29 and 1.30 respectively.

195. Pursuant to this definition “proceeds of crime” means “*any property derived directly or indirectly from a predicate criminal offence*” (where “predicate offence” is defined by paragraph 1.28 somewhat redundantly as “*any offence which generates proceeds of crime*”). As for the scope of “property” there is a remarkably broad and detailed definition under paragraphs 1.30 as follows:

“1.30. Property or Funds- assets of every kind, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets, including but not limited to bank credits, traveler’s cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, and any interest, dividends or other income on or value accruing from or generated by such assets;”

196. The definition of “property” appears to be almost fully in line with the standards set by the relevant UN Conventions (Art. 2(d) of the Palermo Convention and Art. 1(q) of the Vienna Convention) with the only, rather formal difference that it does not include the “tangible or intangible” features. This deficiency, however, cannot be considered as a serious shortcoming that would limit the applicability of the definition, considering that reference is given to the very similar terms “corporeal and incorporeal” the scope of which meets (or at least overlaps to a large extent) the scope of “tangible or intangible” and thus the same effect can be achieved. (Certainly, the Conventions make reference both to “corporeal/incorporeal” and “tangible/intangible” features in the respective definitions nonetheless one must not forget the actual meaning of these terms where the notion of “tangible” is practically the same as that of “corporeal”.) Furthermore, the definition in paragraph 1.30 generally refers to “*assets of every kind*” and contains an open-ended list of intangible examples of assets.

197. According to paragraph 1.29 as mentioned above, the term “proceeds of crime” refers to property derived “*from a predicate criminal offence*” in which context the term “criminal offence” must obviously be applied to denote a concrete act rendered punishable by criminal substantive law which was committed at a certain time and place. In other words, there must be a specific criminal offence by which the assets were generated (predicate offence) and the prosecution has to prove the link between this offence and the related ML offence.

198. Notwithstanding this, the issue of predicate criminality is put in a different context by the preliminary paragraph of the ML offence in Art. 32.2 which defines the object of the offence by making reference to the knowledge that “*certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime*”. The second part of this sentence (referring to property that is “in fact” proceeds of crime) would in itself be fully in line with the definitions discussed above but the first part (that refers to property being proceeds of “*some form of criminal activity*”) disrupts the inner logic and harmony of the provision. That is, while the first part of the sentence opens the ML offence towards proceeds derived from any sort of criminal activity without any apparent need to specify exactly which criminal offence is the source of the proceeds (as if it would be enough to prove that the laundered property was derived from “drug crimes” or “trafficking” in general, regardless of whether any specific criminal act can be identified within this “activity” and if yes, when and where this predicate act had been committed) this extensive approach is opposed by the second part of the sentence where the scope of the offence is clearly restricted to “proceeds of crime” which term denotes, by virtue of the above mentioned Art. 2 paragraph 1.28 property derived from a predicate criminal offence.

199. In this context, the reference to “some form of criminal activity” in Art. 32.2 is entirely controversial and misleading. Apparently, this deficiency has already been recognized by the Kosovo authorities too. In the last version of the Draft law on amending and supplementing the AML/CFT Law⁴⁷ this issue is addressed by inserting a new paragraph 1.40 into Art.2 to introduce a definition for “criminal activity” which has not yet been properly defined by the law. According to this draft provision “criminal activity” would mean *„any kind of criminal involvement in the commission of a criminal offence as defined under the Laws of Kosovo”*. Certainly, such an explanation would eliminate the apparent self-contradiction within the preliminary paragraph of Art. 32.2 since both parts of the problematic sentence would eventually refer to the concept of “criminal offence” (and not to the more generic notion of “criminal activity”).

200. On the other hand, introduction of such a definition would obviously lead to redundancy. In other words, the preliminary part of Art.32.2 would cover

- (i) property that is proceeds of some form of [criminal activity]
 - = property that is proceeds of some form of [any kind of criminal involvement in the commission of a criminal offence]
 - = property that is proceeds of any kind of involvement in the commission of a criminal offence
 - = property that is proceeds of a criminal offence
- (ii) property that is in fact [proceeds of crime]
 - = property that is in fact [any property derived directly or indirectly from a predicate criminal offence]
 - = property that is in fact proceeds of a predicate criminal offence
 - = property that is proceeds of a criminal offence

201. As a result, it can be concluded that the object of ML can be any property (as defined by paragraph 1.30) that is derived from the commission of one or more concrete criminal offence, including any sorts of offences that may generate proceeds but not a broader concept of “criminal activity” in terms of indefinite criminality (drug crimes, trafficking crimes etc. in general). No conviction for ML appears therefore possible where it is proved that the property that constitutes the object of ML originated from a predicate offence but it cannot be established precisely which offence (CETS 198 Art. 9 (6)).

202. The definition of proceeds of crime in paragraph 1.29 clearly encompasses both direct and indirect proceeds as follows:

“(…) Property derived indirectly from a predicate criminal offence includes property into which any property directly derived from the predicate criminal offence was later converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the commission of the predicate criminal offence;”

203. No monetary threshold is specified by the definition of “proceeds of crime” and hence any property may be subject of ML offence regardless of its value. The evaluation team was not made aware of any opposite practice in concrete ML cases.

⁴⁷ The Law on Amending and Supplementing the Law No. 03/L-196 on the Prevention of Money Laundering and Prevention of Terrorist Financing (Law No. 04/L-178) was adopted on 11 February 2013. Article 2.1.40 was adopted as quoted here.

Proving property is the proceeds of crime (FATF R.1: Essential Criterion 1.2.1, CETS 198 Art. 9(5))

204. The evaluation team noted an overall uncertainty among practitioners regarding the level of proof of the predicate offence as required to prove that the property had actually been proceeds of crime, that is, whether the commission of a specific predicate offence had to be proven and if yes, whether or not a prior conviction for the predicate crime was necessary. Despite the lawmakers' efforts to settle this issue in positive law, the existing provisions have so far been insufficient to eliminate this controversy.

205. The legal background consists of Art. 32 paragraph 4.1 of the AML/CFT Law which provides that:

“(…) a person may be convicted of the criminal offence of money laundering, even if he or she has not been convicted at any time of the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived”

206. While some of the authorities the evaluation team met (the representatives of the Police and the Ministry of Justice) were confident that the provision quoted above makes it unnecessary to obtain a prior or simultaneous conviction for the predicate offence in order to prove that property is the proceeds of crime, the prosecutors appeared to have a completely opposite opinion. The replies the State Prosecutor's Office gave to the Questionnaire as well as the oral statements the representatives of the Special Prosecutor's Office provided during the onsite visit both contained complaints that the provision in Art. 32 paragraph 4.1 is to a large extent not understandable and therefore it requires additional clarification.

207. At this point, the evaluation team needs to note that this paragraph cannot be considered a novelty in Kosovo law that still needs some introductory explanation so it can be properly implemented by the practitioners. The same provision could already be found in the predecessor legislation with the same wording as Art. 32 paragraph 4.1 of the present AML/CFT Law is literally the same as Art. 10 paragraph 4(a) of the 2004/2 UNMIK Regulation.

208. During and subsequently to the onsite visit, the evaluation team put efforts into exploring what problems the Kosovo prosecutors might actually have about paragraph 4.1 and in which points they would require further clarification or explanation but no definite answers have so far been achieved. In their written replies to the Questionnaire, the State Prosecutor's Office indicated that the main problem they had was that “*the criminal offence of money laundering should be underlying with the predicate criminal offence. As a result there can be no separate conviction only for criminal offence of money laundering.*” As it was further explained onsite, the prosecutors have the firm opinion that ML is always an accessory criminal act that is, it does not exist, and therefore it cannot be prosecuted, as a *sui generis* separate offence. In line with this approach, the prosecutors the evaluation team met expressed that a previous or at least parallel conviction for the predicate offence would likely be a precondition to achieve a conviction of the related ML offence. This is a principal standpoint which appeared to be practically incompatible to the probable meaning of paragraph 4.1 quoted above.

209. In fact, the formulation of paragraph 4.1 does not at all facilitate the comprehension of its actual meaning. It only provides that the perpetrator can be *convicted of the ML offence even if he/she has not been convicted of the related predicate criminal offence but this is not what is required by FATF R.1. While paragraph 4.1 is clearly restricted to the perpetrator of the ML offence (whether he/she can be convicted of ML if not convicted for the predicate crime) FATF R.1.2.1 provides that when proving that property is the proceeds of crime it*

should not be necessary that a person, that is, any person and not only the one who eventually committed the ML offence, be convicted of the predicate offence. For this reason paragraph 4.1 is, from a formalistic point of view, too restrictive to meet FATF R.1.2.1 although the evaluators remain uncertain as to the actual intent the lawmakers might have had with this provision – bearing in mind that some authorities (e.g. the Ministry of Internal Affairs) appeared to interpret it broadly enough to encompass the general concept of FATF R.1.2.1.

210. In any case, there have been no conviction for ML in Kosovo and thus it cannot be known what the standard is the court would actually apply in this context. The lack of relevant information on pending cases prevented the examination team from drawing further conclusions in this field.

The scope of the predicate offence & threshold approach for predicate offences (FATF R.1: Essential Criterion 1.3 and 1.4)

211. The Kosovo legislation applies the principle of the universality of the predicate offences as the ML offence clearly provides for an “all-crime approach” instead of using any further threshold or categorization.

212. Reference was made above to the detailed (though redundant) definitions the AML/CFT Law provides for terms such as “proceeds of crime” and “predicate criminal offence”. As a result of these definitions, it can be concluded that the offence of ML covers proceeds of crime which means any property derived directly or indirectly from a predicate criminal offence where the latter term denotes any offence, which generates proceeds of crime. As a result, any act the Kosovo criminal legislation renders a criminal offence that may generate material gain can be a predicate offence to ML.

213. The Kosovo legislation covers the FATF (and CETS 198) designated categories of offences as indicated in the table below.

Table 5: *Designated categories of offences*

| Designated categories of offences based on the FATF Methodology and CETS 198 | Offence in domestic legislation according to the new CC | Corresponding articles of the old CC |
|---|---|---|
| Participation in an organised criminal group and racketeering; | Article 283 – Participation in or organization of an organized criminal group | Art. 274 |
| Terrorism, including terrorist financing | Article 136 – Commission of the offence of terrorism and the subsequent offences in Art. 137 to 144 including Article 138 – Facilitation of the commission of terrorism | Articles 110 to 113 |
| Trafficking in human beings and migrant smuggling | Art. 171 – Smuggling of persons Art. 170 – Smuggling of migrants Article 172 – Withholding identity papers of victims of slavery or trafficking in persons | Articles 138 to 140 |
| Sexual exploitation, including sexual exploitation of children; | Chapter XX – Criminal offences against sexual integrity (more) | Chapter XIX |

| Designated categories of offences based on the FATF Methodology and CETS 198 | Offence in domestic legislation according to the new CC | Corresponding articles of the old CC |
|---|---|---|
| Illicit trafficking in narcotic drugs and psychotropic substances; | Chapter XXIII – Narcotic drug offences (more) | Articles 229 to 231 |
| Illicit arms trafficking | Article 372 – Unauthorised import, export, supply, transport, production, exchange, brokering or sale of weapons or explosive materials (further offences in Chapter XXX) | Articles 327 and 330 |
| Illicit trafficking in stolen and other goods | Article 345 – Purchase, receipt or concealment of goods obtained through the commission of a criminal offense | Art. 272 |
| Corruption and bribery | Chapter XXXIV – Official corruption and criminal offences against official duty (more) | Chapter XXIX |
| Fraud | Article 335 to 337 – Fraud (various sorts) Article 288 – Fraud in bankruptcy Article 310 – Fraud in trading with securities | Art. 261-262 |
| Counterfeiting currency | Article 302 – Counterfeit money Article 293 – Counterfeit securities and payment instruments Article 294 – Counterfeiting stamps of value | Art. 239 Art. 244 |
| Counterfeiting and piracy of products | Article 295 – Violating patent rights Article 296 – Violation of copyrights | Art. 240-241 |
| Environmental crime | Chapter XXVIII – Criminal offences against the environment, animals, plants and cultural objects (more) | Chapter XXIV |
| Murder, grievous bodily injury | Article 178 to 179 – Murder Article 189 – Grievous bodily injury | Art. 146-147 Art. 154 |
| Kidnapping, illegal restraint and hostage-taking | Article 194 – Kidnapping Article 196 – Unlawful deprivation of liberty Article 175 – Hostage-taking | Art. 159 Art. 162 Art. 143 |
| Robbery or theft; | Article 325 to 327 – Theft Article 328 – Theft in the nature of robbery Article 329 – Robbery | Articles 252 to 256 |
| Smuggling | Article 317 – Smuggling of goods | Art. 273 |
| Extortion | Article 340 – Extortion Article 341 – Blackmail | Art. 267-268 |
| Forgery | Article 398 to 399 – Falsifying documents Article 434 – Falsifying official document and other specific offences (e.g. Art. 314, 376, 403) | Art. 332-335 Art. 348 |
| Piracy | Article 168 – Piracy | Art. 136 |
| Insider trading and market manipulation | Article 311 – Abuse of insider information | (not covered) |

214. Thus, the criminal legislation of Kosovo covers all but one of the 20 categories of predicate offences for ML required under the Glossary to the FATF Recommendations. More

precisely, the Provisional Criminal Code had already covered 19 of these categories entirely, except for the offences of insider trading and market manipulation. Since Art.311 of the new Criminal Code rendered insider trading a *sui generis* criminal offence as from 1 January 2013 now the only exception is the offence of market manipulation which, as it was confirmed by the Ministry of Justice, has not yet been covered by criminal legislation.

Extraterritorially committed predicate offences (FATF R.1: Essential Criterion 1.5 and 1.8, CETS 198 Art. 11)

215. Predicate offences for money laundering extend to conducts that occurred in another jurisdiction by virtue of Art. 32 paragraph 4.3 which provides, that

“...the Courts of Kosovo may have jurisdiction over a criminal offence of money laundering, even if they do not have territorial jurisdiction over the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived, since it has been committed outside Kosovo.”

216. This provision is clear in that proceeds derived from foreign predicates can actually form the basis of a domestic ML offence in Kosovo. Furthermore, the provision in paragraph 4.3 does not appear to require that the foreign predicate offence meet the standard of double criminality (i.e. the same act would also have constituted a predicate offence had it occurred domestically) which feature may further facilitate the extension of the applicability of the ML offence to foreign proceeds. Notwithstanding this, the Kosovo authorities (namely the State Prosecutor’s Office) had the opinion that the offence from which the laundered proceeds were derived has to be a criminal offence stipulated in the other jurisdiction but, on the other hand, it also has to constitute a criminal offence pursuant to the law of Kosovo (hence the dual criminality applies) although this requirement does not seem to be included in paragraph 4.3.

217. Because of opinions like this, the evaluation team could not make sure about the actual admissibility of proceeds of foreign predicates that do not meet the standard of dual criminality. Consequently, it could not be determined whether or not the laundering of assets derived from a conduct that occurred in another jurisdiction, which is not an offence in that other jurisdiction but which would have constituted a predicate offence had it occurred in Kosovo, would constitute a ML offence.

218. The evaluation team needs to note at this point that the notion of extraterritorially committed predicates did not appear clear to most of the practitioners they met. Kosovo authorities seem to consider this issue from the aspect of whether or not Kosovo has jurisdiction over criminal offences committed outside its territory which is not the issue in the context of FATF R.1.5 and 1.8. That is, these standards clearly refer to the domestic laundering of foreign proceeds, in other words, to the domestic punishability of laundering activities which undoubtedly fall under the jurisdiction of the respective country (either because the laundering was committed in its territory or by its nationals) but the assets that have been laundered are proceeds of crimes committed abroad. It is not the question whether Kosovo has jurisdiction over these foreign predicate offences as this is not required by FATF standards (for which reason it is indifferent whether such a predicate offence meets the rules regarding the applicability of criminal laws of Kosovo according to the place of the commission of the criminal offence as provided in Chapter XI. of Prov.CC or Chapter XII. of the new CC). The real question is whether the domestic laundering of proceeds derived from these predicates would constitute a ML offence in Kosovo – and this question is positively answered by paragraph 4.3 above, according to which Kosovo courts can also have jurisdiction over the criminal offence of ML in cases when there is no territorial jurisdiction for predicate offence.

219. In lack of practice, the provisions governing the issue of foreign predicates had not yet been tested before the courts. The evaluation team has no specific information as to the occurrence of cases involving foreign proceeds among those investigated or prosecuted at earlier stages of proceedings. It was made sure, however, that there is absolutely no practice with respect to laundering the proceeds of actions that do not constitute an offence where committed overseas but would constitute a criminal offence in Kosovo (i.e. ML cases related to foreign proceeds where dual criminality is not met).

220. The absence of such information does not allow for establishing if there is, or would be, any proper jurisprudence in Kosovo to provide for the possibility of taking into account, when determining the penalty, final decisions against natural or legal persons taken in another country in relation to offences pursuant to CETS 198 Art. 11 (in any case, there is no specific legislation to address this issue).

Laundering one's own illicit funds (FATF R.1: Essential Criterion 1.6)

221. There is no specific legislation in the AML/CFT Law or elsewhere to provide for the formal coverage of the laundering by the author of the predicate offence although, on the other hand, the examiners are not aware of any principal or fundamental legal objections to that. The language of the ML offence, as it is provided by Art. 32.2 of the AML/CFT Law, appears to encompass predicate offences with no specific distinction or limitation depending on who the author of the predicate offence was. As there is no formal exception made in cases where the perpetrator launders the proceeds of the crime he or she has committed, the Kosovo authorities have a strong opinion that the ML offence embraces, without any further specification, the laundering of own proceeds.

222. This argumentation is supported, even if indirectly, by Art. 32 paragraph 4.2 of the AML/CFT Law which provides that:

“(…) the same person may be prosecuted and convicted in separate proceedings of the criminal offences of money laundering and the predicate criminal offence from which the proceeds of crime in the criminal offence of money laundering were derived”

223. According to this provision, the same person may be prosecuted for money laundering as well as for the related predicate offence which can only take place if laundering of one's own proceeds is covered by the AML criminal legislation. As a consequence, the evaluation team is ready to accept that the criminalization of self-laundering, as it is required by FATF R.1 is covered by the criminal legislation of Kosovo, even if the actual scope of this coverage has not yet been confirmed by relevant case law and jurisprudence.

224. Notwithstanding all these factors, the evaluators had some difficulties in comprehending the actual meaning and purpose of the above quoted paragraph 4.2. While it is clear that the same person can be held criminally responsible for the predicate crime and for the related act of laundering, the structure and wording of the provision may equally mean the following:

(i) in this provision, the law explicitly allows for the prosecution and conviction of the same person for both offences which, however, can only take place in two separate proceedings (here “may” refers to the rest of the sentence)

(ii) the prosecution and conviction of the same person for both offences is taken as provided, the law only allows that it can also take place in two separate proceedings (here “may” refers to the optional bifurcation of the proceedings).

225. The wording of the provision allows for both interpretations because of the reference to “separate proceedings” which unnecessarily brings a confusing “procedural” component

into the definition otherwise based on criminal substantive law. Once the laundering of own proceeds is rendered punishable, it should normally be prosecutable either in the same procedure or, if necessary, also in separate proceedings depending on the characteristics of the case. (It may happen, for example, that the person has already been convicted for the predicate crime when his related laundering activities are detected in which case he can only be prosecuted for ML in a separate procedure.)

Ancillary offences (FATF R.1: Essential Criterion 1.7)

226. Ancillary offences to the criminal offence of ML are covered in a separate paragraph (2.7) within Art. 32.2 of the AML/CFT Law. This paragraph is one of those which had not yet been included in the offence as it was criminalised by the previous AML/CFT legislation (UNMIK Regulation 2004/2) and which were only added to the offence in the present AML/CFT Law:

“2.7. participates in, associates to commit and aids, abets, facilitates and counsels the commission of any of the actions mentioned in sub-paragraphs 2.1 to 2.6 of this paragraph”

227. The ancillary conducts listed in this paragraph are formulated in full accordance with the wording of Art. 6(1)(b/ii) of the Palermo Convention as regards participation, association, aiding-abetting, facilitating and counselling. Certainly, an approach by which the very provisions of an international convention are copied-and-pasted into the domestic legislation would undoubtedly provide for the most accurate implementation of the original, nevertheless it is also a requirement that the lawmakers pay attention as to whether and how such an imported provision would fit into the context of the existing legislation.

228. In this very case, one can find, on the one hand, a set of ancillary offences in the AML/CFT Law that is applicable specifically and exclusively to the offence of ML and, on the other hand, those ancillary offences that are defined in the General Part of the respective Criminal Code with a view to their general applicability to all criminal offences – including the offence of ML as well. The uniform applicability of criminal legislation would normally require that the same concept and terminology for general issues of criminal substantive law (such as, among others, the range and scope of ancillary offences) be used in both the Criminal Code (as *lex generalis*) and other, additional sources of criminal law such as the AML/CFT Law (as *lex specialis*). In case of ancillary offences, however, the concept and terminology applied in (either of) the Criminal Codes and the AML/CFT Law show significant differences in this field which might cause problems of interpretation to the practitioners.

229. Certainly, a more profound analysis shows that the concept of participation, association, aiding-abetting, facilitating and counselling, as referred to in paragraph 2.7 above, are all addressed by (either of) the Criminal Codes despite the apparent differences in terminology. That is, both the Prov. CC and the new CC define the act of “co-perpetration” (as it is rendered punishable by Art. 23 and Art. 33 respectively) that covers the notion of participation, the act of “criminal association” (as in Art. 24 and Art. 34) that covers association and “assistance” (as in Art. 25 and Art. 33) that covers aiding-abetting, facilitating and counselling. Nonetheless, such a positive conclusion can only be drawn as a result of broad interpretation of the competing legal texts (particularly that of the CCs as the AML/CFT Law provides no definitions for the respective terms) but it cannot be excluded that the significant formal differences between the two legal sources may also lead to a more restrictive interpretation.

230. Conspiracy is the only kind of ancillary offences required by the Vienna and Palermo Conventions which is clearly missing, for reasons unknown to the evaluation team, from the

list of ancillary acts as provided by Art. 32 paragraph 2.7 of the AML/CFT Law. Notwithstanding that, the General Part of (either) Criminal Code appears to cover this conduct in general terms, that is, with an applicability to the offence of ML too, by the use of the following provisions (with more or less overlap with the notion of “association” discussed above)

- criminal association (Art. 26 Prov. CC / Art. 34 CC) meaning explicitly or implicitly agreeing with one or more persons to commit or to incite the commission of a criminal offence that is punishable by imprisonment of at least five years and undertaking preparatory acts for the fulfilment of such an agreement
- agreement to commit criminal offence (Art. 35 – only in the new CC) meaning agreeing with one or more other persons to commit a criminal offence and one or more of such persons does any substantial act (i.e. a substantial preparatory step) towards the commission of the criminal offence.

231. Attempt is not specifically referred to within paragraph 2.7 but attempted ML is clearly criminalized in all but one of the preceding paragraphs of Art. 32.2 by which the various conducts of ML are defined (such as “*converts or transfers, or attempts to convert or transfer*” in paragraph 2.1). While this approach is consequently followed throughout paragraphs 2.1 to 2.5 it cannot be understood why the specific reference to attempt is missing in paragraph 2.6 (which was the other paragraph being only added to the offence in the present AML/CFT Law).

232. The general provisions by which attempt is criminalized can be found in the General Part of (either) Criminal Code (namely Art. 20 in the Prov. CC and Art. 28 in the new CC). Both Criminal Codes provide that an attempt to commit a criminal offence threatened with imprisonment of at least 3 years shall generally be punishable while in case of other (less serious) criminal offences attempt can only be punishable if expressly provided for by law. In case of the ML offence in Art. 32.2 of the AML/CFT Law, the punishment for attempt is expressly provided by law (except in paragraph 2.6) nevertheless the offence itself is punishable by a term of imprisonment of up to 10 years and hence an attempted offence would be punishable anyway, even in case of the conducts under paragraph 2.6.

233. In other words, the attempt to commit the conducts in paragraphs 2.1 to 2.5 is rendered punishable right there by the same paragraphs while the attempt to the offence in paragraph 2.6 is only covered by the general provisions of the respective CCs. Does it make any difference? Actually, it did until the end of year 2012 considering that Art. 20.3 of the Prov. CC provided that a person who attempted to commit a criminal offence “*shall be punished more leniently than the perpetrator, in accordance with Article 65(2) of the present Code*” the latter provision being “*no more than three-quarters of the maximum punishment prescribed for the criminal offence*” while in paragraphs 2.1 to 2.5 the attempted ML is threatened with the very same range of punishment as the completed offence. As from 01.01.2013 the sanctioning regimes in the two laws are harmonized considering that Art. 28.3 of the new CC also applies the same range of punishment for the attempter who “*shall be punished as if he or she committed the criminal offence, however, the punishment may be reduced*”.

Statistics and effectiveness

234. The evaluation team encountered serious difficulties when trying to obtain comprehensive and sufficiently detailed statistics in respect of the number of criminal investigations, prosecutions and convictions for ML. No appropriate and reliable statistics have so far been provided by Kosovo authorities and the occasional statistical information the examiners have received to date is substantially contradictory. Different figures were

provided by the State Prosecutor's Office and the Kosovo Judicial Council while further, partial data were also provided by the Ministry of International Affairs.

235. The discrepancies between these statistics are so high that the examiners are not in the position to establish, for example, whether there has ever been a single conviction for ML offence in Kosovo. In this respect, the Judicial Council declared that according to the court statistics there had been no final court decisions in ML cases (either convictions or acquittals) during the last three years and, furthermore, in the same time period, neither was there a single indictment proposal for ML offence.

236. The State Prosecutor's Office, however, claimed they had actually had indictments submitted in ML cases in the time period specified above:

- During 2009, prosecutors solved cases for 5 persons, whereas none was solved with indictment.
- During 2010, prosecutors solved total of 21 cases with 8 indictments filed for 8 persons
- During 2011, prosecutors solved total of 33 cases and 7 indictments were filed.
- During the first nine months of 2012, prosecutors solved 32 cases and filed 7 indictments.

and what is more, reference was made to at least one ML case that ended with a conviction (the so called "Coalition case" the actual details of which however were not provided to the examiners).

237. There is a major discrepancy between the number of ML investigations reported by the KPC and by the police (see section 2.7 of this report)

238. While the examiners maintain their request for comprehensive statistical figures (particularly from the judiciary) they have the opinion, even on basis of such incomplete and unreliable statistics, that there are promising trends in the figures available and so there can be seen some promising signs that the prosecution will soon be able to achieve more than one conviction for ML which should be followed by more and more cases to develop jurisprudence based on case law. Unfortunately, due to the complete lack of information regarding the characteristics of the ML offences that have so far been subject to investigation and prosecution in Kosovo, the examination team was not able to draw conclusions as to the typical predicate offences, the laundering methods, the occurrence of third-party ML and self-laundering or other relevant factors in this field. As a result, the effective applicability of the ML criminalization could not be assessed.

2.1.2 Recommendations and Comments

Criminalisation of money laundering – Physical and material elements of the offence (FATF R.1: Essential Criterion 1.1)

239. The evaluation team has no specific comments regarding the ML offence to the extent it regulates issues within the scope of the Vienna and Palermo Conventions considering its overall compliance with the respective international standards. As regards the further provisions in Art.32 that apparently go beyond the scope defined by the above mentioned Conventions, however, the evaluation team have some concerns.

240. The provisions in paragraphs 2.3 and 2.4 that introduce "extra" ML offences with specific purposive components appear to cause problems once applied in concrete cases because of their mainly redundant character by which they overlap with other offences

provided elsewhere in the same article. For these reasons, the Kosovo authorities should revisit these provisions to reconsider whether and to what extent they might overlap with other provisions.

241. It was also discussed above that the mixture of criminal substantive and procedural law in those parts of the ML offence that refer, either directly or indirectly, to the application of “covert measures” is indefinite and illogical and so might cause problems in practice. Although this is another issue that goes beyond the scope of this evaluation, the examiners reiterate that covert measures should ideally be regulated exclusively in criminal procedural legislation in a manner by which they can easily and effectively be applicable to any criminal offences.

242. As it is discussed more in details above, the duplicate definition of “money laundering” in the very same piece of legislation (Art. 2.1.23 vs. Art. 32.2 of the AML/CFT Law) was found very problematic by the evaluation team. The legal uncertainty the bifurcation of the definitions may cause can only be eliminated by the use of one single definition of ML that is equally applicable for the purposes of criminal jurisdiction and those of the preventive regime. The evaluation team thus strongly recommends deleting Art. 2.1.23 so that there will be only one provision in Art. 32.2 where ML is defined for any of the purposes mentioned above.

Laundered property (FATF R.1: Essential Criterion 1.2, CETS 198 Art. 9(6))

243. The current provisions in the AML/CFT Law that define “property” “proceeds of crime” and “predicate offence” (Art. 2 paragraphs 1.28 to 1.30) are all in significant overlap (at some points they go in circles) which leads to unnecessary redundancy. The system and actual scope of these definitions should urgently be reconsidered. What is more important is to determine whether Art. 32.2 refers to proceeds of an indeterminate “criminal activity” or that of a more precise “criminal offence” before inserting the now draft paragraph 1.40 into Art. 2 otherwise the redundancy will increase without increasing the applicability of the respective provisions.

244. Indeed, it would be perhaps more expedient to delete the reference to “criminal activity” in Art.32.2 so that the rest of the said paragraph will simply refer to proceeds of a criminal offence – all in accordance with the other, respective articles of the AML/CFT Law. Certainly, this is not the only option as the Kosovo lawmakers might choose any other legislative solutions for this unfortunate situation. The minimum requirement is, however, that the same terminology be used to denote the same concept throughout the entire AML/CFT Law and all respective definitions should be harmonized in order to avoid confusion and redundancy.

Proving property is the proceeds of crime (FATF R.1: Essential Criterion 1.2.1 CETS 198 Art. 9(5))

245. The overall uncertainty among practitioners regarding the level of proof of the predicate offence was alarming and thus it requires urgent steps from the side of Kosovo authorities. As a minimum, the Ministry of Finance as the authority responsible for the drafting of the current AML/CFT legislation (and particularly Art. 32 paragraph 4.1 of the AML/CFT Law) or another competent body should issue appropriate guidance as to the interpretation and implementation of the respective provisions. It is a major deficiency of the system that practitioners, particularly the public prosecutors appear to be left without proper guidance in such crucial issues as this one.

246. If explanatory guidance cannot remedy the unfamiliarity with and resistance to the respective provisions (and the underlying concepts in general) the evaluation team

recommends to discuss this issue in the framework of a roundtable exchange among the authorities involved. In this context, it needs to be explored whether and what jurisprudence has been developed by EULEX in this area that can be made of use to Kosovo authorities (considering that EULEX officials did not appear to have any particular problem with the same provisions that had been, on the other hand, part of the respective UNMIK regulation for a considerable time).

The scope of the predicate offence & threshold approach for predicate offences (FATF R.1: Essential Criterion 1.3 and 1.4)

247. The offence of market manipulation should be introduced in the criminal legislation of Kosovo so that the last missing category of designated predicate offences will also be covered.

Extraterritorially committed predicate offences (FATF R.1: Essential Criterion 1.5 and 1.8, CETS 198 Art. 11)

248. The current legislation in Art. 32 paragraph 4.3 of AML/CFT Law should put it beyond doubt whether and to what extent dual criminality is required for the predicate offence that was committed in another jurisdiction. In case there is no need to apply this standard (that is, the ML offence also encompasses assets derived from a conduct that occurred in another jurisdiction, which is not an offence there but which would have constituted a predicate offence had it occurred in Kosovo) then it should equally be specified precisely by the law so as to avoid any future problem of interpretation.

Laundering one's own illicit funds (FATF R.1: Essential Criterion 1.6)

249. It should be provided more expressly by positive law whether the laundering by the author of the predicate offence is covered by the ML offence. In this context, the explanatory provision in Art. 32 paragraph 4.2 does not facilitate comprehending the actual scope of the offence as regards laundering of own proceeds – instead, it makes it more difficult.

250. As a minimum, the lawmakers should decide what is to be defined by paragraph 4.2 that is, whether it allows for the prosecution of self-laundering (that is, holding someone criminally responsible for both offences) or for this prosecution to take place in two separate proceedings or, as another option, whether it does actually provide that the predicate crime and the laundering offence can only be prosecuted separately (which would otherwise make not much sense but this may also be derived from the text of the law). Generally, the reference to “separate proceedings” should be revisited and, if not indispensable, abandoned as the laundering of own proceeds should normally be prosecutable either in the same procedure or, if necessary, also in separate proceedings.

251. If there is, however, a common opinion that laundering of own proceeds is implicitly covered (because it is not excluded) by the ML offence in Art. 32.2 then Kosovo legislators could also consider simply deleting the explanatory provision in paragraph 4.2 – with or without the enhancement of the formal positive coverage of self-laundering in Art. 32.2.

Ancillary offences (FATF R.1: Essential Criterion 1.7)

252. While the ancillary offences to the criminal offence of ML as provided by Art. 32 paragraph 2.7 of the AML/CFT Law are in accordance with the international requirements and indeed they are likely to provide, even though in a different structure and logic, for the same coverage as the respective offences in the General Part of the CC (as it was demonstrated above) the use of two different sets of ancillary offences is far from being an optimal solution.

253. The duplication of terminology and the use of more or less different concepts in this field has more disadvantages than positive results. Kosovo authorities should urgently provide for the harmonic coexistence of the criminal provisions in the CC and those in the *lex specialis* AML/CFT Law in order to assure themselves that the differences in concept and terminology do not cause problems when these two legal sources are to be applied together. Specifically, it must be made clear whether the range of ancillary offences in 2.7 can be considered to provide for the same coverage as the respective generic provisions of the CC (as indicated) and if yes, why it is necessary to use a different terminology.

254. Ideally, the same terms and concepts should be used in any sources of criminal substantive law. Furthermore, once the ancillary offences related to ML are supposed to have the same coverage as those in the General Part of the CC it is redundant to reiterate them, even if under different terms, in the *lex specialis* particularly as ML is now formally in the new CC among the other ordinary criminal offences (Art. 308). If however any of the ancillary offences in 2.7 goes beyond the scope of the CC it requires a proper definition.

2.1.3 Rating for Recommendation 1

| | Rating | Summary of factors underlying rating |
|-----|--------|---|
| R.1 | PC | <ul style="list-style-type: none"> • The offence of market manipulation is not covered among predicate offences to ML • Confusion and redundancy in definitions related to proceeds of crime as well as in terms of whether proceeds of criminal activity in general can be subject of ML • Inadequate regulation of the required level of proof for the predicate crime in Art. 32 paragraph 4.1 causing uncertainty to and unfamiliarity with the respective provisions among practitioners • Unclear and inadequate formulation of the provision that defines the coverage of self-laundering (Art. 32 para 4.2) • Harmonization required between AML/CFT Law and CC in terms of concept and terminology as regards ancillary offences • Effectiveness of the application of the ML offence could not be assessed due to conflicting statistics provided to the assessment team and the complete lack of additional information regarding pending cases. |

2.2 Liability for ML offence (R.2)

2.2.1 Description and Analysis

Liability of Natural Persons (FATF R.2: Essential Criterion 2.1, CETS 198 Art. 9(3)) & the Mental Element of the ML Offence (FATF R.2: Essential Criterion 2.2)

255. The ML offence does extend to natural persons who knowingly engage in ML activity and even goes beyond this limit. The knowledge element for Art.32.2 of the AML/CFT Law is the perpetrator’s knowledge (“*whoever knowing*”) or the reasonable ground to know (“*having cause to know*”) that the property subject to laundering constitutes proceeds of an offence.

256. The latter element goes beyond the knowledge standard, making the ML offence applicable to anyone in case of whom the direct knowledge of guilt cannot be proven but it can nevertheless be demonstrated that they had a factual cause by which they should have known that the property was proceeds of crime. That is, the minimum requirement is lowered to the level of “should have known” standard (“ought to have assumed” in CETS 198) which approach obviously facilitates the evidence of the mental element in ML cases and hence it enlarges the scope in which Art.32.2 can effectively be applied in practice.

257. In this respect, Kosovo provisions appear to exceed the requirements of the Vienna and Palermo Conventions. On the other hand, the practitioners will have to pay attention to the fact that the rather common-law style “should have known” standard does not automatically fit into the civil-law shaped system of criminal liability traditionally based on the concept of intent and negligence (see Art. 17.1 of the new CC or Art.11.1 Prov. CC which provide that persons are criminally liable if they commit a criminal offence intentionally or negligently). The “should have known” standard obviously goes beyond the scope of direct or eventual intent (see Art. 21 CC or Art. 15 Prov. CC) furthermore it can be considered comparable, at least theoretically, to unconscious negligence as defined by Art. 23.3 CC (Art. 16.3 Prov. CC)

“A person acts with unconscious negligence when he or she is unaware that a prohibited consequence can occur as a result of his or her act or omission, although under the circumstances and according to his or her personal characteristics he or she should or could have been aware of such a possibility.”

258. However, Art. 17.2 of the new CC (Art. 11.3 Prov. CC) provides that criminal liability for negligent commission of a criminal offence applies only if it is explicitly provided for by law (e.g. in case of negligent murder Art. 181 CC, transmitting contagious diseases by negligence Art. 255.3 or 258.2 CC, causing bankruptcy by negligence Art. 286.3 CC etc.). In these cases, the law specifically refers to the respective negligent offences (typically in a separate paragraph) designating them by the use of the exact legal term “by negligence” or “negligent”. In case of the ML offence, however, the lawmakers chose to apply a different concept and terminology to determine the required level of the mental element (“to have cause to know” i.e. should have known standard) which does not appear automatically interchangeable or replaceable with the respective CC term “(unconscious) negligence” even if these concepts are approximate and comparable to each other.

259. Now one can find it confusing that, from a formal aspect, there is no explicit coverage of a *per definitionem* negligent ML offence in Art. 32.2 (one that would be in line with Art. 17.2 CC) while ML committed by kind of a *quasi* unconscious negligence (“should have known” standard) is one of the very conducts that make part of the core ML offence. This discrepancy in terminology obviously originates in the fact that AML criminal legislation in Kosovo has always been (and is currently) developing separately from the Criminal Codes of any time, nevertheless the evaluators do not consider this issue serious enough to impede the effective applicability of the ML offence (at least the evaluation team is not aware of any negative experience in this respect).

260. The requirement in FATF R.2.2. is explicitly addressed, and also met, by Art.22 of the new CC according to which “*knowledge, intention, negligence or purpose required as an element of a criminal offence may be inferred from factual circumstances*”.

261. The provision quoted above is an innovation in the new CC being in force since 1 January 2013. Until then, there was no similar provision in the predecessor legislation Prov. CC and therefore the admissibility of inferences from circumstantial evidence could only be made possible by provisions of criminal procedural law that allowed for the free evaluation of evidence (Art. 152.2 Prov. CPC providing that the court, according to its own assessment

“may admit and consider any admissible evidence that it deems is relevant and has probative value (...) and shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility” which issue is roughly covered now by Art. 361.2 CPC).

Liability of Legal Persons (FATF R.2: Essential Criterion 2.3)

262. Criminal liability of legal persons for the offence of ML is specifically provided for by the current AML/CFT Law as follows:

**“Article 34
Criminal Liability of Legal Persons**

1. If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that:

- 1.1. the offence was committed without his or her consent or knowledge; and
- 1.2. the person took reasonable steps to prevent the commission of the offence as ought to have been exercised by that person having regard to the nature of his or her functions in that capacity.”

263. As it can be seen, this provision does not directly provide for the criminal accountability of legal persons since it takes it as a fact that legal persons may commit a ML offence. Instead, it provides for the collective responsibility of natural persons participating in the direction and management of the legal entity for their collective decision as a result of which the respective criminal offence was committed (further aspects of this provision will be discussed below).

264. The broader legal background, by which criminal liability for ML is extended to legal persons in the law of Kosovo, consists of the following pieces of legislation:

- the Law No. 04/L-030 (2011) on the Criminal Liability of Legal Persons for Criminal Offences (hereinafter CLLP Law)
- the new CC (particularly Art. 40 on the criminal liability of legal persons)

265. Both the CLLP Law and the new CC entered into force on 1 January 2013 (even if the former had been adopted since 31 August 2011) which means that the legal framework by which legal entities can be prosecuted and convicted for criminal offences has just been established (the Prov.CC did not contain any specific provision in this respect). Considering that, up to this date, there was no actual legislation in force to provide for the criminal responsibility of legal persons, it is evident that the above-quoted Art. 34 of the AML/CFT Law, which refers to the criminal liability of legal persons, can also be considered as de facto applicable since 1 January 2013 (even if it had formally been in force even before).

266. Pursuant to Art. 3 CLLP Law the provisions of the CC and CPC of Kosovo are generally applicable against legal persons who may take liability for criminal offences provided for in Special Part of the CC and for other criminal offences, provided the conditions for the criminal liability of legal persons are met. Since the offence of ML is, at least formally, provided for in the new CC (Art. 308) there is nothing against the applicability of the CLLP Law thereto.

267. Corporate criminal liability extends to both national and foreign legal persons for criminal offences committed either within or outside the territory of Kosovo (as to foreign entities, responsibility for offences committed abroad applies as far as the offence damages

Kosovo or its citizens or causes damage to national legal persons). Administrative and local governance bodies and foreign governance organizations acting in Kosovo shall not be liable for criminal offences.

268. The grounds and limits of corporate criminal liability are defined by Art. 5 of the CLLP Law which article is, interestingly, in all details identical to Art. 40 of the new CC. (The evaluation team need to note at this point that the word-by-word reiteration of the very same article was perhaps an unnecessary redundancy particularly if taking into account Art. 119 CC by which a proper connection is established between the two laws.)

**“Article 5
Grounds and limit of liability of legal persons**

1. A legal person is liable for the criminal offence of the responsible person, who has committed a criminal offence, acting on behalf of the legal person within his or her authorizations, with purpose to gain benefit or has caused damages for that legal person.

The liability of legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person.

2. Under the conditions provided for in paragraph 1. of this Article, the legal person shall be liable for criminal offences also in cases if the responsible person, who has committed the criminal offence, was not sentenced for that criminal offence.

3. The liability of the legal person is based on the culpability of the responsible person.

4. The subjective element of the criminal offence, which exists only for the responsible person, shall be evaluated in relation with the legal person, if the basis for the liability provided for in paragraph 1. of this Article, was fulfilled.”

269. According to Art. 5.1 the basis of corporate liability is the liability of the “responsible person”. In the law of Kosovo this term denotes a natural person within the legal person, who is entrusted to perform certain tasks, or who is authorized to act on behalf of the legal person and there exists high probability that he/she is authorized to act on behalf of the legal person (the latter definition can equally be found, in a practically identical wording, in Art. 2 paragraph 1.1 of CLLP Law and Art. 120.5 CC). At this point, the evaluators note that the cumulative formulation of this paragraph (the use of "and" before the last phrase) implies that the last two conditions must be met at the same time, that is, the law appears to require high probability for the authorization in case of a person who has factually been authorized already. Considering that this additional cumulative condition might clearly limit the scope of application of both laws, the wording of this paragraph should urgently be revisited.

270. Paragraphs 2 and 3 provide for further details as to the scope of the criminal responsibility. Paragraph 3 specifies that the legal person’s liability is based on the culpability of the responsible natural person, in which context the term “culpability” necessarily means that the responsible person must be found guilty in the respective criminal offence as a precondition so that the legal person can be held liable for the same offence. This is a clear rule being in accordance (if not in overlap) with the provision in paragraph 1 quoted above.

271. Notwithstanding all this, paragraph 2 appears to run counter to what is provided in the neighboring paragraphs 1 and 3 in specifying that a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that. This rule is in an explicit contradiction with those discussed above and it goes to such an extent that already impedes the applicability of the entire article. The formulation of paragraph 2 is unlikely to be a result of mistranslation (considering that the very same wording can be found in two different pieces of legislation) but even if it was done

on purpose, the evaluation team have so far failed to comprehend the actual goal the lawmakers had intended to achieve.

272. It could be a possible solution if “was not sentenced for that” was restricted to cases where the responsible natural person has actually committed the criminal offence nevertheless he cannot be convicted for it because of his death or absconding. In such cases, the lack of sentence would not equal to the lack of culpability and hence paragraphs 2 could be applicable together with the other two paragraphs. However, if the expression “not being sentenced for a criminal offence” includes cases where the court tries the responsible natural person but finally grants him a judgment of acquittal (for any reason provided by Art. 364.1 of the new CPC) it would definitely affect the question of culpability and hence paragraph 2 would not be applicable in its current context.

273. It is a further question whether and how the above-quoted Art. 34 of the AML/CFT Law can be applied together with the generic rules of the new CC and particularly the CLLP Law. That is, while the CC and CLLP Law provide that a legal person is liable for the criminal offence of the responsible person (where the criminal liability of the legal person depends on the culpability of the responsible natural person) the AML/CFT Law provides that the criminal liability of a legal person brings about the liability of all its directors and those involved in its management (unless they can be exempted pursuant to subparagraphs 1.1 or 1.2). In other words, the *quasi* collective liability of all directors and managers for the offence of ML committed by the respective legal entity requires that the offence be committed by the legal person (see Art. 34 of the AML/CFT Law) which however can only take place on the condition that one or more responsible person of the same entity (one or more of the directors and managers mentioned above) can be found personally liable, as a natural person, for the same offence (see Art. 5.1 and 5.3 of the CLLP Law – and the more favorable interpretation of Art. 5.2). While these provisions are not necessarily opposite to each other, they obviously show two different approaches in connecting the legal entities to the respective natural persons being responsible for the acts committed by or on behalf of the legal entity which may raise some issues of interpretation in concrete cases, particularly as the different regime only applies to the offence of ML and not to the related predicate offences.

274. As for the compliance with Art.10 paragraphs (1) and (2) of CETS 198 it can be established that Art.5.1 of the CLLP Law covers the offence defined in Art. 10(1) but not that one defined in Art. 10(2). The definition in Art. 10(1) requires that legal persons can be held liable for ML offences committed for their benefit by a natural person who has a leading position within the legal person which is roughly covered by the offence committed by the responsible natural person pursuant to Art. 5.1 of CLLP Law. The definition in Art. 10(2) however refers to the liability of legal persons in cases where the lack of supervision or control by the same natural person (i.e. the one who meets the conditions for “responsible person” in the CLLP Law) has made possible the commission of the ML offence for the benefit of that legal person “by a natural person under its authority” that is, the ML offence itself was not committed by the “responsible person” but as a result of his omission – which construction clearly goes beyond the scope of Art. 5 of the CLLP Law as it is based on the criminal responsibility of the responsible natural person.

Possible parallel civil or administrative proceedings (FATF R.2: Essential Criterion 2.4)

275. Neither the CC nor the CLLP Law does contain any clear provision in relation to other (civil or administrative) forms of liability applicable to legal entities and hence it could not yet be established whether and to what extent the criminal liability of legal persons would preclude any possible parallel civil or administrative proceedings or sanctions – even if it not unlikely that other sources of administrative legislation may contain provisions relevant in this field.

276. Furthermore, the evaluation team has doubts about the general understanding of this issue considering the substantially different answers they received in this respect from various authorities. While the State Prosecutor's Office expressed it was possible to conduct two or more separate proceedings against the same legal person at the same time (e.g. an administrative and a criminal procedure simultaneously) while the Ministry of Internal Affairs had the opinion that in such cases, the other civil or administrative procedures may not take place until culpability or innocence of the legal person is announced in a final judgment. The assessment team was not provided with any further information as to what other civil or administrative procedures could be applied in this context and what sanctions could be imposed.

Sanctions for Money Laundering (FATF R.2: Essential Criterion 2.5)

277. The criminal sanctions applicable to natural persons for the ML offence, as provided by Art.32 paragraph 2.8 of the AML/CFT Law, are the following:

- a term of imprisonment of up to 10 years
- and a fine of up to three times the value of the property that is the subject of the ML offence.

278. Art. 46.1 of the new CC provides that the punishment of a fine may not be less than 100 € or more than 25,000 € however, in the case of criminal offences related, among others, to terrorism, organized crime or criminal offences committed to obtain a material benefit, the maximum amount of fine goes up to 500,000 € (the range was 50 € to 25,000 € and 500,000 € respectively in Art. 39.1 Prov. CC that was in force until the end of 2012). Obviously, the latter category also refers to ML offences related to predicate offences that meet these conditions. If the convicted person remains unwilling or unable to pay the fine, the court may replace the punishment of fine with the punishment of imprisonment (see Art.46.3 CC or 39.3 Prov. CC).

279. This range of punishment is generally applicable to any forms of ML offences as the law does not specify any aggravated cases of ML that would be threatened with more severe sanctions. On the other hand, the sanctions are doubtlessly dissuasive (also in the context of punishments available for other serious economic crimes) and their range is wide enough to allow sufficient room for the court to deliberate on the punishment that is proportionate to the respective offence.

280. Pursuant to Art.8.2 of the CLLP Law, the types of punishments applicable to legal persons are the fine and the termination of work. Calculation of the amount of the fine applicable to legal entities for a specific criminal offence is based on the respective range of punishment provided by CC for the same offence. The rules for the conversion of punishments imposable on natural persons to those applicable to legal entities can be found in Art.9 of the CLLP Law. Since the offence of ML is threatened with 10 years of punishment, it is addressed by Art.9 paragraph 2.3 which provides that for criminal offences, where the punishment provided for is by imprisonment from 8 to 20 years, the court may impose a punishment by fine from 15.000 € to 35.000 €. Compared to the fines applicable to natural persons for the same offence, this limit is extremely low even if taking account that fine may also be imposed on the basis of the value of the property that has been laundered (up to three times of this value). It remained unclear to the examination team whether these two sorts of fines can be applied cumulatively.

281. Termination of work may be imposed if a legal person (except for units of self-governance and political parties) was established for the purpose of committing criminal offences or has used its activities mainly for the commission of criminal offences (Art.11 of the CLLP Law). This sanction is executed through the liquidation of the legal entity.

2.2.2 Recommendations and Comments

Liability of Natural Persons (FATF R.2: Essential Criterion 2.1, CETS 198 Art. 9(3)) & the Mental Element of the ML Offence (FATF R.2: Essential Criterion 2.2)

282. Similarly to the issue of ancillary offences, the ML offence applies a language and concept that is, on the one hand, in line with the respective international standards (even goes beyond them) but, on the other hand, it does not fit easily into the context of the Criminal Code because of the different approach and terminology used in the two pieces of legislation. The knowledge element for Art.32.2 of the AML/CFT Law (knowledge or reasonable ground to know) can be converted, with more or less broad interpretation, to the language of the CC based on the concept of various levels of intent and negligence but the evaluation team would consider it more expedient if the same terms and concepts were applied throughout all sources of criminal substantive law, which particularly refers to such basic elements of criminal responsibility as these components of *mens rea*.

283. Kosovo authorities should therefore reconsider whether and how the knowledge element in the ML offence meets the respective standards set by the CC and provide for the mutual interchangeability of these terms either by a legislative solution (e.g. adding another explanatory provision to paragraph 4) or by developing jurisprudence in this field. On the other hand, it would be more expedient if the lawmakers adapted the current wording of Art. 32.2 to the respective terminology of the Criminal Code (including the explicit coverage of the negligent ML once the term “to have cause to know” does actually cover, as it is assumed by the evaluation team, a negligent form of the offence).

Liability of Legal Persons (FATF R.2: Essential Criterion 2.3)

284. Kosovo authorities should reconsider whether it is actually necessary to use literally the same provisions in Art. 5 of the CLLP Law and Art. 40 of the new CC when defining the grounds and limits of corporate criminal liability, with a particular attention to Art. 119 CC that establishes an otherwise appropriate connection between the two laws. One of these articles should eventually be abandoned (it seems more reasonable to keep the one in the CLLP Law and delete the other one from the CC).

285. In this context, the most urgent problem is the contradiction between paragraphs 1 and 3 on the one hand and paragraph 2 on the other, as it was discussed more in details in the descriptive part. As it was demonstrated there, paragraph 2 appears to contradict the neighboring paragraphs 1 and 3 in specifying that a legal person shall also be liable for the criminal offence if the respective person, who has committed the criminal offence, was not sentenced for that. The evaluation team tried to find possible solutions by which the coexistence of the apparently contradictory provisions could be explained but it should rather be up to Kosovo authorities to decide, first, what is the goal they actually intended to achieve by this legislation and second, what changes should be carried out so that the language of the law actually represent these goals. Whichever solution is chosen, either paragraphs 1 and 3 or paragraph 2 has to be modified accordingly.

286. The cumulative wording in the definition of "responsible person" (Art. 2.1.1 CLLP Law and Art. 120.5 CC) should urgently be revisited and remedied. The current text implies to require the last two conditions being met at the same time, and even if the examiners believe that this formulation does not reflect the actual will of the lawmakers, the definition, in its present form, might clearly limit the scope of application of both laws. If these conditions are actually meant to be alternatives then this feature should be expressed by using the term "or" instead of "and".

287. Once the legislators created harmony within the context of Art. 5 CLLP (or Art. 40 CC) they have to find harmony between the general legislation on corporate criminal liability and the respective specific rules in Art. 34 of the AML/CFT Law. As it was demonstrated above, these provisions are not necessarily opposite to each other but they show two different approaches in connecting the legal entities to the respective natural persons being responsible for the acts committed by or on behalf of the legal entity and such discrepancies may eventually raise issues of interpretation in concrete cases, particularly if it comes to legal entities held responsible both for the offence of ML and other criminal offences (not necessarily the predicates) in the same proceedings.

288. Kosovo authorities should also find a legislative solution to provide for the coverage of Art.10 paragraph (2) of CETS 198 as regards the liability of legal persons in cases where the lack of supervision or control by the responsible person made possible the commission of the ML offence for the benefit of that legal person but by another natural person under its authority (that is, the ML offence was actually committed as a result of the responsible person's omission).

Possible parallel civil or administrative proceedings (FATF R.2: Essential Criterion 2.4)

289. Due to the complete lack of relevant information, the examination team was prevented from assessing whether and what other civil or administrative procedures are applicable to legal entities as well as from forming an opinion and making adequate recommendations in this field.

Sanctions for Money Laundering (FATF R.2 Essential Criterion 2.5)

290. While the criminal sanctions applicable to natural persons for the ML offence were found dissuasive and proportionate, the same cannot be said about the punishments available to legal persons. A fine ranging from 15.000 € to 35.000 € cannot be considered proportionate and dissuasive and thus cannot be effective either. In order to solve this problem, Kosovo authorities should either reconsider the rates for converting imprisonment punishments to fines applicable to legal persons or the introduction of additional factors by which the converted amounts can be further increased or multiplied under certain circumstances.

2.2.3 Rating for Recommendation 2

| | Rating | Summary of factors underlying rating |
|------------|---------------|--|
| R.2 | PC | <ul style="list-style-type: none"> • serious uncertainty in legislation as regards the basics of corporate criminal liability (whether or not it depends on the culpability of the natural person) • ineffectively mild sanctioning provisions of legal entities for criminal offences (low range of punishment) • harmonization required between AML/CFT Law and CC or CLLP Law in terms of concept and terminology as regards <ul style="list-style-type: none"> ○ the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC) ○ the basics of corporate criminal responsibility and that of the related natural persons (Art.34 AML/CFT Law vs Art.40 CC / Art.5 CLLP Law) |

2.3 Criminalization of Terrorist Financing (SR.II)

2.3.1 Description and Analysis

Criminalisation of financing of terrorism (FATF SR.II: Essential Criterion II.1)

Financing of a terrorist act

291. Financing of terrorism has traditionally been criminalised in Kosovo law in the framework of the criminal offence of facilitation of the commission of terrorism. Within the Prov. CC that was in force until the end of year 2012 it was Art. 112 that provided for this offence as follows:

**“Article 112
Facilitation of the commission of terrorism**

(1) Whoever provides, solicits, collects or conceals funds or other material resources used, in whole or in part, for the purpose of committing terrorism shall be punished by imprisonment of five to fifteen years.

(2) Whoever commits the offence provided for in paragraph 1 of the present article by negligence shall be punished by imprisonment of three to ten years.”

292. The next two paragraphs (3 to 4) referred to other aspects by which terrorism can be facilitated, that is, recruitment as well as provision or receipt of instruction or training for the purpose of terrorism, which equally fell out of the scope of FT. There was then paragraph (5) which covered, among others, the dispatching or transfer of “other material resources” into or out of Kosovo for the purpose of committing terrorism:

“(5) Whoever, for the purpose of committing terrorism, dispatches or transfers armed groups, equipment, weapons or other material resources into or out of Kosovo shall be punished by imprisonment of ten to fifteen years.”

which was, in this very respect, in an apparent overlap with the offence defined in paragraph (1) above. While all these offences covered conducts which only extended to the financing of a terrorist act (“for the purposes of committing terrorism”) there was a separate provision under Art. 113.2 to provide for the financing of a terrorist organization (group) as follows:

**“Article 113
Organization, support and participation in terrorist groups**

(2) Whoever provides support to a terrorist group shall be punished by imprisonment of three to ten years.

where Art. 109.6 defined that the term “support to a terrorist group” included (among others) “providing or collecting funds or other material resources with the intent, knowledge or reasonable grounds for belief that they will be used, in whole or in part, by a terrorist group”.

293. In the drafting process of the new CC this complex structure was amended with an apparent intent to gather and separate the FT-related conducts within the area of criminal offences of terrorist character. As a result, the offence of facilitation of the commission of terrorism, now provided in Art.138 of the new CC, encompasses both the financing of a terrorist act and that of a terrorist organization:

**“Article 138
Facilitation of the commission of terrorism**

1. Whoever by any means directly or indirectly provides, solicits, collects or conceals funds or material resources with the intent, knowledge or reasonable grounds for belief that they will be used in whole or in part, for or by a terrorist group or for the commission of a terrorist act shall be punished by imprisonment of five (5) to fifteen (15) years.

2. Whoever assists the perpetrator or his or her accomplice, after the commission of an act of terrorism, by providing funds or other material resources to such person or persons shall be punished by imprisonment of three (3) to ten (10) years.”

294. The new legislation no longer provides for the negligent FT offence (as it was in Art. 112.2 Prov. CC) which is quite reasonable in case of a criminal offence that is based on a purposive element. Recruitment and training are now criminalized by separate offences (Art. 139-140) and the offence of organization and participation in a terrorist group (Art. 143) no longer includes the financing component (as it makes part of Art. 138.1 now). The aggravated offence that was defined in Art.112.5 Prov. CC can now be found in the structure of a different criminal offence called preparation of terrorist offences or criminal offences against the order and security of Kosovo (Art. 144) where Art. 4 provides that

“Whoever, for the purpose of committing one or more acts of terrorist offenses in this Chapter, dispatches or transfers armed groups, equipment, or other material resources into or out of Kosovo shall be punished by imprisonment of ten (10) to twenty (20) years.”

in which definition of “material resources” in paragraph (2) includes, but is not limited to, a range of resources including “financial services” which brings this offence, again, to some apparent overlap with the proper FT offence in Art. 138.1 as quoted above.

295. In any case, the new criminal legislation provides for a structure and wording that is more in line with the respective international standards set by Art. 2 of the International Convention for the Suppression of the Financing of Terrorism (hereinafter: FT Convention) and FATF Special Recommendation II. Considering, that the evaluation team was not made aware of any actual implementation of the former CFT criminal legislation in any concrete criminal cases (there had been no investigations or prosecutions for any FT-related offences) it appears unnecessary to enter into any profound analysis of the old Prov.CC provisions that were applicable for the criminalization of FT until the end of 2012 instead of which the assessment will rather focus on the respective provisions of the new CC.

296. In the structure of the new CC the following offences provide for, to any extent, the actual financing of any aspects of terrorism:

- Art. 138 Facilitation of the commission of terrorism (financing of a terrorist act or a terrorist organization, see as quoted above)
- Art. 144.4 Preparation of terrorist offences or criminal offences against the constitutional order and security of Kosovo (possible coverage of financing of a terrorist act, see quoted above)
- Art. 137.3 Assistance in the commission of terrorism (this paragraph is, for unknown reasons, almost literally identical to the provision in Art. 138.2 as quoted above)
- Art. 139 Recruitment for terrorism (expressly refers also to those who recruit financiers of terrorism).

297. The financing of a terrorist act, as required by Criterion II.1(a)i is expressly criminalised under Art. 138.1 CC (“*for the commission of a terrorist act*”). In this respect, the term “terrorist act” is given a significantly comprehensive definition in Art. 135.1 as follows:

“Terrorism, act of terrorism or terrorist offence - the commission of one or more of the following criminal offences with an intent to seriously intimidate a population, to unduly compel a public entity, government or international organization to do or to abstain from doing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of Kosovo, another State or an international organization⁴⁸

- 1.1. murder or aggravated murder (Art. 178-179)
- 1.2. inciting or assisting suicide (Art. 183)
- 1.3. assault, including assault with light and grievous bodily injury (Art. 187-189)
- 1.4. sexual offences (Art. 230-232, 235-239 or 241)
- 1.5. hostage-taking, kidnapping or unlawful deprivation of l (Art. 175, 194 or 196)
- 1.6. pollution of drinking water or food products; offences related to the pollution or destruction of the environment (Art. 270 and Chapter XXVII)
- 1.7. causing general danger, arson or reckless burning or exploding (Art. 334 or 365)
- 1.8. destroying, damaging or removing public installations or endangering public traffic (Art. 129, 366, 378 or 380)
- 1.9. unauthorized supply, transport, production, exchange or sale of weapons, explosives or nuclear, biological or chemical weapons (Art. 176, 369 or 372-377)
- 1.10. unauthorized acquisition, ownership, control, possession or use of weapons, explosives, or nuclear, biological or chemical weapons, or research into or development of biological or chemical weapons (same references as above for 1.9)
- 1.11. endangering internationally protected persons (Art. 173)
- 1.12. endangering United Nations and associated personnel (Art. 174)
- 1.13. hijacking or unlawful seizure of aircraft (Art. 164) or hijacking other means of public or goods transportation (no specific reference given)
- 1.14. endangering civil aviation safety (Art. 165)
- 1.15. hijacking ships or endangering maritime navigation safety (Art. 166)
- 1.16. endangering the safety of fixed platforms located on the continental shelf (Art. 167)
- 1.17. unauthorized appropriation, use, transfer or disposal of nuclear materials (Art. 176)
- 1.18. threats to use or to commit theft or robbery of nuclear materials (Art. 177) or
- 1.19. threatening to commit any of the acts listed in sub-paragraphs 1.1 to 1.18 of this paragraph.”

298. As it can be seen above, Art. 135.1 provides for a common definition for “terrorism” “act of terrorism” and “terrorist offence” which terms thus appear interchangeable in Kosovo criminal legislation. On the other hand, the FT offence in Art.138.1 refers to the financing of a “terrorist act” which is a further, different legal term even in the Albanian original (the terms defined by Art. 135.1 are “*terrorizëm*” “*veprim terrorist*” and “*vepër e terrorizmit*” respectively, while the one in Art. 138.1 is the slightly different “*vepra terroriste*”) which

⁴⁸ The format (but not the contents) of the list of offences is edited for the purposes of this report. References are given to the respective articles of the new CC.

variety of terms appears, on the face of it, somewhat confusing for those not familiar with Albanian legal terminology.

299. Following with Art.136 that defines the criminal offence of Commission of the offence of terrorism, one can find that it applies further, different terms for the same concept namely “offence of terrorism” and “act of terrorism” as follows:

**“Article 136
Commission of the offence of terrorism**

1. Whoever commits an act of terrorism shall be punished by imprisonment of not less than five (5) years.
2. When the offence provided for in paragraph 1 of this Article results in grievous bodily injury of one or more persons, the perpetrator shall be punished by imprisonment of not less than ten (10) years.
3. When the offence provided for in paragraph 1 of this Article results in death of one or more persons, the perpetrator shall be punished by imprisonment of not less than fifteen (15) years or life long imprisonment.”

300. Both these English terms are, however, equivalents of the same Albanian original “*vepra terroriste*” which is, as it was discussed above, translated as “terrorist act” in the FT offence in Art.138.1 thus it can be demonstrated that both criminal offences refer to the very same concept in this respect. Furthermore, Art.144 paragraph (1) and (4) specify that Articles 135 to 142 all define “(acts of) terrorist offences” (which clearly goes beyond the definition in Art. 135.1). Also considering that Art.135 does not provide for a criminal offence but for explanations to terms used in the subsequent articles of the CC, the evaluation team have the opinion that the slight discrepancy in terminology does not appear to be intentional and therefore they are ready to accept, for the time being, that the terms “terrorist act” in Art. 138.1 and “act/offence of terrorism” in Art.136 are equally covered by the explanatory definition in Art.135.1 as quoted above. Consequently, the broad definition in Art.135.1 is applicable both to the FT offence in Art. 138.1 and the offence of terrorism in Art.136 (it is a further question to be discussed below whether the terrorism-related offences in Art. 136 to 144 would also fall within this category).

301. In this context, an “offence of terrorism” in Art.136 would be committed by perpetrating any of the offences defined and listed in Art.135.1 as quoted above, more precisely, any of the criminal offences listed in subparagraphs 1.1 to 1.18 if the respective offence is committed for the purpose specified in the preliminary part of paragraph 1 (“*with an intent to seriously intimidate a population, to unduly compel a public entity...*” etc.)

302. Kosovo lawmakers thus did not choose to provide for, on the one hand, a “generic” offence of terrorist act in line with the definition provided by Art. 2(1)b of the FT Convention and, on the other, the criminalization of the various terrorist offences prescribed in the nine treaties annexed to the same Convention pursuant to Art. 2(1)a. While they criminalized almost each of the nine “treaty offences” (see the table below) they decided to cover the remaining “generic” offence of terrorist act by giving references to the respective traditional criminal offences by which its components can be carried out. As a result, the coverage of Art.2(1) of the FT Convention is provided like this:

- Art. 2(1)a (“an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”) see subparagraphs 1.5 as well as 1.11 to 1.18 of Art. 135.1 CC (references in the table below)
- Art. 2(1)b (“any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict...”) see the other subparagraphs which give references to criminal

acts by which death or serious bodily injury can be caused such as murder (1.1) assault (1.2) and others.

303. As it was mentioned above, all the offences listed in subparagraph 1.1 to 1.18 can only constitute a terrorist act if committed for the purpose provided in the preliminary paragraph of Art.135.1 which is acceptable for the offences that cover the “generic” offence (Art.2(1)b of the FT Convention) but definitely not for those by which the nine “treaty offences” are covered (Art.2(1)a idem). The reason is that Art.2(1)a requires countries to criminalise the financing of treaty offences without any extra purposive element and hence it is inconsistent with the Conventions to require proof that a particular treaty offence was done for the particular purpose (such as the one in Art. 135.1).

304. For example, the hijacking offence in the Convention for the Suppression of Unlawful Seizure of Aircraft (which is listed in the annex to the FT Convention) does not require proof that the hijacking was done for a particular purpose. The FT Convention only requires that financing of this hijacking offence be criminalized. In case of Kosovo, the new CC criminalized the hijacking offence fully in line with the respective convention (see Art. 164) but it can only be considered a “terrorist act” and hence its financing can only be considered a FT offence pursuant to Art. 138.1 if the hijacking is committed for the purpose provided in the preliminary part of Art.135.1 which approach is restrictive and does not meet the standard of the FT Convention.

305. In case of hostage taking, which is one of the treaty offences, the purposive element makes part of the offence itself according to the International Convention against the Taking of Hostages. In this case, the new CC criminalized the offence (Art. 175) with an incomplete adoption of the respective purposive element (compelling of a natural or juridical person or a group of persons is not included) which is only the first problem. The second problem is the listing of this offence in Art. 135 paragraph 1.5 which means that it can only be considered a “terrorist act” if committed for the purpose specified in Art. 135.1 – and this is clearly redundant in case of an offence that otherwise contains a purposive element.

Table 6 : *Conventions listed in the Annex of the FT Convention*

| | |
|---|--|
| Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 | Art. 135.1.13 ← Art. 164 CC Hijacking aircraft or unlawful seizure of aircraft |
| Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on 23 September 1971 | Art. 135.1.14 ← Art. 165 CC Endangering civil aviation safety |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 | Art. 135.1.11 ← Art. 173 CC Endangering internationally protected persons Art. 135.1.12 ← Art. 174 CC Endangering United Nations and associated personnel |
| International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 | Art. 135.1.5 ← Art. 175 CC Hostage taking (with a restricted coverage as regards the entities that can be compelled) |
| Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980 | Art. 135.1.17 ← Art. 176 CC Unauthorized appropriation, use, transfer or disposal of nuclear materials Art. 135.1.18 ← Art. 177 CC Threats to use or to commit theft or robbery |

| | |
|---|---|
| | of nuclear materials |
| Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988 | Art. 135.1.14 ← Art. 165 CC Endangering civil aviation safety |
| Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) done at Rome on 10 March 1988 | Art. 135.1.15 ← Art. 166 CC Hijacking ships or endangering maritime navigation safety ⁴⁹ |
| Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (SUA Protocol) done at Rome on 10 March 1988 | Art. 135.1.16 ← Art. 167 CC Endangering the safety of fixed platforms located on the continental shelf ⁵⁰ |
| International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 | no specific coverage (partially covered by Art. 135.1.7 ← Art. 334 Arson or Art. 365 Causing general danger) |

306. Because of the general requirement of the extra purposive element and the sometimes deficient implementation, the coverage of the “treaty offences” is only partially in line with the standards prescribed by the FT Convention and the same can be said about the “generic” offence of terrorist act too. Certainly, the concept of Art.2(1)b of the FT Convention is to a very large extent covered by the various offences (murder, assault etc.) listed under Art. 135.1 but the Convention encompasses “any other act” intended to cause death etc. thus not only the ones that can be subsumed under the criminal offences listed under Art. 135.1. While this construction is likely to be applicable in most of the cases, the actual coverage cannot be as large as that of the offence in the FT Convention.

307. As for the link between the collected or provided funds and the respective terrorist act, the knowledge element in the FT offence in Art. 138.1 is limited to the mere carrying out (committing) of the terrorist act but not its organisation and preparation. Ideally, the funding of a terrorist act should already be penalised at the stage of preparation or organisation which is currently not the case in Art. 138.1. Nonetheless, this apparent deficiency is addressed by Art. 145 which provides that for an act to constitute an offence as set forth in Art. 135 to 144 (thus including the FT offence too) it is not necessary that a terrorist offense actually be committed.

308. Apart from this issue, the evaluation team have some doubts whether the definition of “terrorist act” in Art. 135.1 does actually extend to the other terrorism-related offences in Articles 136 to 144. This is out of question in case of Art. 136 (which consists of the commission of any of the offences listed under Art. 135.1) and the FT offence in Art. 138.1 (or else the “financing of the financing” would be penalized) but not in case of the other related offences such as:

- Assistance in the commission of terrorism (Art. 137 covering the failure to report the preparation of a terrorist offence or its perpetrators)

⁴⁹ Art.166 CC does not cover the amended definition of the criminal offences in the SUA Convention as carried out by the 2005 Protocol but the FT Convention only requires the coverage of the SUA Convention.

⁵⁰ Art.167 CC does not cover the amended definition of the criminal offences in the SUA Protocol as carried out by the 2005 Protocol thereto but the FT Convention only requires the coverage of the 1988 SUA Protocol.

- Recruitment for terrorism (Art. 139)
- Training for terrorism (Art. 140)
- Incitement to commit a terrorist offence (Art. 141)
- Concealment or failure to report terrorists and terrorist groups (Art. 142)
- Organization and participation in a terrorist group (Art. 143) and
- Preparation of terrorist offenses or criminal offenses against the constitutional order and security of Kosovo (Art. 144).

309. Since these offences are not listed and thus, theoretically, cannot be subsumed under the definition in Art. 135.1 it is doubtful whether and how the funding of these offences could be considered a FT offence in the sense of Art. 138.1. Some of them might indirectly be covered (e.g. funding the commission of the offence in Art. 143 that consists of organization of or participation in a terrorist group could obviously be considered as financing a terrorist group as referred to in Art. 138.1). Others can be, to some extent, covered by the above-quoted Art. 144.4 which provides that whoever, for the purpose of committing one or more acts of terrorist offenses in the same Chapter of the CC dispatches or transfers armed groups, equipment or other material resources into or out of Kosovo (however it appears inapplicable to material sources that do not cross the border of Kosovo). Nonetheless, there might be offences (e.g. collecting and providing assets, only within the territory of Kosovo, for the purposes of recruitment for terrorism) which are apparently uncovered by the FT offence in Art. 138.1.

Financing of a terrorist organization and an individual terrorist

310. As for the coverage of financing activities beyond the scope of Art.2 of the FT Convention, that is, the general concept of financing of terrorist organisations and individual terrorists, the evaluation team needs to note that these aspects have only partially been addressed by the criminal legislation of Kosovo.

311. The most important deficiency in this field is that the relevant criminal legislation does not at all cover the financing of an individual terrorist. Art. 138 covers the financing of terrorism only to the extent that the funds or material resources are provided, solicited, collected or concealed to support a terrorist group or the commission of a terrorist act. On the other hand, Article 138.2 CC (the same provision exists also in Article 137.3 CC) criminalises the provision of funds or other material resources to an individual terrorist but only after the commission of an act of terrorism. This *quasi* accessoryship after the fact construction is directly linked to a specific terrorist act that has already been committed (or at least attempted) and in no circumstances can be considered as financing of an individual terrorist for any purposes, including legitimate activities, as required by the spirit of FATF SR.II.

312. Instead of “terrorist organization” the FT offence makes reference to the financing of a “terrorist group” which term is defined by Art. 135.4 as

“Terrorist group - a structured group of more than two persons, established over a period of time and acting in concert to commit terrorism. A structured group is a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”

313. Considering the broad definition the new CC provides for “terrorism” in Art. 135.1 this definition meets the contents of the definition of “terrorist organisation” as provided by the Glossary of Definitions attached to the FATF Methodology. The fact that the terrorist group needs to be “structured” implies, on the face of it, a higher level of integration and

structure than what is required by the Glossary definition of terrorist organisation which only refers to “*any group of terrorists*” but the second sentence of the definition above extends the scope of the term “structured group” wide enough to remain in line with the FATF standard (the only requirement being that the group is not randomly formed for the immediate commission of an offence).

314. It is not expressly specified by legislation but it appears from the definition above that financing of a terrorist organisation (i.e. a terrorist group) does not require that the funds were actually used to carry out or attempt a terrorist act or were linked to a specific terrorist act (as required by FATF SR.II.1.c). This conclusion is allowed by the rather indefinite definition above as well as the formulation of the offence in Art. 138.1 being not related, as far as the financing of a terrorist group is concerned, to any concrete terrorist act. On the other hand, this broad interpretation appears open to argumentation and therefore should be confirmed by case practice as soon as possible.

315. Another aspect where the current legislation appears to need clarification or completion is related to whether and to what extent the financing of terrorist group for any purpose (including legitimate activities such as funding the everyday expenses of the group) is actually covered. Certainly, the CC does cover financing activities where the funds are to be used by such a group without any explicit specification or restriction as to what the funds are actually intended for. Notwithstanding that, the evaluation team have the opinion that full compliance with both the wording and meaning of SR.II can only be achieved if this aspect is also covered by positive law or, at least, by jurisprudence.

316. There is another issue that needs to be mentioned at this point. While the FT offence is provided and defined by the CC as discussed above, the AML/CFT Law also provides for a definition of the term “terrorist financing” in Art.2 paragraph 1.36 – in which respect the lawmakers followed the same approach that resulted in the definition of “money laundering” in paragraph 1.23 of the same article. This definition clearly refers to “terrorist financing” as opposed to the name of the FT offence in Art.138.1 “facilitation of the commission of terrorism”.

“Terrorist financing- the provision or collection of funds, by any means, directly or indirectly, with the intention that they should 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 112 and 113 of the Criminal Code of Kosovo and within the specific definitions provided by FATF in the Special Recommendation II.”

317. While in case of ML definition in paragraph 1.23 the evaluation team could only assume that its introduction in the preventive law might have served for the purposes of the preventive reporting regime, they are almost sure about the same in case of the FT definition above.

318. The least important problem with this definition is its reference to the article numbers of the already obsolete Prov. CC considering that Art.440 of the new CC provides that all references to articles in other laws of Kosovo or the UNMIK Regulations (namely the Prov. CC) shall refer to the respective new article numbers of the new CC as a result of which the reference to Art. 112 and 113 Prov. CC shall refer to the new Art. 138 (Facilitation of the commission of terrorism) and Art. 144 (Preparation of terrorist offences or criminal offences against the constitutional order and security of Kosovo).

319. What is more problematic is the actual scope and meaning of this definition. First, it is clearly restricted to the financing of offences thus excluding the funding of terrorist organizations or individual terrorists for any purpose. In this respect, it is even more restrictive than the FT offence in Art. 138.1 which, at least, does cover the financing of

terrorist organizations (groups). (The conducts by which financing is carried out are practically the same as those in the proper FT offence with only slight changes in the wording.) It is a further issue, however, that which offences can actually be subject to financing according to this definition: these are offences “*within the meaning of Articles 112 and 113 of the Criminal Code of Kosovo (that is Art. 138 and 144 of the new CC) and within the specific definitions provided by FATF in the Special Recommendation II.*” Within the meaning of the above mentioned CC articles one can find, first of all, the FT offence itself and, on the other hand, another preparatory offence to the commission of terrorism with a specific FT-like conduct in Art. 144.4 as quoted above. Within the specific definitions of FATF SR.II one can find, again, definitions related to the offence of terrorist financing as it needs to be criminalized pursuant to, and even beyond, the scope of the FT Convention. Taking these pieces together, the definition quoted above clearly refers to the provision or collection of funds to be used to carry out terrorist financing offences, that is, the financing of terrorist financing, which is absurd.

320. Furthermore, the reference to FATF SR.II – a unique feature which is likely to be a specialty of the legislation of Kosovo – is problematic in itself. The less important problem is that SR.II as such is already outdated and reference should therefore be made to the new Recommendation 5 that replaced it. It is a more serious issue, however, that SR.II (or the new R.5) just does not fit into this context. FATF (Special) Recommendations are international standards but not legal norms that could be directly applied and enforced. Countries have to find the optimal way to implement the standards set by these Recommendations for which a simple reference like this, however, just cannot be considered a solution.

Definition of funds (FATF SR.II: Essential Criterion II.1.b)

321. The FT offence in Art. 138.1 extends to any funds as that term is defined in the TF Convention. The range of funds applicable to the FT offence is defined by Article 135.2 CC identically to the respective definition in the FT offence as “*assets of any kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letter of credit*”.

322. By use of the expression “however acquired” the definition clearly includes funds whether from a legitimate or illegitimate source.

Attempt and ancillary offences (FATF SR.II: Essential Criterion II.1.d and e)

323. The attempt to commit a FT offence is covered by the general provision in Art. 28 of the new CC by which attempt to commit a criminal offence threatened with imprisonment of at least 3 years shall generally be punishable (which obviously refers to the FT offence that is punishable by a term of imprisonment of up to 15 years).

324. Art. 2.4 of the FT Convention requires the criminalization of participation as an accomplice in a completed or attempted ML offence, organizing or directing others to commit such offence as well as contributing to the commission thereof in the framework of association or conspiracy. As it was discussed in relation to the ML offence, these are all addressed by the new CC where the act of “co-perpetration” (Art. 33) covers the notion of participation as an accomplice, the “criminal association” (Art. 34) covers association while the notion of conspiracy is covered either by the latter article or by the act of “agreement to commit criminal offence” (Art. 35). Organizing or directing others to commit the offence may also be covered (apart from those mentioned above) by the act of incitement (Art. 32).

FT offences as predicates for ML (FATF SR.II: Essential Criterion II.1.f)

325. As discussed in relation to the ML offence, any criminal offence under the law of Kosovo may constitute a predicate offense for ML including the offence of FT.

Jurisdiction for Terrorist Financing Offence (FATF SR.II: Essential Criterion II.3)

326. The criminal legislation of Kosovo does not specify whether the FT offence apply regardless of whether the person alleged to have committed the financing offence in the same jurisdiction or a different jurisdiction from the one in which the terrorist act occurred or would occur or where the respective terrorist or terrorist organisation is located. That is, the FT offence in Art. 138.1 CC does not contain a provision similar to the one in Art. 32 paragraph 4.3 of the AML/CFT Law by which jurisdiction for the laundering of foreign proceeds is provided.

327. Certainly, the scope of Art. 138.1 and the related offences within the new CC are not restricted to domestic forms of terrorism and therefore, on the face of it, the financing of foreign terrorists or terrorist organizations as well as terrorist acts to be committed in another country can be subsumed under the FT offence. Nonetheless, this is just an implicit coverage which should rather be provided for by positive legislation.

328. It needs to note that concerning some terrorism-related offences, the criminal law of Kosovo applies to any person who commits a criminal offence provided for in Art. 136-145 CC outside the territory of Kosovo if such an offence constitutes a threat to the security of Kosovo or its population, in whole or in part (Art. 115.2 CC) but this sort of legislation does not meet FATF SR.II.3. These rules may regulate whether and under what conditions a country has jurisdiction over criminal offences committed abroad, but the actual wording of FATF SR.II.3 leaves no doubt that the ultimate question is whether the financing of terrorism can be punished in a country once the respective terrorist activities (are planned to) take place or the terrorist organisations or individuals are located in a different country, which results in a certain bifurcation as regards the place of commission of the crime (i.e. financing activities in country “A” while the respective terrorist activities / organisations / individuals in country “B”). Such a situation needs to be addressed by a specific provision which is currently missing from the law of Kosovo.

The mental element of the FT (applying FATF R.2: Essential Criterion 2.2)

329. As it was discussed in relation to the ML offence, the respective FATF standard on the inference of the intentional element from circumstantial evidence is met by Art.22 of the new CC according to which “*knowledge, intention, negligence or purpose required as an element of a criminal offence may be inferred from factual circumstances*”.

Liability of legal persons (applying FATF R.2: Essential Criterion 2.3 & 2.4)

330. Criminal liability of legal persons applies, as it was discussed above in relation to the ML offence, with respect to all offences including the offence of FT. For this reason, the findings and recommendations made by the evaluation team in relation to the ML offence are equally relevant as regards the FT offence.

Sanctions for FT (applying FATF R.2: Essential Criterion 2.5)

331. The punishments imposed for the offence of FT are severe enough to be effective, dissuasive and also proportionate to the threat the offence represents. The FT offence in Art. 138.1 is threatened with an imprisonment ranging from 5 to 15 years and the related accessoryship offence in Art. 138.2 with one ranging from 3 to 10 years which is all in line

with the range of punishment available for other terrorism-related offences, first of all the commission of a terrorist offence in Art. 136 which is punishable with a minimum 5 years term of imprisonment, but the minimum level is 10 years in case the offence results in grievous bodily injury and 15 years or lifelong imprisonment if the offence causes death.

Statistics and effectiveness

332. Both the statistics provided to the evaluators and the information gathered on-site confirmed that there has never been any investigation or prosecution for FT or any FT-related offences in Kosovo. Any assessment of the effectiveness and implementation of the relevant provisions cannot be undertaken in the absence of concrete cases, let alone judicial practice.

2.3.2 Recommendations and Comments

Criminalisation of financing of terrorism (FATF SR.II: Essential Criterion II.1)

333. As to the terminology used in Art. 135 to 144 of the new CC the evaluators noted the risk of redundancy or confusion that might be caused by the use of slightly different terms in the explanatory provision of Art. 135.1 and the offences in Art. 136 and 138. Since there is no sign of substantial discrepancy as regards the scope of the different term (art. 135.1 provides the very same definition for three terms at the same time) the legislators should reconsider the simplification and uniformization of the terminology used in the respective articles.

334. Covering the scope of the generic terrorist offence as required by Art. 2(1)b of the FT Convention is carried out by Art. 135 by way of listing various criminal offences of the CC. This solution may to a very large extent cover the concept of Art.2(1)b but as the Convention encompasses “any other act” the list of the respective offences (murder, assault etc.) cannot be as large as that of the offence in the FT Convention. As a consequence, Art. 2(1)b of the FT Convention should be addressed by a separate offence (it can be formulated either within the explanatory provision in Art.135 or, more adequately, within the structure of the offence in Art. 136) and so the references to murder, assault etc. in Art. 135.1 can be abandoned.

335. As for the criminalization of the “treaty offences” these can only be considered a “terrorist act” and hence their financing can only be considered a FT offence pursuant to Art. 138.1 if these are committed for the purpose provided in the preliminary part of Art.135.1. Considering that Art.2(1)a of the FT Convention requires countries to criminalise the financing of treaty offences without any extra purposive element, it is inconsistent with this standard to require proof that a particular treaty offence was done for the particular purpose. Because of the general requirement of the extra purposive element and the sometimes deficient implementation (see examples in the descriptive part) the coverage of the “treaty offences” is only partially in line with the FT Convention which should urgently be remedied in the respective criminal legislation.

336. It is doubtful whether and to what extent the definition of “terrorist act” in Art. 135.1 extends to the terrorism-related offences themselves in Articles 136 to 144 (apart from Art. 136 and Art. 138.1) particularly whether the funding of these offences could be considered a FT offence in the sense of Art. 138.1. This issue should be revisited by Kosovo authorities and an appropriate legislative solution needs to be found (e.g. the extension of Art. 135.1 in this respect) so that financing of these offences can also be subsumed under the scope of the FT offence.

337. The financing of an individual terrorist, as required by FATF SR.II is entirely missing from the legislation of Kosovo and should urgently be provided for. The offence in Art. 138.2 is not relevant in this respect.

338. It is not expressly specified by law that financing of a terrorist group does not require that the funds were actually used to carry out or attempt a terrorist act or were linked to a specific terrorist act. While this conclusion can indirectly be drawn from the existing provisions, there remains some room for argumentation and therefore this issue should either be confirmed by jurisprudence or by a more precise positive legislation. Equally, the current legislation needs clarification or completion as regards the financing of terrorist groups for any purpose (including legitimate activities such as funding the everyday expenses).

339. As it was already recommended regarding the “extra” ML definition in Art. 2 paragraph 1.23 the evaluation team cannot see the reason why there would be need for two definitions of terrorist financing – even if, in this case, the two definitions can be found in different pieces of legislation and the FT offence is not actually labelled as “terrorist financing” (which nevertheless it actually is). Other jurisdictions found it more expedient to define criminal offences of ML and FT in criminal substantive law and to insert appropriate provisions into the preventive law that make clear reference to these offences (where the preventive legislation simply provides that for the purposes of reporting regime, the term “FT” means the offence in the respective CC).

340. In order to be consistent with their conclusions made in relation to the definition of ML, the evaluation team recommends deleting the “extra” definition of FT in Art. 2 paragraph 1.36. Such a solution would automatically resolve the otherwise deficient coverage of this definition (regarding the funding of terrorist organizations and individual terrorists) as well as the problems with its confusing (and probably entirely wrong) references to certain FT-related articles of the (former) CC and to FATF SR.II.

341. The assessors note that the latest version of the Draft Law on Amending and Supplementing the AML/CFT Law would introduce a new paragraph 1.42 in Art.2 of the AML/CFT Law to provide for the definition of “Terrorist act for the purpose of this law” meaning acts *“intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”* This is likely to replace the old definition in Art. 2.1.36 (although formally does not repeal it) by improving it in many aspects nevertheless, for the reasons above, the evaluation team would find it more favourable not to redefine this term in the preventive law but in the CC.⁵¹

342. Unfortunately, this is not the only instance where the above-mentioned Draft Law will affect, once adopted, the legal framework for the criminalisation of FT. Specifically, Art. 19B of the Draft inserts a new, *sui generis* FT offence into the AML/CFT Law (it cannot be known, however, exactly where this new provision would be placed in the law) which reads as follows:

Terrorist Financing Offense

1. Whoever, when committed intentionally, participates as an accomplice, organizes or direct others to provide or collect funds, or attempts to do so, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used in full or in part:

1.1 to carry out a terrorist act;

⁵¹ Apparently, the lawmakers of Kosovo have come to the same conclusion, considering that in the final version of the amending law, as it was adopted as the Law No. 04/L-178 on Amending and Supplementing the Law No. 03/L-196 on the Prevention of Money Laundering and Prevention of Terrorist Financing, the definition in paragraph 1.42 is as follows: “Terrorist act – means definition as defined in the Criminal Code of Kosovo”. On the other hand, paragraph 1.36 remained unaffected.

- 1.2 by a terrorist; or*
- 1.3 by a terrorist organization;*
- 1.4 will be deemed to have committed the act of terrorist financing.*

2. The offence is committed irrespective of any occurrence of a terrorist act referred to in paragraph 1, or whether the funds have actually been used to commit such act.

3. Terrorist financing shall be punishable by a fine of 500,000 euro or imprisonment from seven to twenty year or either of these penalties.

4. An attempt to commit the offence of financing of terrorism or aiding, abetting, facilitating or counselling the commission of any such offence shall be punished as if the offence had been completed.

343. On the one hand, this criminal offence would be remarkably more in line with the respective international standards than the current legal framework in the CC as described above. On the other hand, the examination team has serious concerns about such a legislative solution for the following reasons.

344. The FT offence would be an entirely “foreign body” within the context of the AML/CFT Law. It needs to be emphasized that the examiners do not consider it a deficiency in itself that this criminal offence would be provided in a separate piece of legislation and not in the CC particularly as the ML offence is provided in the same separate law.

345. Nonetheless, as opposed to the ML offence, this draft FT offence could not be interpreted and implemented on its own. Terrorist financing is an offence that is traditionally rooted into the context of terrorism-related criminal offences and the respective definitions of terrorist act, individual terrorist or terrorist organization. The CC provisions, by which the FT criminalization is currently covered in Kosovo, are actually based on this contextual approach. The draft FT offence would definitely be out of this context which would lead to a situation where the FT offence can be found in one piece of legislation whereas all terrorism-related offences and the definitions of the relevant terms are provided in another.

346. What is more, the Draft Law appears to have no impact on the CC in terms of amending or repealing any of the respective CC articles. As a result, the existing CFT framework in the Special Part of the CC, as described and analysed above, would remain entirely intact even after the introduction of the new FT offence in the AML/CFT Law as a result of which there would be two competing criminal offences, one in the CC and one in the AML/CFT Law, under which FT activities could equally be subsumed. Such a situation would obviously lead to legal uncertainty and serious problems in effective application of the respective provisions⁵².

Jurisdiction for Terrorist Financing Offence (FATF SR.II: Essential Criterion II.3)

347. While the scope of Art. 138.1 (and the related offences) are clearly not restricted to domestic forms of terrorism and therefore the offence does not exclude its applicability to the financing of foreign terrorists or organizations or terrorist acts committed in another country (and therefore, in lack of any opposite practice, the rating is not affected at this point) this implicit coverage should rather be provided for by positive legislation.

⁵² In the final, adopted version of the amending Law No. 04/L-178 the FT offence remained practically the same as it is quoted above from the draft version. The new FT offence can thus be found in Art. 36B of the AML/CFT Law (in an apparently unrelated context). As it could be foreseen, the amending law did not bring about any changes in the respective articles of the CC.

2.3.3 Rating for Special Recommendation II

| | Rating | Summary of factors underlying rating |
|-------|--------|--|
| SR.II | PC | <ul style="list-style-type: none"> • financing of an individual terrorist (for any purpose) is clearly not covered by the FT offence • inconsistent and/or redundant terminology used in FT-related provisions in the CC • deficient coverage of “act of terrorism” as required by Art. 2(1) of the FT Convention: <ul style="list-style-type: none"> ○ no complete and general coverage of the “generic” offence of terrorism as subject of FT ○ deficient coverage of the “treaty offences” as subject of FT by requiring an extra purposive element • unclear whether the definition of “terrorist act” in Art. 135.1 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence |

2.4 Confiscation, freezing and seizing of proceeds of crime (R.3)

2.4.1 Description and Analysis

348. The Kosovo seizure and confiscation framework is regulated primarily by the Criminal Code (CC) and the Criminal Procedure Code (CPC) and is generally adequate in terms of legislative design and scope, however there are a number of inconsistencies. The new CC and CPC entered into force immediately after the on-site visit. Prior to this a provisional CC and CPC had been used with a significantly more narrow framework for seizure and confiscation.

Scope of property subject to confiscation (FATF R.3: Essential Criterion 3.1)

349. The Kosovo Criminal Code (KCC) Article 96⁵³ provides for the confiscation of ‘*material benefits acquired through the commission of criminal offences*’. This covers all crimes that generate criminal proceeds, including ML, TF and other predicate offences. Article 69 of the CC provides for the general confiscation of objects (instrumentalities) used in or derived from the commission of criminal offences, which together with the abovementioned provisions on “material benefit” satisfies the requirements of FATF EC.3.1.a - c.

350. In order to undertake the confiscation of *material benefit* the criminal proceedings must be concluded with a judgement in which the accused is pronounced guilty (Article 280 of the CPC). The Prosecutor is required to list property subject to confiscation in the indictment (art. 274 revised CPC). Failure to do so can trigger an application for the property to be released to its owner.

351. In order to confiscate property *used* in a criminal offence (*instrumentalities*) the prosecutor must prove at the main trial that the asset was used in the criminal offence (Article 283 of the CPC). It is not entirely clear whether a guilty verdict is needed in order to confiscate such *instrumentalities*. The CPC does not however include any standard of proof or

⁵³ Art 96 of Law No. 04-L-082.

procedure for the final confiscation of *instrumentalities intended for use* in the commission of an offence, which raises doubts about the possibility of their final confiscation.

352. Article 97.1 of the CC provides for a payment of an ‘equivalent’ (i.e. corresponding) value to be made where the material benefit cannot be confiscated. This has never happened in practice.

Confiscation of direct and indirect proceeds (FATF R.3: Essential Criterion 3.1.1a)

353. In accordance with Article 120.34 material benefit is “any property derived directly or indirectly from a criminal offense. Property derived indirectly from a criminal offense includes property into which any property directly derived from the criminal offense was later converted, transformed, or intermingled, as well as income, capital or other economic gains derived or realized for such property at any time since the commission of the criminal offense”. Article 276 of the CPC generally provides for a similar definition, which meets the requirements of the FATF standard with regard to the confiscation of indirect proceeds.

Confiscation from a third party (EC.3.1.1.b)

354. With regard to confiscation from a third party, the provisions of the CC and CPC differ quite significantly, creating a certain amount of ambiguity, and possibly leading to serious problems of implementation in the future. Article 97.2 of the CC allows for confiscation from third parties where they have acquired the material benefits without ‘compensation’ or less than the real value knowing (or where they should have known) that the material benefit had been acquired through crime. Where the transfer of benefits was made to a family member there is a reversal of the burden of proof onto the family member to prove “they gave compensation for the entire value”. These provisions are generally acceptable to meet the requirements of international standards. At the same time Article 278 of the CPC, establishes a much higher burden of proof stating that criminal proceeds *transferred* to third parties can only be subject to confiscation in three cases:

1. the proceeds of the criminal offence were transferred from the possession of the defendant;
2. the transfer was for substantially less than the fair market value of the criminal proceeds; and
3. there is evidence that the defendant still retains control or use of the criminal proceeds.

355. In addition, in the view of the assessment team the wording implies that all three abovementioned conditions must be met simultaneously for confiscation to take place.

356. When criminal proceeds are in the possession of a third party, they shall be subject to confiscation if:

1. the third party obtained possession of the proceeds of a criminal offence as a direct result of the criminal offence;
2. there is evidence that the defendant still retains control or use of the criminal proceeds or maintains control of the third party.

357. Therefore the conflict of the CPC provisions with the CC creates a hindrance to the implementation of the norms contained in the Criminal Code, by setting a higher standard of proof, which could ultimately impact the effectiveness of law enforcement as and when they undertake confiscation measures.

Provisional measures (FATF R.3: Essential Criterion 3.2)

358. The previous Criminal Procedure Code (RE2003_26) Article 247⁵⁴ gave a general power of ‘temporary confiscation’ to the Public Prosecutor. Articles 490-499⁵⁵ gave the Court power to carry out the final confiscation of the material benefits and equivalent sums of the material benefits (inferentially not available) upon conviction.

359. The revised CPC⁵⁶ Article 264 sets out a system for temporary freezing of assets that are the proceeds of crime or evidence in the investigation as a preventative measure to prevent removal or dissipation. This includes an Order issued by the State Prosecutor and valid for 72 hours during which time the Prosecutor must immediately make an application to the pre-trial Judge for an ‘Attachment Order’ to freeze the assets. The Attachment Order lasts initially for 30 days during which time and giving three weeks notice a hearing is scheduled to consider any challenge from those affected by the Attachment Order.

360. Article 112 also allows for temporary sequestration of objects and the definition includes the material benefits from the commission of a criminal offence. It is unclear from the drafting if this relates solely to objects found in the course of a search as this section follows on from the Articles concerning searches with and without a Court Order. The language of the text is inconsistent as it refers to temporary sequestration and temporary confiscation in the same breath. The same terms should be employed for purposes of clarity and consistency.

361. The FIU has a power under the AML law to delay a reported transaction for up to 48 hours (AML law Art. 22.6). This is another temporary freezing power but only applies to certain transactions notified to the FIU by a reporting entity.

362. Under the same AML law (art 29.10), Kosovo Customs has the power to seize monetary instruments suspected to be the proceeds of crime. This must be immediately notified to the Prosecutor for investigation. Customs must also inform the FIU.

Confiscation ex-parte and without prior notice (FATF R.3: Essential Criterion 3.3)

363. It is clear from the text of Article 264 of the CPC that the initial freezing order by the State Prosecutor is inferentially ex parte and without notice. An opportunity to contest the Attachment Order is provided by the later hearing. The assessment team was not able to obtain any confirmation of whether such measures have been applied in practice.

Powers to trace property (FATF R.3: Essential Criterion 3.4)

364. The law enforcement agencies such as Kosovo Police and Customs have sufficient powers to search for and seize, property that is, or is suspected to be, the proceeds of crime. Pre-existing CPC Art.240 (and new CPC Art 105) gives general powers of search and seizure through a Court Order. It seems however that in practice law enforcement authorities have been doing very little in this area (see assessment of effectiveness below).

365. There is no power in law that allows the authorities to determine whether property may become the proceeds of crime.

⁵⁴ Now Article 264 ‘Temporary freezing of assets’ in the new CPC law 2012-04/L-123.

⁵⁵ Now Chapter VIII Articles 274 onwards.

⁵⁶ 2012_04-L-123-eng effective 1/1/2013.

366. The FIU has powers under the AML/CFT law to request information from obliged entities and commercial databases and share that information with law enforcement agencies, tax authority, KIA and Prosecutors for the purposes of investigations within their competence.

367. There are limitations on the ability of all agencies to determine the ownership of real estate. Such registers that exist are out of date. Examples were given to the assessment team where properties were still registered to grandparents who have died, but the families still live in the property and have not registered any change in the title. Indeed the ownership may be vested in several family members but not registered as such.

368. There is no power to compel a convicted criminal to repatriate assets liable to confiscation that he may have removed from the jurisdiction.

Rights of bona fide third parties FATF Rec 3.5

369. Article 270 of the new CPC gives third parties the opportunity to voice their objections to any provisional measures taken with regard to their property that has been used as instrumentalities in an offence. In this regard the third party must prove that

- he/she did not or could not have known about the use of the property in a criminal offence;
- the property cannot be used again in the commission of an offence;
- the provisional measures unreasonably harm the interests of the third party.

370. In cases where the third person's property is linked to the material benefit obtained from an offence, this third person must prove that:

- he/she has had a property interest in the property for over 6 months prior to the temporary confiscation of the property
- he/she paid a market rate for the property interest in the building, immovable property, movable property or asset
- he/she did not know of acts in furtherance of the criminal offence,
- the suspect or defendant would be unable to use, transfer, or otherwise access the building, immovable property, movable property or asset, and
- the temporary measure being proposed would unreasonably harm the interests of the person objecting.

371. While the steps prescribed above to be taken by bona fide third parties seem to be clear and transparent, the onus of proof is perhaps unjustifiably shifted to the bona fide, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property.

372. The new CPC Article 279 gives rights to bona fide 3rd parties to make their ownership claims within the confiscation process.

Powers to void actions and contracts FATF Rec 3.6

373. Beyond the power of the FIU to delay or postpone certain transactions reported to it by obliged entities, there is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

374. The power to freeze the material benefits of criminality to preserve them for possible confiscation could be applied but this does not address the direct recommendation of FATF 3.6.

Additional elements

375. There is a draft law 'Extended Powers for Confiscation' currently before Parliament which extends the powers of confiscation to cases where the defendant has either died or is outside the jurisdiction and cannot be tried for the offence in question. It also allows for confiscation of assets where there is a conviction but the assets are not the proceeds from the predicate offence. The Prosecutor has to show that they were acquired in the same time period of the offence and have no legitimate source. This law is scheduled to be adopted by the end of 2012.

376. There is no provision in law to provide for the confiscation of property of organisations that are primarily criminal in nature.

377. Kosovo does not have any laws that allow for the confiscation of the proceeds of crime *in rem*, except for several corruption offences, as stipulated by Article 281 of the new CPC. In these cases the legal elements of the corruption offence must be established, as well as that a reward, gift or benefit has been accepted. Otherwise any confiscation must be tied to a criminal indictment.

378. Article 6 of the new Extended Powers of Confiscation will extend the powers of confiscation to

“1.1 other assets (acquired) during the same period of time as the criminal offences for which the defendant was convicted, but were not material benefits of those criminal offences,

1.2 The defendant's legitimate income was insufficient to permit the acquisition of those other assets, 1.3 The defendant was engaged in a pattern of activity similar to that with which he or she was convicted, and

1.4 The pattern of activity in paragraph 1.3 would permit the acquisition of those other assets.”

379. The onus is upon the State Prosecutor to show a 'grounded cause' and if successful, the Court issues a copy of the request to the defendant who then has to show within 30 days to "submit proof that the assets were purchased with legitimate income."⁵⁷

380. A hearing follows in which the Court determines if it is appropriate to confiscate these assets considering the issues referenced above, rights of third and/or injured parties, that no injustice is involved and then issues an order for the assets to be handed over to Kosovo.

381. Article 7 of the Extended Powers of Confiscation provide that when a criminal proceeding may not be continued due to the death of the defendant under Article 160 of the revised CPC, but assets are subject to an Attachment Order under Article 265 of the revised CPC, or an indictment has been filed which lists assets subject to confiscation under Article 241.1.9 of the revised CPC, the Court upon the proposal from the state prosecutor or the injured party may continue the confiscation proceeding. The assets in question must exceed €1000 in value and it must be in the interests of justice to continue the confiscation.

⁵⁷ Art.6.4.

382. Article 8 of the Extended Powers of Confiscation provide for when property owned by a fugitive defendant can be confiscated. The assets (which must exceed €5 000 in value) have to be listed in the indictment or have an Attachment Order made against them. The Court then determines if the defendant is a fugitive, if he committed the crime, if the assets represent material benefits of the offence and the rights of any bona fide third parties. If satisfied the Court issues a Judgement on these matters and orders the assets to be handed over to Kosovo. This is appealable.

383. Articles 6, 7 & 8⁵⁸ do not fulfil the civil confiscation/non-conviction based confiscation criteria of FATF 3.7. Under Kosovo law a criminal case has to be preferred against a defendant and the prosecution (except for the criteria of Article 6 above) has to demonstrate the assets/material benefits derived from that criminality. There is no concept in law that there is no right of title to the proceeds of crime *in rem*.

International co-operation in asset freezing/seizing not linked to criminal sanctions (CETS 198 23.5)

384. Article 36 of the AML law (03-L/196) affords powers to extend co-operation to other jurisdictions in the matters of freezing/seizing and confiscation the proceeds of crime, money laundering and Terrorism Finance for the purposes of prosecution and confiscation. As yet no external Orders of this nature have been made in Kosovo. There is **no** legislation that enables deprivation of property that is **not** linked to criminal sanctions to be made.

Compensation linked to confiscated property (CETS 198 25.2)

385. Kosovo has never executed any external requests to freeze or seize or confiscate property in the manner envisaged by CETS 198 Articles 23, 24. It follows that there has been no property or equivalent value returned to a requesting party to CETS 198. There is no specific international asset sharing law or other provision although it is not precluded by the legislation, indeed the AML law affords the widest possible co-operation on confiscation matters. One interpretation of that could be to enable international asset sharing.

386. Kosovo law does envisage that victims of crime can be compensated. The existing Criminal Procedure Code articles 107-118 provide for property claims.

387. Article 490 of the Confiscation procedures (existing CPC) provides for injured parties to make a claim having preference against the proceeds of crime being considered for confiscation.

388. The new Criminal Procedures Code Article 62 establishes the rights of an injured party to compensation. Article 458 allows for property claims such as damages or recovery of an object arising from the commission of a criminal offence.

389. In the new CPC Article 275 gives the rights of injured parties to make a claim during the confiscation process of the material benefits of the crime. In the eventuality of Kosovo executing an external Confiscation Order it would be open for injured parties to make a claim for restitution or compensation during this process.

390. There are no agreements in place for sharing confiscated property with other jurisdictions (CETS 198 25.3). The MoJ has stated that where no formal agreements exist

⁵⁸ It seemed to this assessor during the on-site visit that these provisions were unknown to the Prosecutors. Questions about what happens to criminal assets held by the dead and the fled were met with obfuscation, they clearly didn't know.

with other parties the principles of reciprocity will apply. There have been no cases of sharing confiscated property, if this is requested it will be considered on a case by case basis.

Statistics

391. In 2010 Kosovo created an Agency for the Management of Sequestered and Confiscated Assets⁵⁹. The responsibilities of the agency are to store and manage assets referred to it by the Prosecutor, and dispose of or sell assets once final confiscation is ordered by a Court. The statistics of confiscated property referred to the agency are produced below.

Table 7: *Incomes of the Agency for the administration of Sequestered or Confiscated assets for the period of time 1st of January – 31st of December 2011, and the period of 10 months, January 1st- October 31st 2012*

| Period of time | Selling procedures | Re announcements | Incomes from the confiscated assets | Incomes from the deposits of the sequestered assets | Total |
|--|--------------------|------------------|-------------------------------------|---|-------------|
| 1 st of January – 31 st of December 2011 | 12 | 0 | 27.390.94€ | 26.410.64€ | 53.801.58€ |
| 1 st of January – 31 st of October 2012 | 27 | 6 | 29,926.27€ | 231,612.38€ | 261,538.65€ |

392. At the time of the on-site visit in December 2012 the assessment team was told there had been further referrals bringing the total assets sequestered to approximately €2.5m. These are the only statistics on confiscations provided to the assessment team and can be only indicative, as not all property that has been sequestered or confiscated has been managed by the Agency. - There is a stock of confiscated assets that remain in premises of different other institutions (KJC, KPC, Police, etc.) for which the AMSCA is trying to find modalities to regroup and ensure their reception, management, as well as consider potential sale.

393. Otherwise, no statistics have been provided with a breakdown for the number and type of offences, and whether any of the confiscated proceeds had been linked to money laundering, which makes it difficult to judge the effectiveness of the confiscation regime.

Effectiveness

394. The assessment team had serious concerns about the effectiveness of the system of seizure and confiscation in Kosovo. The legal and procedural tools available under the previous legislation, albeit patchy, had not been used and obviously ignored at various levels of the system, including the police and prosecution.

395. Most notably the assessment team was informed of a case where real estate purchased on criminal proceeds had not been confiscated because it was registered to the spouse of the accused. Instead several much less valuable items, namely automobiles were confiscated clearly demonstrating the selective approach of the responsible prosecutor. In such cases the judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime.

396. The assessment team had the general impression that law enforcement authorities are unwilling to undertake activities to trace criminal proceeds, which is resulting in a low

⁵⁹ AMSCA – law 03/L-141.

number of seizures and confiscations. The other obstacle to developing asset recovery capacities of Kosovo authorities is the apparent lack of feedback between the various actors in the system – FIU, police and prosecutors, who should be working in an integrated manner in order to identify and successfully pursue criminal proceeds. This is obviously not happening in practice. In addition there is no effective system of benchmarking and monitoring in the area of financial investigations and asset tracing/seizure and confiscation. The National Office of Economic Crimes Enforcement, proposed as a part of the recent National Strategy against Economic Crime could become such an overarching authority with the aim to prioritize and monitor measures in this area both at the level of individual agencies, as well as in an interagency framework.

2.4.2 Recommendations and Comments

397. The Criminal Procedure Code should be amended to include provisions that indicate the standard of proof required to allow for the confiscation of instrumentalities intended for the use in a criminal offence.

398. Kosovo should harmonize the norms of the CC and CPC with regard to third party confiscation. In this case priority should be given to the framework set out in the CC, which is generally in line with international standards, and would not pose effectiveness problems in terms of implementation, contrary to the norms of the CPC.

399. Kosovo should revise the provisions of the CPC regulating the protection of the rights of bona fide third parties. The standard of proof required from the bona fide to prove their legitimate rights and intentions with regard to property should be lowered.

400. Kosovo should institute mechanisms prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

401. The judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime.

402. Kosovo should implement the relevant components of the AML/CFT strategy as soon as possible, particularly to enhance the role of financial investigations, asset recovery mechanisms and interagency coordination and cooperation in these fields.

403. The National Office for Economic Crimes Enforcement, foreseen under the strategy should become staffed and operational as soon as possible in order to monitor and enhance the effectiveness of interagency cooperation and coordination in the area of financial crime.

404. The Asset Management Agency, police, KPC and KJC should be required to keep coordinated statistics with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences.

405. There is inconsistent language across the legislation with regard to seizure and confiscation provisions. The AML/CFT Law refers to offences that generate proceeds of crime, the Criminal Code refers to ‘material benefits’. As well, Article 112 CPC refers to temporary sequestration and temporary confiscation in the same breath. The language of the text is inconsistent. The same terms should be employed. There should be consistency of terminology throughout the legislation to dispel ambiguities, including the discrepancies between the CC and CPC.

406. The substitution of non-criminally acquired assets in lieu of confiscating the actual proceeds/material benefit is implied in Article 97.1 of the Criminal Code. This should be redrafted to remove any doubt.

407. Temporary Freezing Orders are initiated by the Prosecutor. There are provisions for appeal by those affected by the Order but it is not explicitly stated in the CPC that application for these Orders are ex parte. The language of the relevant provision (Art 274 CPC) should be explicit to remove doubt.

408. Kosovo should consider implementing a system of *in rem* confiscation of the proceeds of crime. The amendments to the extended law on confiscation do not provide this.

2.4.3 Rating for Recommendation 3

| | Rating | Summary of factors underlying rating |
|-----|--------|--|
| R.3 | NC | <ul style="list-style-type: none"> • No procedure or standard of proof indicated in CPC to allow for the confiscation of instrumentalities intended for the use in a criminal offence. • While the provisions of third party confiscation included in the CC meet international standards, the supporting Articles of the CPC conflict with these provisions. • The standard of proof for a bona fide third party is unjustifiably high, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property. • There is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation. • The effectiveness of the existing measures must be considered low due to an insufficiency of prosecutions resulting in low levels of confiscation of the proceeds of crime. • Meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime. • Law enforcement authorities and prosecutorial authorities do not proactively undertake asset tracing and recovery when pursuing any acquisitive crime. |

2.5 Freezing of Funds Used for Terrorist Financing (SR.III)

2.5.1 Description and Analysis

Freezing assets under S/Res/1267 (FATF SR.III: Essential Criterion III.1) and under S/Res/1373 (FATF SR.III: Essential Criterion III.2)

409. The evaluation team found an almost absolute lack of dedicated legal structure for the practical conversion into domestic law of designations under UNSCRs 1267 and 1373 (including consideration of designations by third countries) and the lack of a national designating authority for UNSCR 1373. As a consequence, there is no specific legislation to

provide for the freezing of assets of designated persons and entities under the relevant UNSCRs in Kosovo.

410. With one, as it seems obsolete exception mentioned below, neither the primary nor the secondary legislation made available to the evaluators contains any positive legal provision regarding any list of designated persons and entities issued either by the UN Security Council or by another international entity or jurisdiction. The notion of such lists is practically non-existent in the law of Kosovo which thus does not provide for their recognition, official publication and updating (let alone the elaboration of national lists) and neither stipulates legal consequences for those being listed by the UNSCR or other jurisdictions.

411. In fact, the only instance the notion of “terrorist lists” has ever been mentioned in any piece of Kosovo legislation were two Administrative Directives issued by the Financial Intelligence Centre (the predecessor of the present FIU) in 2007 and 2008 as follows:

- Administrative Directive No.003 (16 February 2007) published a list of 19 various persons and entities allegedly suspected of involvement in terrorist financing activities. The designation was apparently made upon “information from foreign governments” but no clear reference was made whether or not these persons and entities had ever been listed by the UNSCR or elsewhere. The Directive required that each bank and financial institution take appropriate measures to ascertain whether they have any business relationship or are engaged in any transaction with the listed persons and entities and if yes, the banks and financial institutions were obliged to file an STR (SAR = suspicious activity report) with the Centre within 24 hours pursuant to their reporting obligation as prescribed by the UNMIK Regulation 2004/2 then in force.
- Administrative Directive No.006 (11.03.2008) prescribed that banks and financial institutions develop an internal system whereby new and existing customers who are assessed as high risk, on the basis of established KYC procedures, are checked against the following lists of suspected persons and entities:
 - Consolidated List of the Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organization as Established and Maintained by the UN 1267 Committee (with an URL provided to the regularly updated version of the list on the UN website)
 - Specially Designated Nationals and Blocked Persons list, issued by the US Treasury, Office of Foreign Assets Control (also with an URL to the regularly updated list)

The legal consequences were different depending on which list was involved. If an existing or prospective customer's name appeared on the 1267 list the bank or financial institution was prohibited from taking any action that would result in the release or transfer of any funds or property of the customer from the control of the bank and, at the same time, a SAR had to be submitted to the FIC pursuant to the above-mentioned UNMIK Regulation. If however the customer was designated on any other recognized list (there was only one) the bank or financial institution was obliged to submit a SAR as above and to apply enhanced monitoring to reflect the higher risk posed by the customer but it was not prohibited from continuing the business relationship.

412. At the time of their issuance, these Administrative Directives were considered a secondary legislation issued upon authorization by the UNMIK Regulation 2004/2 (since repealed with the coming into force of the AML/CFT Law) which was a source of primary legislation at that time. Both Administrative Directives refer to Art.2.1 paragraph (1) of the

said UNMIK Regulation which empowered the FIC to issue administrative directives, instructions and guidance on issues related to ensuring or promoting compliance with the Regulation including, but not limited to (i) the use of standardized reporting forms; (ii) the nature of suspicious acts or transactions for the purposes of the Regulation including the development of lists of indicators of such acts and transactions; and (iii) the exemption of persons or entities or categories of persons or entities from reporting obligations under the present Regulation and the methods of reporting such exemptions.

413. Nonetheless, the UNMIK Regulation 2004/2 was silent on the issue whether and under what circumstances the FIC or other authorities have the authority to freeze assets that belong to designated persons and entities listed either by the UN Security Council or elsewhere. In particular, Art.2.1 paragraph (l) does not appear to be specific enough to provide a firm legal basis for such a freezing-and-reporting mechanism that was established by the above mentioned FIC Administrative Decisions. Because of this, the examiners have the opinion that the FIC went beyond its authorization when extending the scope of the reporting regime implemented by the UNMIK Regulation to assets that belonged to designated persons and entities.

414. Apart from the lack of appropriate authorization, there are further problems with these Administrative Directives. As for the one numbered No.003 (2007) it is entirely unclear whether it had anything to do with the consolidated list of persons and entities belonging to or associated with Taliban and Al-Qaida as it is issued and maintained by the competent committee of the UN Security Council instituted by UNSCR 1267. It appears there is no direct or automatic relationship between the two lists and therefore it is more likely that the relatively short list of persons and entities attached to the said Administrative Directive was actually produced by the FIC, which drafted it on the basis of “information from foreign governments”. In doing so, the FIC had apparently acted as a national designating authority in the sense of UNSCR 1373 for which it clearly had not been authorized by the existing legislation of that time (in the UNMIK Regulation 2004/2 or elsewhere).

415. As opposed to the one discussed above, Administrative Decision No.006 (11.03.2008) at least made an adequate reference to the updated UN Security Council list issued and maintained pursuant to UNSCR 1267 and went even beyond this by extending its scope to other lists of designated persons and entities (out of which, however, only the US OFAC list was mentioned but not the list of persons, groups and entities implied in terrorist activities as approved through the Common Position 2001/931/CFSP of the European Union Council). This Administrative Decision was however silent on why the “high risk” customers were exclusively made subject to examination against these lists, why there was a less strict regime established for those included in “other” terrorist lists and what procedures would have been followed when assets belonging to such persons and entities had been identified.

416. For the purposes of the present evaluation, the main question is whether and to what extent these Administrative Decisions can be considered as valid and applicable legislation in Kosovo particularly as both were provided to the examiners as part of the existing legislation in this field. On the other hand, the UNMIK Regulation 2004/2, that is, the primary legislation upon which they had been issued and to which they actually referred as a basis of authorization has not been in force since 2010 and even if the AML/CFT Law gives literally the same powers to the FIU to issue administrative decisions (Art. 14.1.12) it is nowhere stipulated in the law that FIC Administrative Decisions could or should be applicable *mutatis mutandi* in the new legal framework. It was confirmed by the authorities subsequent to the on-site visit that no sanctions could be applied on the basis of these FIC Administrative Decisions as these can only serve as a guidance – which, however, appears questionable in itself as neither of the above mentioned Administrative Decisions can be found on the webpage of the Kosovo FIU among applicable instructions and guidelines. As a consequence,

the examiners are inclined not to consider FIC Administrative Decisions No.003 and No.006 as pieces of valid and enforceable legislation for the time being.

417. Apart from the Administrative Decisions discussed above, there is no other legislation in Kosovo to deal with the freezing of funds used for terrorist financing. When asked about the legislation that may be applicable to target such assets, some Kosovo authorities admitted that there was no proper legislation in place while others made reference to the freezing regime established by the AML/CFT Law, to the provisional measures provided by the Criminal Procedure Code or even to the combination of these regimes (where the transaction involving terrorist assets could be temporarily frozen by virtue of Art. 22.6 of the AML/CFT Law and the assets could eventually be secured by provisional measures as provided by the CPC). Nonetheless, neither of these laws has ever been used for freezing assets used for terrorist financing.

418. The applicability of the AML/CFT freezing regime to funds not involved in any transaction (e.g. deposited assets) is more than questionable and the same goes for the application of coercive temporary measures available in the Criminal Procedure Code. In this context, the examiners need to note that criminal procedural rules could not have been applied without initiating a formal criminal procedure, which requires a criminal offence subject to the jurisdiction of Kosovo whereas the mere appearance of a name on any terrorist list does not necessarily constitute a domestic criminal offence. Moreover once a criminal procedure is initiated, the freezing action would then depend on the outcome of the proceedings.

419. Considering that currently there is no legislation in Kosovo to convert designations under UNSCRs 1267 and 1373 into domestic law (more precisely, UNSCRs 1267, 1988 and 1373 as the Taliban and the Al-Qaida lists were separated in 2011 and the former is now covered by UNSCR 1988) to appoint and authorize a national designating authority for UNSCR 1373 and to effectively, if at all, provide for the freezing of assets of designated persons and entities, the evaluators came to the conclusion that it can be proven without any further analysis of the respective Essential Criteria that Kosovo does not meet, to any extent, the requirements of FATF Special Recommendation III.

2.5.2 Recommendations and Comments

420. There is no specific legal framework that would enable the Kosovo authorities to take the necessary preventive and punitive measures to freeze and if appropriate, seize terrorist related funds or other assets without delay, in accordance with the relevant United Nations resolutions. Neither the AML/CFT Law nor the Criminal Procedure Code can be applied in this respect and the same would go for the No.003 and No.006 FIC Administrative Decisions which are not even enforceable legislation, even if some authorities consider them as guidance (bearing in mind that the latter considered the terrorist lists more specifically, to the fact that a customer is designated on any of these lists as some kind of additional indicators that made a transaction suspicious and thus give rise to reporting and, if applicable, freezing such a transaction by use of the regime set out in the AML/CFT legislation then in force).

421. The evaluation team thus strongly recommend that the Kosovo authorities adopt a comprehensive set of rules (either judicial or administrative) that would enable them to adequately implement the targeted financial sanctions contained in the respective UNSCRs relating to the prevention and suppression of the financing of terrorist acts and the freezing of terrorist assets, addressing all requirements under FATF SR.III. (It needs to be noted in this context that the approach followed by the above-mentioned FIC Administrative Decisions was inadequate and insufficient and hence should not be followed in *lex ferenda*.)

422. Generally speaking, for reasons discussed above, the obligation to freeze must go beyond the notion of “transaction” and the direct application of criminal procedural rules.

More specifically, there should be a mechanism for conversion into domestic Law of designations under UNSCR 1267 and 1988 as well as in the context of UNSCR 1373. There is need for a clear national authority for designations under 1373 and for consideration of foreign requests for designations. All designations under UNSCRs 1267/1988 and 1373 should be communicated promptly to all parts of the financial sector which, on the other hand, need clear guidance on the wide meaning of funds or other assets in the context of SR.III.

423. There need to be publicly known procedures for de-listing and unfreezing and for those inadvertently affected by freezing mechanisms. Once the mechanism is in place, compliance with FATF SR.III should be actively checked and sanctions should be available for non-compliance.

2.5.3 Rating for Special Recommendation III

| | Rating | Summary of factors underlying rating |
|--------|--------|---|
| SR.III | NC | <ul style="list-style-type: none"> • No effective laws and procedures in place for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and to ensure that freezing actions extend to funds or assets controlled by designated persons; • No designation authority in place for UNSCR 1373; • No effective systems for communicating actions under the freezing mechanisms to the financial sector and no practical guidance in this field; • No procedures for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism • No procedure for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452 • No specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs; • No measures for monitoring the compliance with implementation of obligations under SR.III and to impose sanctions. |

2.6 The Financial Intelligence Unit and its functions (R.26)

2.6.1 Description and Analysis

FIU functions (FATF R.26: Essential Criterion 26.1)

424. The Financial Intelligence Unit was established at the end of 2010 by Article 1 of law 03-L/196 on the Prevention of Money Laundering and Terrorist Financing (AML/CFT Law). The FIU inherited the building and structures of its predecessor the Financial Intelligence Centre (FIC), a body established by UNMIK and later run by EULEX to perform the functions of an FIU. The transition period from the EULEX-led FIC to the locally-run FIU took several years in 2010-2012 and was formally completed in June 2012.

425. The FIU sits under the Ministry of Finance and Economy (MFE) and by Article 4 is the central independent institution responsible for requesting, receiving, analysing and disseminating disclosures of information – Suspicious Transaction Reports⁶⁰ (STRs).

426. The legislation requires Reporting Subjects to disclose information to the FIU by means of an STR and within 24 hours, when they suspect money laundering and/or terrorist financing. They are also obliged to disclose to the FIU all single transactions in currency of €10,000 or more. Multiple transactions are treated as a single transaction if the bank or institution has knowledge that the transactions are by or on behalf of another and exceed €10,000 in a single day.

427. The FIU has implemented the UN developed ‘goAML’ system to manage the STRs. The system provides for the secure reception, storage, analysis and dissemination of intelligence packages. There are MoUs covering the request and exchange of data between the FIU and Kosovo Customs, Central Bank of Kosovo. The MoU with Kosovo police is still under negotiation. The MoU with Kosovo Customs as well as the draft MoU with Police envisage a liaison officer working in the FIU in order to facilitate the exchange of information. These liaisons officers also function as analysts in the FIU, apparently focusing on those cases which are of relevance and interest to their agency.

Institutional Guidance (FATF R.26: Essential Criterion 26.2)

428. The FIU has issued guidance to reporting entities by means of ‘Administrative Directives’ by order of the Director of the Financial Intelligence Centre (FIU). There are 14 such Directives up to December 2011. However, as indicated above, consequent to the repeal of UNMIK Regulation 2004/2 which forms the basis for these Directives, the assessment team is inclined not to consider them as pieces of valid and enforceable legislation for the time being. The paragraphs that follow should therefore be read within this context.

429. These cover the manner of reporting, particulars of risk areas that reporters should pay special attention to, imposition of UNSCR 1267 on designated individuals and entities, guidance on when to report aggregated cash deposits that exceed €10,000.

430. The reporting entities are requested to file STRs and other reports electronically through the goAML system. There are apparently some particular drawbacks to this arrangement, resulting in a high resource burden for the private sector. The goAML reporting form is quite demanding in terms of required customer identification information. At the same time the requirement to report aggregated cash deposits over \$10,000 means that any new customer regardless of the amount of deposit will need to be fully registered in the goAML terminal of the reporting subject. This creates a certain burden on the industry to pre-enter a large amount of data into goAML, just in case an STR may need to be filed with regard to a client.

431. At the same time the goAML reporting form allows entities to report their analysis through descriptive narrative text and to attach any supporting reference documents should the entity wish to provide more comprehensive information. Nevertheless the FIU is very often obliged to come back to reporting entities with requests for additional information in almost 100 % of cases, also adding to the resource burden on its analysts as well as financial institutions, which are forced to allocate additional resources to answering FIU requests instead of increasing the *quality* of reporting. This poor quality of reporting is further aggravated by the total lack of feedback to reporting entities on the outcomes of specific cases, as well as such general matters as ML typologies and trends.⁶¹

⁶⁰ Includes suspicious acts (definitions Art 2.1.35).

⁶¹ The FIU Annual Report that is to be published in 2013 will contain typologies useful to the private sector.

Access to information (FATF R.26: Essential Criterion 26.3)

432. The scope and mode of FIU access to various databases is not fully satisfactory, which negatively impacts the analytical function of the Unit.

433. The FIU has direct access (on the basis of MoUs) to the databases of:

- the Kosovo Business Registration Agency within the Ministry of Industry and Trade and
- the Department of NGO Registration within the Ministry of Public Administration

434. These databases are also available to the general public, however the FIU has access to an extended version, which is provided equally to law enforcement, tax and other special authorities. The FIU browses these databases through an internet connection available on a computer that is detached from the FIU analytical mainframe. This makes it impossible to perform any integrated visual analysis with the use of these databases, significantly slowing and diminishing the quality of the analytical process.

435. The FIU does not have direct access to police or Customs databases. The Customs upload new information into the FIU database on a monthly basis on the basis of a signed MoU.

436. The FIU has established electronic links via goAML with Customs and Police through which it can request information searches or exchange the results of analysis and disseminations. Although the FIU would like direct access to LEA databases this is not currently possible, it feels the current system of indirect access, usually via the liaison offices is adequate for its needs.

437. The FIU has signed co-operation agreements (MoU's) with several other domestic institutions, i.e. the Tax Administration, the Anti-Corruption Agency and the Cadastral Agency. These MoUs have not been provided to the assessment team. It is not clear whether the FIU has indirect access to the Cadastral agency database, and what is the mode as well as purpose of exchange of information with the Tax Administration and the KAA. In any event it is clear that the current arrangements with regard to the scope and mode of database access are not sufficient for the FIU to properly undertake its functions. The number of databases that FIU has access to should be expanded. Those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML.

FIU power to obtain additional information (FATF R.26: Essential Criterion 26.4)

438. Paragraph (2) of Article 22 obliges banks and financial institutions to provide additional information related to a suspicious report that the bank or financial institutions would have filed with the FIU. It does not appear however that reporting entities are obliged to provide information when it is not related to a previously filed report by the reporting entity institution. Additionally the abovementioned article, as it appears, does not grant the legal right to the FIU to address a reporting entity with a request for additional information. Indeed no such powers are found in any other parts of the AML/CFT Law, e.g. Article 14 on the duties and competencies of the FIU, which gives it the power to demand information from a *public or governmental bodies or any international or intergovernmental body or organization (in Kosovo) concerning a person, entity, property or transaction*. It is apparent that this does not include reporting entities.

439. In accordance with Article 14.1.4 the FIU “requires data, documents and information related to specific requests of data or analyses from legal obligators, which should be offered precisely for inspection by FIU and to allow their copying and reproduction, only for the use of a Unit. Legal obligators who refuse such requests should within three (3) days be informed about the request of FIU, send it in written their reasons for refusal. After this, the FIU shall decide and notify the legal obligor whether he/she is or is not in compliance with obligations foreseen in this provision”. This wording, while quite ambiguous, seems to relate to the supervisory function of the FIU as regulated under Article 30 of the AML/CFT Law, and does not regulate the procedure to request additional information from reporting entities for analytical purposes.

440. Whatever the interpretation, it is quite apparent that the procedure to request additional information from reporting entities as described in the Law contains significant ambiguity and is open to legal challenge by the reporting entities. The FIU have explained that no problems have occurred in practice, however it is recommended to modify the text so as to make the FIU power to request additional information unequivocal and not subject to any interpretation.

FIU authorised to disseminate when M/TF suspected (FATF R.26: Essential Criterion 26.5)

441. Article 15.2 of the AML law authorises the FIU to disseminate to law enforcement authorities any information received under Article 15.1, that is to say data from reports held by the FIU that identify individuals, transactional data, account particulars, data concerning a person or identity which has provided information to the FIU.

442. The draft amending legislation adds to Article 15 of the AML/CFT Law the explicit power that “the FIU is able to exchange, domestically as well as internationally, all information accessible or obtainable directly or indirectly by the FIU”. The FIU can do so “at its own initiative or upon request”.

443. The FIU uses the goAML system to disseminate information to Customs. The same dissemination mechanism is also foreseen in the draft MoU currently being negotiated with the police. The assessment team was also informed that the FIU disseminates materials directly to the Special Prosecutor’s Office (SPRK), which has exclusive jurisdiction over ML cases. It was not clear to the assessment team, which criteria the FIU was using when choosing whether to disseminate materials to police or to SPRK.

444. The FIU apparently receives no systemic feedback on the progress of its disseminations, even though the dissemination form does contain a request to the receiving authorities to inform the FIU about the outcome of the investigation. The little feedback that is received is usually sporadic and unsystemic.⁶²

FIU Operational independence (FATF R.26: Essential Criterion 26.6)

445. Article 4 of AML law 03-L/196 establishes the FIU under the Ministry of Finance as a central independent national institution responsible for requesting, receiving analysing and disseminating disclosures of information.

446. Article 5 of the AML law establishes a Management Board to oversee and ensure the independence of the FIU, which is comprised of the ministers/directors of the Ministry of

⁶² The assessment team was subsequently informed that the FIU and Police signed a MoU on 19 February 2013, however this falls outside the scope of this assessment, as signature took place more than two months after the on-site visit.

Finance, Ministry of the Interior, Chief Prosecutor, Police, Tax Administration, Customs, Central Bank. The Board, by statute, has no executive or enforcement powers vis-à-vis the FIU. The Board meets twice a year and has no right to interfere in any way in FIU on-going cases. The FIU therefore clearly has operational independence and autonomy. This seems to be the case in practice.

447. The Board is authorized to review, approve and reject the reports of the FIU; oversee and periodically assess the performance of the Director of the FIU; appoint and dismiss the Director of the FIU; determine the budget of FIU upon proposal of its Director; control and oversee the wealth stated by the Director of the FIU and the conflict of interest cases, in accordance with relevant legal rules and procedures.

448. Fifteen (15) days prior to each Board meeting once a year, the Director of the FIU must provide each and every member of the Board with an up-to-date written report summarizing: the administrative, executive, and regulatory activities and decisions of the FIU; and all aspects of the financial management, revenues and expenditures of the FIU. So far one such report has been provided to the Board.

FIU information securely protected (FATF R.26: Essential Criterion 26.7)

449. Article 14 of AML law 03-L/196 requires FIU staff to keep information obtained from their duties confidential and disseminate it only in accordance with the law. Article 33.6 makes it a criminal offence for any official of the FIU to disclose information, remove or destroy records without lawful authority. The FIU premises are physically secure.

FIU public reports FATF 26.8

450. Article 10 of the AML/CFT Law obliges the Director of the FIU to furnish the Board with a written annual report. This report should account for the administrative, executive and regulatory activities and decisions of the Board. Article 14.1.9 allows the FIU to “make reports public as will be helpful in carrying out its tasks”. The first FIU report was submitted to the Board in 2011.

451. The 2011 report has apparently not been made public and it does not contain ML typologies which could be useful to the reporting sector.

FIU application to joining Egmont (FATF 26: Essential Criterion 26.9)

452. The FIU has secured the sponsorship of FIU Slovenia to attain membership of the Egmont group of FIU's. It made a request at the end of 2011 to be allowed to attend Egmont Working Group meetings as an observer but this has been declined by Egmont. The FIU is awaiting the proposed amendments to the AML Law to pass, which could increase its chances of becoming an Egmont group member.

FIU adopting Egmont principles of information exchange (FATF 26: Essential Criterion 26.10)

453. The FIU states that it has not adopted the Egmont Principles of Information Exchange as it is not an Egmont member. Whilst this is true those principles are best practice in this arena and should be adopted forthwith.

Has Kosovo implemented EU 3rdMLD Article 25.1?

454. There is no specific obligation on the CBK or other Supervisors to report any ML/TF suspicions they may uncover in the course of their inspections. However Article 14.1.5 AML

law 03-L/196 obliges FIU and other bodies and institutions in Kosovo to “mutually co-operate and assist one another in performing their duties and shall co-ordinate activities within their competence.” If, during an inspection a supervisor forms a suspicion on ML/TF this article would seem to oblige him to report it as it would assist the FIU. The CBK informed that there has been at least one instance where following an inspection relevant information about such a case was forwarded to the FIU. Apparently the CBK did not receive any feedback about the outcome of the case, nor was the FIU able to recall receiving any such information from the CBK.

Statistics maintained by the FIU

455. The FIU maintains minimal statistics on STR/CTR received and disseminated. They do not keep statistics on wire transfers as they are not reported to FIU. There are no statistics available in the FIU on the outcome of disseminations to law enforcement.

Table 8: Overall STR reporting/disseminations

| | 2010 | 2011 |
|-----------------------------|-----------|-----------|
| Number of STRs received | 145 | 131 |
| Disseminations | | |
| Kosovo Police | 15 | 23 |
| Tax Administration | 6 | 9 |
| SPRK | | 1 |
| Foreign FIU | 1 | |
| Central bank | 1 | |
| EULEX | 4 | 1 |
| Customs | | 4 |
| Total disseminations | 27 | 38 |

Table 9: Statistics on Terrorism financing

| | 2010 | 2011 | 2012 |
|---|-----------|----------|----------|
| No. of Cases regarding with <i>Terrorism financing</i> | 13 | 5 | 3 |
| Total | 13 | 5 | 4 |

Table 10: Reports that have been sent to Kosovo Police, Eulex Police and SPRK

| Case disseminated (generated by STR) | 2011 | 2012 | Request for information (from LE) disseminated | 2011 | 2012 |
|--|-----------|-----------|---|-----------|-----------|
| Kosovo Police | 15 | 23 | Kosovo Police | 21 | 24 |
| SPRK | 0 | 1 | SPRK | 4 | 3 |
| EULEX Police | 4 | 2 | EULEX | 16 | 7 |
| Total | 19 | 26 | Total | 41 | 34 |

456. The main complaint from the FIU is that they do not receive feedback on any of the STR/analyses they disseminate. The number of disseminations is not that great that this would be burdensome on the other agencies.

Is the FIU adequately funded, staffed, trained and have high professional standards?

457. The FIU considers that its budget, staff numbers and technical resources are generally sufficient for the FIU to be effective and discharge its mandate. The Director of the FIU has made a plea for a financial and technical needs assessment in order to stay ahead of developing trends in ML and TF.

Table 11: *FIU financial and human resources*

| Year | 2009 | 2010 | 2011 | 2012 | 2013 |
|------------------------|--------------------------------|--------------------------------|-------------------------------|--------------------------------|--------------------------------|
| Budget in Total | € 328,603.⁰⁰ | € 368,255.⁰⁰ | €327,293.⁰⁰ | € 332,920.⁰⁰ | € 334,250.⁰⁰ |
| Staff | 16 | 16 | 16 | 20 | 20 |

458. There are an additional two EULEX analysts working in the FIU.

459. FIU staff has attended frequent training courses on aspects of money laundering, terrorism finance, trends, strategic and tactical analysis, financial investigation, audit and financial controls, computer management, goAML. This has been provided both locally and internationally. Despite the training we were informed that no strategic analysis has yet been conducted.

460. Staff are expected to maintain high standards of integrity. As mentioned above the Director has to declare his wealth.

461. Staff are recruited through the law on recruiting civil servants which requires them upon signing their contract of employment to comply with the law on conflict of interest and display high standards of professionalism, integrity, honesty and proper skills (see also analysis and recommendations in section 2.4 of the AC assessment report).

462. Apparently the competition to fill vacancies in the FIU is extremely high – approximately 40 candidates per vacancy. This allows the FIU to recruit well-educated and highly-skilled staff. Staff turnover, which seemed to be an issue several years ago is no longer a problem.

463. Staff having access to confidential information go through an additional vetting procedure to verify their past.

Effectiveness

464. Unfortunately the assessment team has not been provided with sufficient information to comprehensively judge about the effectiveness of the FIU. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the absence of interagency feedback and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort.

465. At the same time the FIU provided at least one example where its information was used in a successful ML investigation. The assessment team has also been provided with sanitized files intended for dissemination to law enforcement authorities. These materials demonstrate the clear ability of analysts in the FIU to perform proper analysis to the point as to be able to infer the probable predicate offence from available data. As noted above, the analytical process could surely be made more efficient and comprehensive if the FIU had integrated access to a wider range of databases.

466. The limited access of the FIU to databases of other agencies is a symptom of the limited institutional standing and recognition of the FIU by other authorities. The fact that the FIU is organizationally detached from a major ministry/agency (in this case the Ministry of Finance) reflects positively on its operational independence, however the arrangement does not relieve the Ministry of Finance from the general responsibility (including as the Chair of the Governing Board of the FIU) for the Unit in terms of ensuring and promoting its institutional standing with other authorities. Additionally the Governing Board, when considering and discussing various aspects of the FIU's work, should focus to a much larger extent on facilitating the integration of the FIU with other agencies, particularly in accessing information and databases. Particularly, since the Board consists of representatives of agencies which are key and direct partners of the FIU.

2.6.2 Recommendations and Comments

467. The Ministry of Finance and the Governing Board of the FIU should take measures to facilitate and promote the institutional standing of the FIU with regard to other authorities.

468. The current arrangements with regard to the scope and mode of database access are not sufficient for the FIU to properly undertake its functions. The number of databases that FIU has access to should be expanded. Most importantly, the FIU should be provided access to the database of the Police. Those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML to enhance the quality, scope and speed of analysis.

469. Reporting forms should not pose obligations on reporting entities that go beyond the AML/CFT Law (additional resource burden on the private sector).

470. The current practice of requesting additional information from reporting entities in almost 100% of cases is clearly excessive. Additional measures to increase the quality of STRs and ultimately alleviate the burden of additional requests the FIU should work with the reporting sector by providing general (typologies) and targeted feedback on the outcome of STR disseminations.

471. The measures described above, should ultimately and in concert alleviate the technical resource burden on the FIU and reporting entities, allowing them to focus on the quality of information provided, as well as the quality of analysis undertaken. However, some of the measures require a more concerted effort on the part of a number of agencies. For example the lack of targeted feedback from the FIU to reporting entities stems from the very lack of law enforcement-to-FIU feedback and is thus a problem of the system in general, which needs to be mitigated.

472. Without feedback from law enforcement the FIU is also not able to properly benchmark its analysis, which significantly hinders any quality improvement of analytical materials produced by the FIU. A formal and regular system of feedback on progression of FIU referrals should be implemented jointly with Police, Customs and Prosecutors. This issue should be considered as one of the priorities by the National Office for Economic Crime Enforcement, when this Office is set up.

473. The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap, which results from the absence of interagency feedback and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort.

474. The publication of the annual report by the FIU should be considered a priority in order to raise awareness about the activities of the FIU among the wider interagency community, as well as the reporting sector. This report should be used, inter alia as an effective tool by the FIU to provide feedback to the reporting sector, and thus should always include information on current ML typologies.

475. It is recommended to modify the text of the AML/CFT Law so as to make the FIU power to request additional information unequivocal and not subject to any interpretation. It is therefore recommended to insert a new paragraph (1.2A) to Article 14 of the AML/CFT Law dealing with the duties and competencies of the FIU to the effect that it can demand any information, data or documents from reporting subject that are necessary for the Unit to fulfil any of its obligations under the Law. This recommendation would also cover situations where the FIU is requested information by its foreign counterparts which the Unit currently fulfils under paragraph (2) of Article 22 which is not legally correct as in such circumstances no STR would have been filed:

Article 14 (1.2A) for the purposes of fulfilling any of its obligations under this Law, the FIU may demand from any reporting subject all information, data, or documents that the Unit may require;

476. That the FIU should implement the Egmont Principles of Information Exchange in its dealings with foreign FIU's

477. The FIU should conduct a financial and technical needs assessment including a 3 year forward look. This should be complemented and informed by an assessment of the money laundering threats and risks to Kosovo (as foreseen by the AML/CFT strategy), where the FIU should take a leading role. The two assessments should produce an integrated action/resource allocation plan with joint priorities set for the FIU, law enforcement, supervisory and policy-making authorities.

2.6.3 Rating for Recommendation 26

| | Rating | Summary of factors underlying rating |
|-------------|---------------|---|
| R.26 | PC | <ul style="list-style-type: none"> • The scope and mode of FIU access to various databases is insufficient and negatively impacts the analytical function of the Unit; • Ambiguity in the powers of the FIU to request additional information from reporting entities open it up to legal challenges; • The Kosovo FIU should consider adopting the Egmont group principles for international information exchange; • The lack of feedback from law enforcement on FIU disseminations negatively impacts the effectiveness of the FIU; • The lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis; • Absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on both - the FIU and industry and decreasing effectiveness; • The need to excessively request additional information (stemming from low quality and non-informative STRs) puts a resource burden on the FIU, negatively impacting its' effectiveness. • FIU annual report does not contain ML typologies and has not been |

| | Rating | Summary of factors underlying rating |
|--|--------|--------------------------------------|
| | | made available to the wider public; |

2.7 Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of ML & TF offences, and for confiscation and freezing (R.27 & 28)

2.7.1 Description and Analysis

Recommendation 27

478. All the Kosovo law enforcement agencies have a responsibility for ensuring that money laundering offences are investigated. There is a specialized unit within Kosovo police – the Financial and Money Laundering Investigation Unit within the Directorate against Economic Crimes and Corruption. Kosovo Customs have an investigative responsibility and the FIU also has a responsibility to refer cases for investigation when it detects or suspects that money laundering is taking place.

479. Money Laundering prosecutions are a competence reserved for the Special Prosecutors Office (SPRK). There are currently 10 SPRK Prosecutors with plans to increase this to 15. At the time of the on-site visit there were three levels of Prosecutor, District Prosecutors, State Prosecutors and Special Prosecutors. From the 1st January 2013 Kosovo has re-organised its prosecution and courts service into a flatter structure. The Special Prosecutors Office has been retained and has also reserved its competence to prosecute ML cases on an exclusive basis.

480. The police regularly receive disseminations from the FIU and carry out a preliminary check within 24 hours of the information prior to submitting the file to the SPRK. Investigations are initiated when the SPRK is presented with sufficient information or evidence from the Kosovo police or other sources (including State Prosecutors) that an offence has been committed. Money laundering investigations are prosecutor-led with law enforcement acting as “the right hand” of the prosecutor. Law enforcement must notify the prosecutor of any and all new information discovered in the course on a ML investigation. The assessment team was informed that there is always an on-duty prosecutor present in the Police in order to speed up the decision-making process on urgent cases.

481. The SPRK then requests the opening of a formal investigation by a pre-trial Judge. The pre-trial Judge may authorise a range of covert investigation techniques as are required to collect sufficient evidence to sustain a prosecution whether for money laundering or any other offence.

482. The Criminal Procedures Code⁶³ Article 87 describes the range of techniques available. These include amongst others the interception of communications, undercover operations, co-operating agent, the controlled delivery of postal items and the disclosure of financial data.⁶⁴ There are no statistics available on the instances where special investigative techniques have been employed in the investigation of money laundering or terrorism finance cases.

483. FATF R.27: EC.27.2 recommends that consideration be given (by law or otherwise) to allowing an arrest to be postponed or waived. The timing of an arrest is a matter for the

⁶³ 2012_04-L-123-eng extant from 1st January 2013.

⁶⁴ Article 256 of the old CPC has the same definitions.

judgement of the Prosecutor or a pre-trial Judge. The only provision identifiable in the legislation where an arrest could be waived, or an indictment not preferred, is where a potential defendant agrees to become a cooperative witness. Article 235 of the CPC lays out the requirements and obligations of a cooperating witness. This is not fully in line with the requirements of the international standards, which require that postponement be available as a measure when, for example further evidence gathering is required.

484. There is no evidence of any review of ML/TF trends and techniques by competent authorities on a regular interagency basis.⁶⁵

485. The competent authorities responsible for investigating ML and TF offences have the general criminal investigation powers of search and seizure that flow from CPC Article 105 (Court Order authorising search) and Article 110 (search without Court Order).

Recommendation 28

486. Article 119 of the new CPC gives the Prosecutor the right to obtain all documentary evidence including financial records. Article 121 of the CPC lists the non-exclusive range of evidence that can be obtained by the prosecutor at the stage of pre-trial testimony. This provision seems to cover the full range of the types of documents required under FATF Recommendation 28. At the same time, the Article states that tangible evidence is *inter alia* “any... tangible evidence lawfully obtained under this Criminal Procedure Code whose existence and form provide evidence relevant to the investigation”. Tangible evidence can be duly used in a criminal proceeding.

487. Articles 122 and 123 of the CPC provide for the taking of witness statements in the course of the pre-trial stage. The interviewing of a witness can be undertaken by the prosecutor, or alternately can be delegated by him to a representative of law enforcement.

488. Articles 70 - 73⁶⁶ of the new CPC gives the law enforcement agencies the powers to collect information to investigate crime at the initial investigative phase. This includes the interviewing of witnesses and the taking/seizure of evidence.⁶⁷

489. Covert and technical measures of surveillance and investigation can also be undertaken (Articles 86-96 of the CPC) by police at the authorization of a pre-trial judge, or as is in the exclusive case of ML – of a prosecutor, in case the circumstances call for urgency. The evidence and materials gathered with the use of such measures, including financial records are admissible if collected in accordance with criminal procedure. Their admissibility can also be challenged by the defendant in the course of due process.

490. Additionally, Article 14 of the AML/CFT Law gives the FIU the right to request and take copies of certain data and information from obliged bodies. Article 15.2 of the AML/CFT Law allows information held by the FIU to be disclosed to the police and prosecutor for investigative purposes but this cannot be adduced as evidence without the authority of the Director of the FIU (Art. 15.3).⁶⁸ Knowing that the information exists does allow a more focussed approach to evidence gathering.

⁶⁵ FATF recommendation 27.6 refers.

⁶⁶ Article 201 of the ‘old’ CPC – General powers of the police to investigate.

⁶⁷ FATF recommendation 28.2 refers.

⁶⁸ FATF recommendation 28.1 refers.

Resources and staffing (R.30)

491. The Kosovo police financial crime & money laundering unit is small, about 3 staff. As acquisitive crime will almost always be associated with a money laundering offence the assessment team considers this to be inadequate. As ML investigations increase in number and involve more of the police force, this Unit should be clearly tasked with an oversight and guiding role for all such investigations.

492. The assessment team was informed that 50% of police managers are in an ‘acting’ role, i.e. working at a higher grade than their substantive rank and that this causes rigidity in decision making. Apparently there have been approximately 5000 complaints made against the KP of which only 500 have been investigated with consequent loss of public confidence in the integrity of the KP. The assessment team was informed from various sources that political ‘interference’ in the police is a problem and that there are “not enough” police.

493. Kosovo Customs and the FIU have provided extensive evidence of relevant training on aspects of money laundering, financial analysis and other professional competencies. These have been delivered by both external donors and in-country providers. Further training has been provided to KP, KP investigators, Prosecutors, Judges, Tax Inspectors, Customs Officers, FIU, bank and other agencies.

494. The Kosovo Judicial Institute is responsible for training Judges and Prosecutors and candidates for Judge and Prosecutor. Within the Continuous Legal Education Programme, between 2009-2012 they delivered organized crime modules training covering: financial crime, corruption, informal economy and money laundering to 38 Judges and 22 Prosecutors. Corruption Modules covering: investigation techniques in cases of corruption, understanding of corruption – prevention, its consequences and combating, corruption related criminal offences and their elements to 37 Judges, 30 prosecutors and 24 others⁶⁹. Within the Financial Crimes and Informal Economy modules: prosecution and investigation of money laundering, forms and elements of criminal offence of money laundering, legal instruments that sanction financial crimes, institutions authorized for combating of financial crime, criminal offences that constitute elements of financial crime, measures for prevention of financial crimes, investigation and confiscation of assets which proceed by commission of financial crime – evidence, ensuring and analysing of financial evidence, as well as working based on evidence; written documents and computer experts (65 persons participated, of them 26 judges, 17 prosecutors and 22 others⁷⁰). Within the Initial Legal Education Programme (candidates for judges and prosecutors) the module on Financial Crime and Corruption was delivered at 20 training sessions. 141 candidates underwent training in this module, the larger part of them have already been appointed and discharge functions of Judges or Prosecutors.

495. It is unclear from the information provided whether the broader police force has been involved in general awareness-raising training on topics of money laundering and identification criminal proceeds in the context of an economic crime investigation. In order to broaden the efforts in combating economic crime it is imperative to involve and raise awareness among general police about the need to proactively pursue criminal proceeds that are associated with any acquisitive crime.

⁶⁹ Professional associates in courts and prosecutors office, members of KP and representatives from the Anti-corruption units of Albania.

⁷⁰ Professional associates in courts and prosecution offices, representatives from sector of against organized crime (Albania), members of the Kosovo Police.

Statistics and effectiveness

496. The following statistics for arrests and investigation of ML offences have been provided to the assessment team by the Police:

Table 12: Arrests and Investigations of ML Offences

| Money laundering cases | 2010 | 2011 | 2012 |
|-------------------------------|-------------|-------------|-------------|
| Cases under investigation | 22 | 3 | 8 |
| Criminal charges filed | 3 | 3 | 3 |
| Against suspects | 7 | 6 | 14 |
| Arrested | 6 | 1 | 7 |

497. The Prosecutor's Office has otherwise reported the following statistics on money laundering:

- During 2009, prosecutors received in total 10 reports concerning 38 persons, whereas they worked on total of 43 cases during this year. From the information received, 8 were reported by the Police and two from the FIC. 5 cases were solved but no indictments filed;
- During 2010, prosecutors received a total of 17 reports concerning 33 persons, whereas they worked on total of 71 cases. From the received information: 15 were reported by the police, whereas 1 from the FIC and 1 from others. 21 cases were solved and 8 indictments filed for 8 persons.
- During 2011, prosecutors received in total 34 reports concerning 79 persons, whereas during this year there were 129 cases in total. From the information received: 30 were reported by the police, 1 from FIC, one from the prosecutor directly and 2 from others. 33 cases were solved and 7 indictments filed.
- During the first nine-months of 2012, prosecutors received a total of 10 reports involving 35 persons, whereas during this year they worked on 131 cases. From the received information, 4 were reported by the police, 2 from FIC/FIU, 2 from the prosecutors, and 2 from others. 32 cases were solved and 7 indictments filed.

498. Information provided by KJC as well as that of the KPC suggests that there have been no criminal convictions for the offence of ML (it is not clear whether the so-called 'coalition' case (see section 2.1) has ended in a conviction).

499. It is apparent that the statistics and records kept by the Police and the Prosecutors do not match, both in terms of the criteria and the ultimate numbers. The assessment team was informed that the police and prosecutors have made significant progress towards synchronizing their case referencing systems, however the same should be done for statistical referencing. Police statistics do not reflect ML prosecutions or their outcome. The assessment team was informed that police are sometimes informed about prosecutions, however it is clear that such data is not systemically provided, nor is it systemically recorded by police themselves.

The statistics given by prosecutors indicate a gradual increase in the case load for ML offences handled by them, and the growing backlog of cases – almost 100 in 2012. Since money laundering crimes belong to the exclusive competence of the SPRK, which deals with a large number of other offences with only 10-15 prosecutors at its disposal, it is apparent that a change in approach should be eventually considered. Also, SPRK lack of capacity to deal with a growing number of ML cases could be demotivating to law enforcement, who would be reluctant to seek out criminal proceeds even when there is an obvious proceeds-generating predicate in play.

500. The increasing case-load of prosecutors coincided with a sharp drop in the number of ML cases reported to them by the Police in 2012 (according to KPC statistics). If one takes the police statistics for ML cases investigated, the same sharp drop in investigations is recorded, but in 2011. Putting aside the issue of conflicting statistics, it can nevertheless be deducted that there has been a drop in police activity to investigate and refer ML cases to prosecution in the recent years. It is unclear what is the cause for this but it is a clear indicator of decreasing effectiveness. This is also confirmed by the fact that there is no rising rate of convictions (which could have pointed to an increase of quality while sacrificing quantity).

Police/FIU cooperation

501. The assessment team was informed that the police had had a difficult history in cooperating with the FIU, oftentimes due to the lack of clarity in the materials submitted by the FIU. The situation is apparently improving, however the assessment team has concerns with the insufficient feedback being provided to the FIU on the outcome of police investigations.

502. The police were able to inform the assessment team of one successful investigation employing the use of FIU material with regard to a former judge convicted of 10 years imprisonment. The FIU was apparently unaware of this outcome.

503. The police have provided the following statistics with regard to the processing of materials received from the FIU:

2012

22 cases were received from FIU
4 cases under investigation
25 cases of preliminary investigations
PPN under investigation 6
Closed cases 3
With special report 10

2011

31 cases received from FIU
Under investigation 3
Criminal charges 2
Preliminary investigations 24
PPN under investigation 3
Closed cases 7
With special report 2

2010

18 cases received from FIU
Under investigation 4
Criminal charges 2
Preliminary investigations 14
Special reports 8

504. As it was explained above, after the receipt of a file from the FIU police carry out a preliminary investigation to check the information contained in the FIU report. If the preliminary investigation confirms the FIU findings, then a request to open a proper criminal investigation is filed to the Prosecutor. From the abovementioned statistics it is apparent that on average 10-25 % of FIU cases go beyond the pre-investigation stage. The statistic seems to be more or less stable. This is a fact that is worrying in itself, as it demonstrates and confirms

the absence of proper feedback from police to the FIU. Such feedback could have allowed the FIU to fine-tune its analytical approach, which would ultimately result in less cases being turned down by police.

505. While the assessment team has identified several deficiencies in the analytical capacities of the FIU (see analysis in section 2.6 of this report), the sample FIU materials provided to the assessors do demonstrate a result-oriented and rather informative analysis. Hence the gaps in the intelligence-investigation-prosecution chain do not solely fall to the FIU, but to a large extent the police, especially since there is such a large percentage of cases rejected at the preliminary investigation phase. Furthermore, such a mass rejection of cases means that from 75-90 % of FIU resources and staff-time used to generate case materials are rendered irrelevant. This is a rather demotivating statistic, which should be improved as soon as possible through instituting and monitoring FIU-police collaboration, and this should be made an urgent priority of the National Office for Economic Crimes Enforcement.

2.7.2 Recommendations and Comments

506. The National Office for Economic Crimes Enforcement should urgently design measures for closer FIU-police collaboration and monitor their implementation in order to increase the efficiency in the use of FIU resources by police.

507. The National Office for Economic Crimes Enforcement should institute a system of maintaining unified statistics among police and prosecution on ML cases, in order to ensure that accurate analysis of effectiveness of the system can be made.

508. Increase the staffing of the Kosovo Police financial crime and money laundering unit.

509. The police liaison officer placed in the FIU following the signing of the planned MoU should become the main channel of feedback between the two agencies, particularly with regard to the supply of information on the progress of FIU cases. This should be explicitly specified in the text of the MoU. Additionally the FIU should hold regular consultations and coordination meetings with the Police ML unit on issues pertaining to the content of supplied material.

510. To introduce objective and transparent criteria for appointment/dismissal of the General Director and top management of the Police in order to ensure operational independence of the Police (see description in the AC Report, Section 2.3).

511. It is recommended to adopt guidelines for Police concerning the approval of exceptional outside engagement for police officers and establish a limit for the remuneration on such engagements (see description in the AC Report, Section 2.3).

512. The Kosovo Police Inspectorate role should be expanded to include an evaluation on whether KP is effective and 'fit for purpose'. These reports should be made public.

513. There should be a concerted effort to clear the backlog of ML cases in the prosecutorial system.

514. Kosovo competent authorities should undertake a review of ML/TF trends and techniques on a regular interagency basis with detailed input from the police and prosecution.

2.7.3 Ratings for Recommendation 27 & Recommendation 28

| | Rating | Summary of factors underlying rating |
|------|--------|--|
| R.27 | PC | <ul style="list-style-type: none"> • The lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy; • Increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness; • Inadequate staffing at specialized ML Unit in the Police impacts effectiveness; • Police do not provide feedback to FIU on cases, thus decreasing the overall effectiveness of the system; • No systemic feedback provided by prosecutors to police and other law enforcement bodies on the outcome of prosecutions; • Sharp drop in numbers of ML cases reported by the police to SPRK in 2012 indicates decreasing effectiveness of police in pursuing ML; • There is insufficient awareness in the police about the need to proactively pursue criminal proceeds when dealing with acquisitive crime; • No clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved. |
| R.28 | C | This Recommendation has been fully met. |

2.8 Cross border declaration or disclosure (SR.IX)

2.8.1 Description and Analysis

515. The Kosovo Customs Service has implemented a system of cross border currency and negotiable instruments control since 2004. This is now implemented through the AML law⁷¹ Article 29 – obligation to declare. The system envisages that every person entering or leaving Kosovo and carrying monetary instruments of a value of € ten thousand (10,000) or more must declare the amount of the monetary instruments and the source of such monetary instruments in writing, in a format prescribed by the Kosovo Customs, to a customs officer, and, if so requested by the officer, shall present the monetary instruments. The same obligation extends to the sending/receipt of monetary instruments via post or commercial courier.

516. A declaration is considered to be false if it contains incorrect or incomplete information. In case this occurs the Customs have the power to seize and detain monetary instruments which have been falsely declared or undeclared (Article 29, para 12, AML/CFT Law). Customs authorities also have the power to question and search natural persons and their baggage (Article 29, para 11, AML/CFT Law). The powers to restrain currency, as well as to question and search persons apply equally when there is a reasonable suspicion that monetary instruments are the proceeds of crime or were used or intended to be used to commit or facilitate money laundering or the predicate criminal offence from which the proceeds of crime were derived or are related to terrorist financing.

⁷¹ 03/L-196.

517. Customs statistics keep statistics about trans-border transport of currency and negotiable instruments.

Table 13: *Trans-border transport of currency and negotiable instruments*

| YEAR | BUSINESSES | NATURAL PERSONS | TOTAL NO. OF CASES OF DECLARATIONS PER YEAR |
|---------------------------|------------|-----------------|---|
| 2008 | 536 | 443 | 979 |
| 2009 | 608 | 360 | 968 |
| 2010 | 653 | 349 | 1002 |
| 2011 | 731 | 705 | 1436 |
| 2012 (January- August) | 520 | 425 | 945 |

518. Customs authorities have not indicated to the assessment team as to how they maintain information obtained as a result of declarations/false declarations/cases of ML/TF suspicions. While such information is reported to the FIU, however the record-keeping regime within Customs is not clear. Customs have reported that a functional system exists that maintains information obtained as a result of statements / false statements / suspected cases of ML / FT. This information is kept in electronic form in the database of Customs as well as in a physical folder (hard copy), however the assessment team has not seen any regulatory documents confirming this.

519. Kosovo Customs forward copies of all declarations to the FIU. This is done once a month on an electronic carrier, which is uploaded to the FIU database. Customs also report all suspicious ML/TF incidents to the FIU in the form of an STR. So far Customs have sent 3 such STRs to the FIU.

Table 14: *Kosovo Customs on cross border cash notifications to the FIU*

| Year | Cases |
|------|-------------|
| 2010 | 1 002 cases |
| 2011 | 1 436 cases |
| 2012 | 1 075 cases |

520. Kosovo Customs co-operates closely with KP, FIU, Integrated Border Management agencies and EULEX. Joint operational exercises are held on all cross border irregularities and all forms of crime which includes cash couriers. There is a 6 monthly report on developing risk areas to be focussed on. The list of joint operations is listed below.

- 2012 up to September - 102 joint operations were organized;
- 2011 - 115 joint operations were organized;
- 2010 - 98 joint operations were organized.

521. These included several special operations targeted at cash seizures, which produced results. In this regard the overall *modus operandi* of customs in terms of interagency cooperation can be considered effective.

522. Customs report good feedback at the investigation phase from Kosovo police. Kosovo Customs has a designated official contact point between Customs and KP for facilitating the exchange of information and for the acceleration of the process of exchange of

information (intelligence) and also for coordinating common actions between the two agencies. Also another liaison officer is designated as the contact point between Customs and the Unit of Tax investigations in the framework of the Tax Administration, who has a role to accelerate the process of exchange of information and coordination of common actions.

523. Kosovo Customs have signed co-operation agreements with Albania, Finland, Turkey, Slovenia, Macedonia, Montenegro, France, Hungary and Austria. With neighbouring countries, such as Macedonia and Albania Customs has instituted integrated data-sharing mechanisms. Customs use the facilities within ILECU as a communication channel with those Customs Services in the regional ILECU group (for more information on ILECU see Section 6.3 of this report).

524. If there were specific cases, Kosovo Customs would co-operate with the relevant authorities of other countries (where a co-operation agreement exists) in respect of any investigations into the smuggling of gold, precious metal and precious stones, including those where money laundering is suspected, within the constraints of the existing legislation. To date, Kosovo Customs has not recorded an instance of this kind of smuggling linked to actual or suspected money laundering.

525. Kosovo Customs have implemented service standards on the turnaround of international information requests as follows:

- 10 days when dealing with submissions within a normal time limit
- 5 days when dealing with priority submissions
- 1 day when dealing with top priority submission
- Within a day when dealing with urgent submissions

526. These turnaround times are considered by the assessment team to be generally adequate.

Sanctions

527. Kosovo Customs have the power to investigate customs offences and are to be considered as having the competencies and responsibilities of police or judicial police for these investigations⁷².

528. The Kosovo Customs can apply sanctions to persons who make a false declaration or disclosure. These sanctions vary from referral for investigation/prosecution of a criminal offence, confiscation of the entire sum of currency to an administrative penalty amounting to 25% of the value. Upon seizure the authorized custom officer shall issue to the concerned person a written receipt stating the relevant facts and the amount of the monetary instruments seized and retained. The monetary instruments seized shall, where possible, be held in a special non-interest bearing account in the name of the CBK or otherwise beheld in safe custody with CBK until such time as the required fine is paid in full.

Table 15: *Kosovo Customs cash seizures where a penalty has been imposed*

| | |
|------|--|
| 2010 | 3 detected cases where the undeclared cash seized amounts 43,870.00 Euro (25% of undeclared cash). |
| 2011 | 30 detected cases where the undeclared cash seized amounts 162,240.95 Euro (25% of |

⁷² Law on Customs 03-L-109 Articles 302& 303.

| | |
|------|---|
| | undeclared cash). |
| 2012 | 13 detected cases where the undeclared cash seized amounts 94,058.16 Euro (25% of undeclared cash). |

529. Where money has been seized, after 10 days the Prosecutor can apply for its freezing, confiscation or release to the owner.

530. Customs have referred the following cases to the Prosecutor:

- In 2010, 49 criminal charges have been forwarded to the competent prosecutor for suspicion of tax evasion in the amount of 4,233,034.57 €;
- In 2011, 36 criminal charges have been sent to the competent prosecutor for suspicion of tax evasion in the amount of 7,071,221.97 €;
- In 2012, 37 criminal charges have been filed to the competent prosecutor for suspicion of tax evasion in the amount of 23,482,723.21 €.

531. In many of these cases there was evidence of money laundering. There is no feedback on the outcome of these cases, if indeed there is an outcome yet due to delays in the judicial system. For this reason, customs have recently appointed a liaison officer working directly with the prosecutorial services, tracking the Customs related cases and ensuring that they are processed at a faster speed. The assessment team has not been able to verify the practical output and effectiveness of this arrangement, however Customs subsequently reported that with the appointment of a liaison officer there has been progress in exchanging feedback and also in speeding up the review of several cases that are considered of high importance.

Data Protection in Customs systems

532. Kosovo Customs comply with the protection of personal data as required by law on the protection of personal data 03/L-172. Systems used for international transactions that hold personal data restrict access to specific authorised persons from the Directorate of Law Enforcement.

Structure and resources

533. Total Customs staff number 584. Staffing levels for specialist units are as follows: investigation - 15, intelligence - 18, anti-corruption - 4. Customs believe their structure and funding is appropriate for their duties.

534. There is a certain number of vacancies. Apparently understaffing is caused *inter alia* by the personal risks that are associated with uniform duties. This impacts the effectiveness of the functioning of Customs. Subsequently Customs has informed the assessment team that it is in the process of recruitment of adequate staff for the Law Enforcement Directorate⁷³, specifically a competition has been announced in late 2012, testing and interviews procedures have been performed and it is expected that selected officers will fill the vacant posts.

535. There is no efficiency scrutiny of the Department although Internal Audit reports on Departmental spending to the Kosovo Auditor General. Customs are required to maintain highest standards of professionalism including standards related to confidentiality, integrity, honesty and proper skills. There have clearly been corruption issues within Kosovo Customs, however no indictments have occurred. Measures mostly taken were suspension and other

⁷³ In June 2013 Customs informed the assessment team that all vacancies in the Law Enforcement Directorate have been filled, however approximately 25 vacancies in other sectors in Customs still remain.

disciplinary sanctions. In 2003 they instituted a Professional Standards unit and by 2009 had added an Internal Inspection unit dealing with anti-corruption within the department.⁷⁴

536. The Training Section of Customs has identified training needs of staff involved in combating organised crime. In 2012 the following specialised training has been provided: US OTA-Commercial Based Money Laundering/Secret Operations/Money Laundering Advanced Analysis/Advanced Techniques of Financial Analysis; EULEX-Presentation against Money Laundering/Confiscation of Assets; Embassy of France-Informant Recruitment and Management; EXBS-Control of Hidden Places in Transport Means.

2.8.2 Recommendations and Comments

537. Overall the assessment team found the powers and practical functioning of the customs authority to be in compliance with relevant international standards, however some factors pertaining to staffing still pose a certain concern for the assessment team, especially given the extent and scope of operations of Kosovo Customs.

538. The role of the Customs authority in Kosovo is especially important given the wider regional consequences of the drug and weapons trafficking and organized crime⁷⁵, that originates/transits from/through Kosovo. In this regard consideration should be given to further reinforcing the Customs through allocating additional resources to motivate and facilitate the filling of vacancies, as well as to reinforce the integrity of staff.

539. A periodic external fit-for-purpose evaluation should be carried out with regard to Kosovo Customs in order to assess function, structure, effectiveness and value for money. The results should be made public.

2.8.3 Rating for Special Recommendation IX

| | Rating | Summary of factors underlying rating |
|-------|--------|---|
| SR.IX | LC | <ul style="list-style-type: none"> • No record-keeping rules in Customs with regard to information on declarations/false declarations and suspicions of ML/TF; • Prosecutor does not provide structured feedback on cases referred by Customs; • Understaffing impacts the effectiveness of Customs. |

⁷⁴ In June 2013 Customs informed the assessment team that a new internal Code of Ethics has been adopted in Customs.

⁷⁵ See EUROPOL Organized Crime Threat Assessment, 2011.

3 PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS

Legal Framework

- Law on the Prevention of Money Laundering and Terrorist Financing (Law no. 03/L-196 of 30/09/2010), hereinafter AML/CFT Law
- Law on Central Bank of Kosovo (Law no. 03/L-209 of 22 July 2010), hereinafter Law on CBK;
- Law on Banks, Microfinance Institutions and Non Bank Financial Institutions (Law no. 04/L-093 of 12 April 2012), hereinafter Law on Banks
- Law on Pension Funds of Kosovo (Law no. 04/L-101 of 6 April 2012) hereinafter Law on Pension Funds
- UNMIK Regulation 2001/25 on the Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries – hereinafter UNMIK Regulation 2001/25⁷⁶
- Central Banking Authority of Kosovo (CBK) - Advisory Letter 2007-1 of May 2007 on The Prevention of Money Laundering and Terrorist Financing
- CBK (CBK) – Rule X on The Prevention of Money Laundering and Terrorist Financing.⁷⁷
- Financial Intelligence Centre (FIU) - Administrative Directives

Scope of coverage of AML/CFT preventive measures⁷⁸

540. According to Article 16 of the AML/CFT Law banks and financial institutions providing a financial activity as defined in AML/CFT Law are subject to the provisions and obligations under the AML/CFT Law.

541. The AML/CFT Law defines a ‘bank’ according to the definition provided thereto through the Law on the CBK. The latter defines a bank as ‘an entity as defined in the Banking Law’. The Law on Banks in turn defines a bank as ‘a shareholder company engaged in the business of banking, including a subsidiary or a branch of a foreign bank’. The Law on Banks further defines the ‘business of banking’ as ‘the business of accepting deposits from the public and employing such funds either in whole or in part for the purpose of granting credit or making investments at the bank’s own risk’.

542. In accordance with Article 44 of the Law on Banks, banks may be authorized in their licenses to engage in the following financial activities:

- receiving deposits (in the form of demand deposits, time deposits, or other forms of deposit), whether bearing interest or not, in any convertible currency;
- buying and selling for a bank’s own account debt securities issued or guaranteed by governments or central banks of Kosovo or the European Union that are denominated and payable in the currency of the bank’s deposits;
- providing payment and collection services;

⁷⁶ A draft law covering the insurance sector is under process.

⁷⁷ The CBK has informed that a revised version of Rule X has been prepared and will be issued if and when the CBK is designated as the supervisory authority for the purposes of the AML/CFT Law. A draft copy of the revised version has been provided but it is not the scope of this report to undertake an assessment of the draft revised version.

⁷⁸ For further information on the financial sector please refer to Section 1.3 of this Report.

- issuing and administering means of payment (including payment cards, travellers' cheques and bankers' drafts);
- buying and selling foreign exchange for cash for the account of a customer;
- providing for safekeeping of securities and other valuables; and
- extending credit, including: consumer and mortgage credit; factoring with or without recourse; and financing of commercial transactions and buying and selling assets from another bank or financial institutions;
- borrowing funds and buying and selling for a bank's own account or for the account of customers (excluding underwriting) of money market instruments (including notes, bills of exchange and certificates of deposit); debt securities; futures and options relating to debt securities or interest rates; or interest rate instruments;
- acting as intermediary between borrowers and lenders (money brokering);
- financial leasing;
- providing credit information services;
- providing services as a financial agent or consultant (not including services described in sections...);
- dealing in gold or one or more currencies other than the currency in which the bank's balance sheet is denominated, including contracts for the future purchase or sale of foreign currencies;
- providing trust services, including, the investment and administration of funds received in trust and administration of securities;
- providing services as an investment portfolio manager or investment adviser;
- underwriting and distribution of debt and equity securities and dealing in equity securities;
- islamic finance or Islamic banking, with the consent of the CBK and subject to such conditions and in compliance with such regulations as the CBK may prescribe;
- any other activity that the CBK shall determine by regulation is related to a financial activity and that does not conflict with the provisions of this Law.

543. The definition of a 'bank' is consistent with the European definition for such institutions in the relevant European Union Directives.

544. The AML/CFT Law defines a 'financial institution' as a person or entity that conducts one or more of the activities for or on behalf of a customer including activities shown below:

- lending, including but not limited to consumer credit; mortgage credit; factoring (business for buying cheques, obligations etc), with or without recourse; and finance of commercial transactions, including forfeiting;
- financial leasing, except financial leasing arrangements related to consumer products;
- transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system;
- money and currency changing;
- issuing and managing means of payment, including but not limited to credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, or electronic money;

- financial guarantees and commitments;
- trading on behalf of other persons or entities in one or more of the following:
 - money market instruments, cheques, bills, certificates of deposit, derivative products (coming from another activity etc);
 - foreign exchange;
 - exchange, interest rate and index instruments;
 - transferable securities; and
 - commodity futures trading;
- individual and/or collective portfolio management;
- participation in securities issues and the provision of financial services related to such issues;
- safekeeping and administration of cash or liquid securities on behalf of other;
- otherwise investing, administering or managing funds or money on behalf of other persons;
- acting as an insurance company, life insurance company or intermediary of life insurances as defined in Article 1 of UNMIK Regulation No. 2001/25 of 5 October 2001 on Licensing, Supervision and Regulation of Companies and Insurance Intermediaries; and 4
- acting as a fiduciary as defined in section 1 of UNMIK Regulation No. 2001/35 of 22 December 2001 on Pensions in Kosovo.

545. The Law on the CBK further defines a ‘financial institution’ as ‘entities such as banks, foreign exchange offices, insurance companies, pension funds, and other entities conducting financial activities, as defined in any Law relevant for the purposes of this Law, for which the CBK is given supervisory authority by Law’

546. The Law on Banks does not define a ‘financial institution’ except to the extent that the term includes banks, microfinance institutions and non-bank financial institutions, but provides a definition of what constitutes a ‘non-bank financial institution’ as ‘a legal entity that is not a bank and not a microfinance institution that is licensed by the CBK under this Law to be engaged in one or more of the following activities: to extend credit, enter into loans and leases contracts financial-leasing, underwrite, trade in or distribute securities; act as an investment company, or as an investment advisor; or provide other financial services such as foreign exchange and money changing; credit cards; factoring; or guarantees; or provide other financial advisory, training or transactional services as determined by CBK’.

547. It is worth noting that the definitions of a ‘financial institution’ provided by the AML/CFT Law and the Law on the CBK include the insurance sector.

548. Although there are very close similarities to the financial activities that can be undertaken by financial institutions or non-bank financial institutions as defined in the AML/CFT Law, the Law on Banks and the Law on the CBK, when taking into consideration the permitted financial activities under Article 94 of the Law on Banks, there remain some divergences between these definitions that could impact on the application of the international standards as reflected in domestic legislation for the licensing or registration of all types of financial institutions, including the application of the obligations under the AML/CFT Law.

549. Moreover, the Law on Banks also provides a definition of a ‘Microfinance Institution’ being ‘a legal entity organized as either an NGO under the NGO Law or as a joint stock company under the Law on Business Organizations which provides as its primary

business loans and a limited number of financial services to micro and small legal entities, low-income households and low-income persons’.

550. Although there are no other definitions of a Microfinance Institution in the Law on the CBK and in the AML/CFT Law it is clear from the permitted financial activities as defined in Article 93 of the Law on Banks that Microfinance Institutions would be caught under the definitions of ‘non bank financial institution’ given above and would therefore fall subject to the obligations of the AML/CFT Law.

3.1 Risk of money laundering or terrorist financing⁷⁹

551. Kosovo has not undertaken a national risk assessment of its vulnerabilities and risks to money laundering and the financing of terrorism.

552. The CBK has not undertaken a risk assessment of money laundering and financing of terrorism vulnerabilities within the financial sector. Also it has not required banks and financial institutions to undertake a risk assessment of their activities, products and services to identify their vulnerabilities to money laundering and the financing of terrorism and develop their internal control systems accordingly.

553. Notwithstanding, in September 2012, the Government of Kosovo has approved a Strategy and Action Plan on Prevention of Money Laundering and Terrorist Financing. The Strategy includes specific objectives in the national efforts to increase the level of combating money laundering and terrorist financing, with the main objectives of the Strategy being :

- achieving and maintaining legal and administrative compliance with international standards;
- building and retention of capacities of the enforcement community in fulfillment of their duties; and
- incorporation of management practices focused on prevention and prosecution of offences related to money laundering and terrorist financing

554. In turn, these generic strategic objectives contain specific objectives comprising specific activities for the development of an effective and efficient system to fight money laundering and terrorist financing.

555. The CBK has informed that in 2009 it had established a working group to develop a methodology for a risk based approach to supervision and it has eventually introduced the CAMEL (Capital, Assets, Management, Earnings and Liquidity) methodology. However, the CAMEL methodology⁸⁰ is internationally applied for prudential purposes as it is not designed to identify issues related to money laundering or the financing of terrorism. Hence it appears that a risk based supervisory approach for the purposes of examining compliance with money laundering and financing of terrorism preventive measures is not applied within the financial sector.

556. Consequently, as is shown under Section 1.3 of this Report, Kosovo has not excluded any financial activity from the obligations under the AML/CFT Law.

⁷⁹ For further information on the risk of money laundering and the financing of terrorism please refer to Section 1.6 of this Report.

⁸⁰ Which now includes an ‘S’ at the end for ‘market Sensitivity’, becoming ‘CAMELS’.

3.2 Customer Due Diligence (R.5 (*) 81)

3.2.1 Description and Analysis

557. FATF Recommendation 5 requires the application of CDD measures as defined in the Recommendation to be applied in specific circumstances as defined by law. It also requires that where CDD cannot be satisfactorily completed, then business should not be undertaken, accounts closed and a STR possibly be filed with the relevant authorities.

558. Article 17(1) of the AML/CFT Law⁸² defines the CDD measures to be applied in accordance with the definition in the FATF 40 Recommendations. Thus, CDD measures include:

- the identification of the customer and verification of identity;
- identification, as applicable, of beneficial owner and verification of identify through risk based adequate measures;
- understanding the purpose and nature of the business relationship; and
- conducting ongoing monitoring of relationship and transactions.

559. Notwithstanding this definition, the AML/CFT Law does not refer to CDD any further. In accordance with the provisions of Article 17(2), there is no obligation for reporting subjects to apply the full CDD measures but only the application of the identification and verification measures to customers (not including beneficial owners). Indeed, under Article 21 the AML/CFT Law creates a distinction between ‘customer due diligence’ and ‘identification measures’, even though the latter is a component of the former. Indeed, Article 21(3) of the AML/CFT Law states that *The requirements for identification and customer due diligence is deemed to be fulfilled, even without the physical presence of the customer, in the following cases:*

560. It should be noted that Article 23 of the AML/CFT Law covers obligations of banks and financial institutions in maintaining adequate internal programmes. The obligations established by Article 23(2) in detailing the coverage of the internal programmes does not cover the requirement to have procedures in place for banks and financial institutions to undertake CDD measures but only to undertake those for the first component, being the identification of the customer (without reference to the verification process) and excluding all other components of the CDD measures as defined under the Law itself under Article 17(1).

561. Article 6 of Rule X of the CBK provides a slightly different version of CDD measures but, in essence, it covers that provided by the AML/CFT Law under Article 17(1). The Rule requires banks and financial institutions to conduct thorough CDD as defined in the Rule. The obligation under Rule X to apply full CDD measures, although contrasting with the requirements under the Law and is therefore debatable to what extent the provisions under Rule X override those of the AML/CFT Law, is in line with the requirements under international standards.

562. It is to be noted that Rule X of the CBK is based on UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation which has been repealed by the coming into force of the new Law on Banks through Article 117 which states that *The United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/21 of 15 November*

⁸¹ In accordance with the FATF Standards Methodology, an asterixed (*) Recommendation or EC signifies that that Recommendation or EC should be covered by primary law or regulation.

⁸² The draft Amending Law amending the AML/CFT Law is replacing the current definition of Customer Due Diligence which is in line with the FATF definition.

1999, UNMIK Regulation No. 2008/28 of 28 May 2008, and any amendments thereto are hereby replaced upon enactment of this Law. Any rules promulgated under such regulations shall continue in effect, to the extent they are not in conflict with this law or until modified or repealed by the CBK.

563. Moreover Rule X of the CBK still makes references to UNMIK Regulation 2004/2 which has been completely repealed with the coming into force of the AML/CFT Law through Article 39 which states that *This Law repeals and replaces UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offence.*

564. The above also applies to the Advisory Letter 2007/1 of May 2007 on ‘The prevention of Money Laundering and Terrorist Financing’ of the CBK which is also based and provides links and references to the above mentioned repealed UNMIK Regulations.

565. Consequently, the validity of the Advisory Letter and Rule X of the CBK as ‘regulation’ for the purposes of the FATF Methodology is questionable.⁸³

566. The paragraphs that follow, analysing the application of CDD measures under the AML/CFT Law, will be only addressing one component of the CDD concept, being the identification measures and the verification thereof, but will be providing comments and recommendations accordingly.

567. Finally, any reference to the provisions of Rule X and Advisory Letter 2007/1 of the CBK are retained for the sake of consistency with the current practice but such references, and in particular where requirements under a particular standard are expected to be found in law or regulation, are without prejudice to, and should be read and interpreted within, the context of the concerns expressed on the entire validity of both documents.

568. The non-reference to the full CDD measures in the appropriate provisions of the AML/CFT Law has consequential impacts on the full obligations for CDD measures under international standards, including the identification of the beneficial owner. Although subject to interpretation, this may be slightly mitigated through the provisions under Article 18 of the AML/CFT Law which however makes some reference to the ‘beneficiary’ which is more with reference to the beneficiary of a transaction. Notwithstanding, the application of identification verification process under Article 18 is not bound to be applied in accordance with the appropriate timing under Article 17(2) as it provides for different circumstances.

569. The divergences between the AML/CFT Law and the Rule X of the CBK with reference to the application of the CDD measures (Rule X reflects international standards), does not appear only on paper but is also impacting the effectiveness of the application of the obligations in line with international practices. This has been confirmed by some of the industry in the course of the on-site visit, even though in practice they claim to be applying the full CDD measures because they are aware of the international requirements, particularly where they form part of a larger international banking group.

570. Notwithstanding it is advisable that this anomaly in the AML/CFT Law be addressed immediately by ensuring that reporting subjects under Article 16 of the Law are obliged to apply full CDD measures under Article 17(2) as defined in paragraph (1) to Article 17 and hence in accordance with the obligations under Rule X.

⁸³ The CBK has informed that it is in the process of reviewing and updating Rule X and Advisory Letter 2007/1 upon the coming into force of the amendments to the AML/CFT Law.

571. Moreover there is an urgent need to review both the content and the legality of Rule X of the CBK consequent to the repeal of the supporting UNMIK Regulations and the coming into force of the Law on Banks and the AML/CFT Law. This should further remove anomalies and give more legal clarity to the industry and the authorities themselves. This also applies to the Advisory Letter 2007/1 of the CBK.⁸⁴

Anonymous accounts – Essential Criterion 5.1*

572. Article 18(1) of the AML/CFT Law specifically prohibits banks and financial institutions from maintaining anonymous accounts. Indeed Article 18(2) requires that bank and financial institutions verify the identity of the customer obtained in accordance with Article 17(2) *before opening an account*.

573. There is no reference to anonymous accounts in Rule X and Advisory Letter 2007/1 of the CBK.

574. The CBK has confirmed that banks in Kosovo never maintained anonymous accounts as this has always been prohibited by law.⁸⁵ UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, being the fore-runner of the AML/CFT Law did not make references prohibiting anonymous accounts but required the verification of the name and address and date of birth (for natural persons) before opening of an account.

575. Indeed, Section 15.2 of Rule X of the CBK requires that *For all customer relationships in existence at the date on which this Rule comes into effect, banks and financial institutions shall apply the customer due diligence measures as set out in Section 6 by April 30, 2007*. It is presumed that even if banks held anonymous accounts, these should have been converted to nominative ones accordingly. The CBK has confirmed that this has been the case.

576. However, the AML/CFT Law does not prohibit banks and financial institutions from maintaining accounts in fictitious names. While this may be in accordance with the European Union Third AML Directive,⁸⁶ the maintenance of such accounts is not allowed under the FATF standards. Accounts in *fictitious* names may be accounts that are named but the name appearing on the account is a fictitious one even though the bank or financial institution may have applied and maintained records for the full CDD measures – but these accounts are not easily identifiable from normal named accounts. The beneficiaries of accounts in fictitious names would normally only be known to selected officers of the institution.⁸⁷

577. Although from information available it does not appear that accounts in fictitious names exist or can be opened in Kosovo given the strict identification measures established for opening accounts in general, yet the law does not prohibit to *maintain* them. The CBK has confirmed that no such accounts exist in banks in Kosovo.

⁸⁴ The CBK has informed that it is in the process of reviewing and updating Rule X and Advisory Letter 2007/1 upon the coming into force of the amendments to the AML/CFT Law

⁸⁵ The draft Amending Law refers to past anonymous accounts. Indeed Article 18 of the AML/CFT Law is being amended to reflect to current anonymous accounts.

⁸⁶ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing - *OJ L 309, 25.11.2005, pp 15-36*.

⁸⁷ Accounts in fictitious names could be similar to numbered accounts but carry a fictitious name as opposed to a predetermined number. However numbered accounts are easily identified and allowed under both the EU and the FATF Standards provided that full customer due diligence measures are applied accordingly. Numbered accounts are mainly used in private banking and should be subject to enhanced monitoring both by the institution and the supervisory authorities.

578. The prohibition on the opening and maintaining of anonymous accounts is adequately covered through the AML/CFT Law. In practice it cannot be ascertained whether banks and financial institutions maintain or do not maintain anonymous accounts coming from previous periods, although as stated, the CBK has confirmed that as a result of its onsite examinations banks and financial institutions do not maintain such accounts.⁸⁸

579. However, the lack of prohibition on the maintenance of accounts in fictitious names and the lack of guidance on such accounts could lead to abuse of the system and thus become a vulnerability for banks and financial institutions.

580. It is therefore highly advisable that Article 18(1) of the AML/CFT Law be amended to prohibit the opening and maintenance of accounts in fictitious names through the addition of the word ‘and accounts in fictitious names’ at the end of the paragraph – please refer also to EU Third AML Directive Article 6 below.

When Customer Due Diligence is required – Essential Criterion 5.2*

581. EC 5.2 of the FATF Standards requires that financial institutions undertake full CDD measures in five specific instances:

- a) establishing business relations;
- b) carrying out occasional transactions above the applicable designated threshold (USD/€ 15,000);
- c) carrying out occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note to SR VII;
- d) there is a suspicion of money laundering or terrorist financing, regardless of any exemptions or thresholds; or
- e) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data

582. Article 17(2) of the AML/CFT Law requires reporting subjects to identify their customers and verify their identity in three specific instances, with one instance composed of three elements:

- 2.1. establishing business relations;
- 2.2. carrying out occasional transactions, when the customer wishes to carry out:
 - 2.2.1. a transaction in an amount equal to or above ten thousand (10.000) Euro, whether conducted as a single transaction or several transactions that appears to be linked. If the amount of the transaction is unknown at the time of the operation, the identification shall be done as soon as the amount becomes known or the threshold is reached, or
 - 2.2.2. a domestic or international wire transfer of funds;
 - 2.2.3. doubts exist about the veracity or adequacy of previously obtained customer identification data;
- 2.3. there is a suspicion of money laundering or financing of terrorism.

⁸⁸ The proposed amendments to Article 18 of the AML/CFT Law raise doubts on the non-existence of anonymous accounts.

583. Although there are similarities between the requirements under the FATF Standards and the AML/CFT Law, yet there are serious divergences which impact both on compliance with the obligations and on effectiveness.

584. As already indicated above while the FATF Standard is to undertake full CDD in the specific instances, the AML/CFT Law only requires the undertaking of the identification of the customer and the verification of the identity.

585. A closer comparison of the two requirements shows the following divergences:

- (i) whereas the FATF Standard refers to circumstances when carrying out occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note for SR VII, thus creating a threshold of €1,000, the AML/CFT Law (Article 17(2.2.2)) does not create a threshold and could therefore lend itself to interpretation – either that the identification measures are to be applied for every transaction that is a wire transfer without any threshold or that the threshold is set at €10,000 consequent to item 2.2.1. Indeed the timing of verification as established under paragraph (2) of Article 18 appears to be that established for an occasional transaction, which could be a wire transfer transaction, under item 2.5 of the said paragraph (2).
- (ii) although paragraph (2.2.3) of Article 17 of the AML/CFT Law covers situations where doubts arise on the veracity or adequacy of previous obtained customer identification data, similar to item (e) of the FATF Standard, yet whereas the FATF Standard apply in all circumstances, the obligation under the AML/CFT Law applies only when the customer is carrying out an occasional transaction.

It is worth noting in the circumstances that the AML/CFT Law does not define ‘occasional transaction’. However, a logical definition would be that for a transaction that is carried out outside an established business relationship and therefore is not part of a continuous business activity between the reporting subject and the customer. Indeed when defining a ‘business relationship’ Advisory Letter 2007/1 of the CBK states: *A business relationship with a bank or financial institution means to engage the financial services of the bank or financial institution for more than an occasional transaction or transactions.*

586. Administrative Directive 006 of 11 March 2008 issued by the Financial Intelligence Centre⁸⁹ requires banks and financial institution to have mechanisms in place whereby new and existing customers who are assessed as high risk, on the basis of established know-your-customer procedures, are checked against the United Nations (Taliban and Al Qaeda 1267) lists and the Specially Designated Nationals and Blocked Persons list issued by the US Treasury, Office of Foreign Assets Control (OFAC) of suspected persons and entities. This Report expresses concern on the validity of the Administrative Directive in the light that the Directive was issued under UNMIK Regulation 2004/2 which has been repealed with the coming into force of the AML/CFT Law which does not provide for the continuity of such Directives.

587. The CBK informed that some banks use software with these lists and update them from the lists received by them from the Ministry of Foreign Affairs. It has been stated that the lists are sent to the banks for information and to the relevant associations.

⁸⁹ The Financial Information Centre (FIC) is the forerunner of the present FIU.

588. On the other hand some parts of the industry were not clear on how such lists are received and how these are applied in the CDD process. Some parts claimed that they had received a list of such persons attached to the Administrative Directive 003 of 16 February 2007 of the Financial Intelligence Centre and have never received any further lists.

589. The ambiguities arising out of the interpretation that may be given to the requirements under Article 17(2) for identifying customers indicate inconsistencies with the international standards and could impact negatively on their application by the industry.

590. Since the obligation under Article 17(2) is to identify the customer and verify the identity as opposed to the undertaking of the full CDD measures as specified in the Law itself, it follows that there is no obligation to identify the beneficial owner (paragraph (1.2) of Article 17(1) on the definition of CDD) under the circumstances as defined by Article 17(2) of the AML/CFT Law – see also further comment for EC 5.5* below.

591. Consequently, as already advised above, it is recommended that this anomaly in the AML/CFT Law be addressed immediately by ensuring that reporting subjects under Article 16 of the Law are obliged to apply full CDD under Article 17(2).

592. Moreover, it is further recommended to review paragraph (2.2.2) and paragraph (2.2.3) of Article 17 of the AML Law to remove their subjectivity to interpretation and ensure that the measures there-under are applied in the appropriate circumstances.

593. Finally it is recommended that further management on the circulation of the United Nations and other lists of designated persons and entities and further guidance on their use by the industry would be appropriate to further strengthen effectiveness.

Required CDD measures - Identification of customer and verification of identity – Essential Criterion 5.3*

594. EC 5.3 requires that financial institutions identify their customers and verify the customer's identity using reliable, independent source documents, data and information.

595. Article 17 of the AML/CFT Law requires reporting subjects to identify their 'customers' and to verify that identification by means of reliable independent source, documents, data or information. By definition (the AML/CFT Law defines a 'client' and not a 'customer' although for the purposes of this analysis they are understood to refer to the same person) includes both a natural person and an entity, but there is no reference to 'legal arrangements', which term is not defined in the AML/CFT Law.

596. Article 17 of the AML/CFT Law further defines the type of independent source documents and information that banks and financial institutions should obtain to verify the identity of both a natural person or an entity. The CBK Advisory Letter 2007/1 provides additional guidance on the documents and information that banks and financial institutions should seek to verify the customer's identity.

597. EC 5.3* appears to be adequately covered by the AML/CFT Law and the additional guidance provided in the Advisory Letter 2007/1 of the CBK, although further refinement on the verification process and verification documentation may be necessary.

598. In this regard, in a review of Rule X and the Advisory Letter 2007/1 of the CBK, it is highly recommended that references be made to the two publications of the Basel Committee on Banking Supervision which should serve as the source documents for customer identification and verification of that identification: *Customer Due Diligence for Banks* of

October 2001 (publication 85), and its attachment *General Guide to Account Opening and Customer Identification* of February 2003.

Required CDD measures – verification for legal persons and legal arrangements – Essential Criterion 5.4

599. The requirement under EC 5.4 is twofold. First financial institutions should identify whether any person purporting to act on behalf of a legal person or legal arrangement is so authorised (a requirement that should be found in the law), and identify and verify the identity of that person. Second, verify the legal status of the legal person or legal arrangement.

600. Paragraph (3) of Article 18⁹⁰ of the AML/CFT Law requires a person establishing a business relationship with a bank or a financial institution to declare in writing whether that person is acting on his own behalf or on behalf of another person or entity.

601. Moreover, paragraphs (4) and (5) of Article 17 further provide for the obligation to identify that person and the entity he is representing and to ensure that such persons is appropriately authorised by the legal entity through a document indicating such authorisation.

602. EC 5.4 appears to be adequately covered by the AML/CFT Law and the additional guidance provided in the Advisory Letter 2007/1 of the CBK, although, as already indicated under the analysis of EC 5.3 above, further refinement on the verification process and verification documentation may be necessary.

603. It is therefore strongly recommended that the verification procedures under the AML/CFT Law and under a revised Rule X of the CBK take into consideration the above-mentioned publications of the Basel Committee on Banking Supervision.

Identification of beneficial owner – Essential Criterion 5.5*⁹¹

604. EC 5.5 requires the identification of the beneficial owner and to take appropriate measures to verify that identify against independent data, information and documents from a reliable source.

605. According to the FATF Standards, the term ‘beneficial owner’ refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

606. The AML/CFT Law defines a beneficial owner as the natural person who ultimately owns or controls a customer or an account, the person on whose behalf a transaction is being conducted, or the person who ultimately exercises effective control over a legal person or arrangement.

607. It is worth noting that the definition in the AML/CFT Law is very close to that found in the FATF Glossary. Indeed, the definition in the AML/CFT Law consequently makes reference to the beneficial owner of a ‘legal arrangement’ when the Law does not define such term and does not make any further reference to legal arrangements, such as trusts – depending on their acceptance in the legal structure of Kosovo.

⁹⁰ The reference ‘engaging in a transaction under paragraph (3) of Article 17 of this Law’ seems misleading as paragraph (3) only provides for the identification of a natural person.

⁹¹ The issue of the procedures that can be applied to identify the beneficial owner is further discussed under Section 4 of this Report.

608. Under Article 17(1) the AML/CFT Law defines what constitutes the CDD measures, which include the identification of the beneficial owner and the verification of that identity. Article 17(2) then provides for the identification of customers and for the verification of that identification, with no reference to the beneficial owner.

609. Moreover, Article 18 of the AML/CFT Law, which provides for the timing of the verification for all clients,⁹² does not make reference to the timing of verification for the identification of the beneficial owner. Indeed, the only remote reference is found under item 3.2 of paragraph (3) of Article 18 which states *having taken reasonable steps to verify that each identified person or entity is the owner or the beneficiary of any property that is the subject of the transaction, and believing in good faith that each identified person or entity is the owner and/or beneficiary of any property that is the subject of the transaction*. It is however highly debatable to what extent this can be interpreted as referring to the ‘beneficial owner’ as defined under the AML/CFT Law as opposed to the ‘beneficiary’ of a transaction that is undertaken.

610. It should be worth noting the definition of ‘client’ in the AML/CFT Law which is defined as: *a person or entity which conducts a transaction with or uses the services of a bank, financial institution, lawyer, certified accountant, licensed auditor or tax advisor. The term “client” includes any owner or beneficiary or other person or entity on whose behalf the transaction is conducted or the services are received*. A quasi similar definition for a ‘customer’ is found in the Advisory Letter 2007/1 of the CBK, which however contains a very fine difference in that it refers to ‘beneficial owner’ as opposed to the reference to ‘beneficiary’ in the AML/CFT Law. Therefore, to what extent the reference to ‘beneficiary’ under the definition is referring to the ‘beneficial owner’ of a legal entity as opposed to the ‘beneficiary’ of a transaction – more probably being the latter – remains debatable and subject to interpretation.

611. Without prejudice to the concerns expressed earlier in this Report on the current validity of the content of both documents, Advisory Letter 2007/1 and Rule X of the CBK make further references to the beneficial owner concept.

612. For example, Advisory Letter 2007/1, although similar to the AML/CFT Law, does not give any guidance or obligation on the identification of the beneficial owner and the verification of that identification, but includes the following reference to the beneficial owner concept:

- with reference to enhanced CDD, it refers to scrutiny of customer identification (including of the beneficial owner and controller);
- with reference to the enquiries of the compliance function it includes a reference to the occupation or business activity of the customer and the beneficial owner and reference as to whether the customer or the beneficial owner is a PEP;
- likewise, under the same circumstances, reference is made to the requirement for the compliance function for obtaining information in written or oral form from the customer or beneficial owner; and to visiting the places of business of the customer and beneficial owner; and
- when addressing issues related to correspondent banking relationships where the Letter requires information on the beneficial owner of non-resident banks;

⁹² Whereas the AML/CFT Law defines a ‘client’ the law and regulations refers to either ‘customer’ or ‘client’ interchangeably. For the purposes of this Report these two terms are interpreted to be similar in definition. Similar references are made in Rule X of the CBK.

613. On the other hand Rule X of the CBK seems to recognize that the AML/CFT Law does not provide any obligations on the identification and verification of the beneficial owner and therefore includes the following reference:

- under Section 6 it requires that banks and financial institutions shall conduct thorough CDD including (a) identification of customers, including beneficial owners;
- under Section 6.2 in determining the identification of the beneficial owner where it requires that *Banks or financial institutions shall take measures to determine if a customer is acting on behalf of one or more beneficial owner(s) in accordance with section 3.2 of Regulation 2004/2* and to verify such identification against reliable sources – although this is subject to interpretation as to what extent it refers to the beneficial owner of a legal person as opposed to the beneficiary of a transaction despite the definition of beneficial owner in the same Section; and
- under Section 8 with reference to record keeping where it states that the necessary components of transaction records include (a) the name of the customer and the beneficial owner;

614. The provisions in the AML/CFT Law dealing with the identification of the beneficial owner and the verification of that identity have serious shortcomings which lead to the conclusion that the concept of the beneficial owner of legal entities is not adequately and clearly provided for.

615. The seriousness of this situation has also been noted in discussion with the private sector who expressed concerns on their obligations and difficulties in identifying the beneficial owner of a legal entity, also as a result of the definition of the beneficial owner which does not include any ownership threshold.⁹³

616. Indeed the definition of ‘beneficial owner’ in the AML/CFT Law is very similar to that provided for in the FATF Glossary, thus also including the beneficial owner of a legal arrangement, which could include, for example, trusts.

617. In the case of legal arrangements such as trusts, one usually expects to find a further extension of the definition of beneficial owner defining who such owners would be under the trust. This is missing in the AML/CFT Law and the relevant rules of the CBK as further references to legal arrangements in the AML/CFT Law are absent beyond their inclusion in the definition.

618. The provisions under the AML/CFT Law seem confusing and unclear as to where the legal obligation to identify the beneficial owner lies.

619. Indeed the only direct obligation on banks and financial institutions to identify the beneficial owner of a legal entity and to verify such identification is only found in Rule X of the CBK under Section 6 which requires that banks and financial institutions shall conduct thorough CDD including (a) identification of customers, including beneficial owners – note also the difference from the AML/CFT Law which only requires the identification of customers under Article 17(2) as opposed to the full CDD.

620. However, for the purposes of this analysis, the validity of this requirement is questionable since international standards require such obligation to be under the law – taking account also that Rule X has been issued in terms of the now repealed UNMIK Regulation 1999/21 and, in this case, could therefore be in conflict with the AML/CFT Law – even

⁹³ The draft Amending Law amending the AML/CFT Law is introducing a threshold for beneficial ownership.

though it is Rule X that is implementing the international standard to be followed by the banks and financial institutions.

621. It is therefore strongly recommended that the AML/CFT Law be amended to directly provide for the identification of the beneficial owner of a legal entity and the verification thereto. This could be met by making references to the obligations of the application of the full CDD measures beyond the identification obligations – please refer also below to EU Third AML Directive Article 3(6).

Determination whether customer is acting on behalf of third party – Essential Criterion 5.5.1*

622. EC 5.5.1, through legislation or regulation, requires that for all customers financial institutions determine whether a person is acting on behalf of another person and should take reasonable measures to identify the third party.

623. Paragraph (3) of Article 18⁹⁴ of the AML/CFT Law requires a person establishing a business relationship with a bank or a financial institution to declare in writing whether that person is acting on his own behalf or on behalf of another person or entity.

624. Moreover, paragraphs (4) and (5) of Article 17 further provide for the obligation on banks and financial institutions to identify that person and the authorising person or entity he is representing.

625. Without prejudice to the concerns expressed in this Report on its validity, this obligation is further reflected in Rule X of the CBK under Section 6 which requires the identification of the beneficial owner as defined in the Section where a person is acting on behalf of another.

626. EC 5.5.1* appears to be adequately covered.

Ownership and control structure – Essential Criterion 5.5.2

627. EC 5.5.2 requires financial institutions to first understand the ownership and control structure of a legal person or arrangement and second (through legal provisions) to determine those persons who exercise ultimate effective control. The Methodology further provides guidance in this respect. For legal entities this would involve identifying the natural persons with a controlling interest and the persons who comprise the mind and management. For legal arrangements, such as trusts, this obligation would require the identification of the settlor, the trustee or person exercising control over the trust, and the beneficiaries.

628. With the exception of the provisions referred to under the analysis for EC 5.5 and EC 5.5.1 of this Report in relation to the identification of the beneficial owner, and subject to the comments thereto, the AML/CFT Law is silent on the requirement under EC 5.5.2 in understanding the ownership and control structure of a legal person or legal arrangement.

629. Save for a slight reference under Section 3 in providing additional guidance on identification documents, Advisory Letter 2007/1 of the CBK is also silent on the requirements for banks and financial institutions in meeting the measures required under EC 5.5.2.

⁹⁴ The reference ‘engaging in a transaction under paragraph (3) of Article 17 of this Law’ seems misleading as paragraph (3) only provides for the identification of a natural person.

630. Section 6.2 of Rule X of the CBK provides guidance for banks and financial institutions in this respect, stating that: *For customers that are entities as defined in Regulation 2004/2, the bank or financial institution shall take reasonable measures to understand the ownership and control structure of the entity. This includes identifying the natural person(s) who ultimately owns or controls the entity.* It should however be noted that, further to the reservations on the validity of the Rule, UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences has been entirely repealed by the coming into force of the AML/CFT Law.

631. The minor provisions and references in the Advisory Letter 2007/1 and Rule X of the CBK are inadequate to cover the requirements under EC 5.5.2 of Recommendation 5 of the FATF Standards.

632. In dealing with legal entities, banks and financial institutions should have mandatory obligations under the AML/CFT Law on what measures they are expected to undertake, supplemented by clear guidance on how to achieve compliance.

633. Indeed the whole concept of how to undertake full CDD measures, in particular when carrying out transactions with legal entities and legal arrangements is seriously absent with negative consequences on the efficiency and effectiveness of the system which is currently vulnerable.

634. It is therefore strongly recommended that the entire provisions relating to the application of customer identification by banks and financial institutions be thoroughly reviewed in accordance with the relevant requirements for undertaking full CDD measures under the FATF Standards.

Purpose and intended nature of the business relationship – Essential Criterion 5.6

635. In defining ‘Customer Due Diligence’, Article 17(1) includes the requirement of obtaining information on the purpose and intended nature of the business relationship. However, as already indicated earlier in this Report, the AML/CFT Law does not provide for banks and financial institutions to undertake full CDD measures as and when required but only to apply one component of the measures, and that is the identification and verification component.

636. Otherwise the AML/CFT Law remains silent on the obligation for banks and financial institutions to obtain information and understand the purpose and intended nature of the business relationship.

637. In substance, the Advisory Letter 2007/1 of the CBK is silent on the requirement for banks and financial institutions to obtain information on the purpose and intended nature of the business relationship. It only makes a slight reference that could be linked to this obligation when addressing the recognition of suspicious transactions by requiring that financial institutions should gather information to learn about the customer and the customer's business to help them to recognize when a transaction is unusual.

638. On the other hand, Section 6.4 of Rule X of the CBK requires banks and financial institutions to collect information regarding the anticipated purpose and intended nature of the business relationship such that banks and financial institutions can create and maintain a customer profile for each customer of sufficient nature and detail.

639. In a risk based system that applies the CDD concept it is highly important that banks and financial institutions understand the purpose and intended nature of the business relationships they enter into. This is important for banks and financial institutions not only to

build the customer profile but also to develop their customer acceptance policies and to determine those customers that, through their business and risk profile, would fall within their customer acceptance policies.

640. Although, and without prejudice to the concerns expressed in this Report on Rule X, Rule X provides for a requirement for banks and financial institutions to obtain information on the purpose and intended nature of the business relationship, this may be beyond the requirements under the main Law, which is silent on the issue except to the extent that it includes this requirement in the definition of CDD.

641. Moreover, the reference under the Advisory Letter 2007/1 of the CBK as indicated above is only in relation to the recognition of suspicious transactions and, although it may to an extent reach the required obligation, it does not entirely cover the requirements under the international standards in the application of the CDD concept.

642. It is understood that the concerns expressed by the industry on the appropriate application of the CDD further leads to concerns on the need to understand the scope and purpose of the intended nature of the business relationship – notwithstanding that parts of the industry may be obtaining such information because of their links within the foreign banking groups of which they form part.

643. It appears again that this weakness in the AML/CFT Law arises out of the fact that reporting subjects under the Law are only obliged to apply the identification and verification measures notwithstanding the detailed definition of what constitutes the internationally accepted CDD measures.

644. It is therefore again strongly recommended that the entire provisions relating to the application of customer identification by banks and financial institutions be thoroughly reviewed in accordance with the relevant requirements for undertaking full CDD measures under the FATF Standards.

Ongoing due diligence on business relationship – Essential Criterion 5.7*

645. EC 5.7 requires legal provisions to be in place obliging financial institutions to conduct ongoing due diligence on their business relationships.

646. In its definition of what constitutes ‘Customer Due Diligence’ the AML/CFT Law includes the component dealing with the obligation for the ongoing monitoring of business relationships. However, there are no further references to this obligation in the AML/CFT Law with the exception of item (5.4) of paragraph (5) of Article 21 dealing with enhanced due diligence which requires banks and financial institutions to ensure continuous and strengthened monitoring of the bank relationship or the spot operations for business relationships with PEPs residing outside Kosovo.

647. Indeed, under Article 23 of the AML/CFT Law requiring banks and financial institutions to develop internal programmes with written procedures and controls for the prevention of money laundering and the financing of terrorism, there is no reference that the procedures should include measures to undertake ongoing monitoring of business relationships – even though the list provided is not exhaustive.

648. Moreover, Section 7 of Rule X of the CBK more specifically requires banks and financial institutions to conduct ongoing due diligence (the Law only defines the CDD process but does not specifically apply it on the business relationship).

649. The Advisory Letter 2007/1 of the CBK is silent on the ongoing due diligence and monitoring of the business relationship.

650. The major and severe shortcoming in the AML/CFT Law is not requiring banks and financial institutions to undertake full CDD measures but only to apply one component being the identification of the customer and the verification of that identification has serious negative impacts and implications for the whole process of the CDD concept. This is again identified in the requirement for financial institutions to undertake ongoing monitoring of the business relationship in all instances and not partially and in the case of higher risk customers only.

651. The AML/CFT Law therefore falls short on this requirement and only tries to apply this requirement for one category of higher risk customers.

652. Notwithstanding, and without prejudice to the concerns expressed in this Report on the validity of Rule X of the CBK, Rule X covers this requirement, but in doing so it is going beyond the requirements under the AML/CFT Law which is basically silent on this issue and only applies it limitedly to higher risk situations. The fact that Rule X at times goes beyond the requirements of the AML/CFT Law is also a concern expressed by the industry. This creates conflicts within the industry as to whether to comply with the requirements of the AML/CFT Law or to go beyond and comply with the provisions of Rule X – which in fact is more harmonised with international standards than the AML/CFT Law itself. Normally, where not specifically empowered by the main law, rules and regulations should only serve to provide direction and best practices for the industry to effectively implement their obligations under the law.

653. However, since the AML/CFT Law does not oblige reporting subjects to undertake full CDD measures, which include the ongoing monitoring of the business relationship, although it defines the process, there is an issue in that Rule X goes beyond the requirements of the Law and reflects international standards, but could create uncertainties to the system.

654. It is therefore recommended that this shortcoming in the AML/CFT Law be rectified as part of the overall overview of the application of the CDD measures under Section 17 of the Law as already recommended.

Ongoing scrutiny of transactions – Essential Criterion 5.7.1*

655. As part of the ongoing due diligence, EC 5.7.1 requires financial institutions to undertake scrutiny of all transactions undertaken in the course of the business relationship to ensure their consistency with the customer profile, their knowledge of the customer, and, where necessary, the source of funds.

656. As already described under the analysis for EC 5.7 above, with the exception of item (5.4) of paragraph (5) of Article 21 dealing with enhanced due diligence which requires banks and financial institutions to ensure continuous and strengthened monitoring of the bank relationship or the spot operations for business relationships with PEPs residing out of Kosovo, the AML/CFT Law is silent on this issue.

657. However, Article 20 of the AML/CFT Law on special monitoring of certain transactions, requires banks and financial institutions to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose and to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently

apply the relevant international standards to combat money laundering and financing of terrorism.

658. Moreover, but only in the case of applying enhanced CDD for higher risk customers, Advisory Letter 2007/1 of the CBK requires banks and financial institutions, *inter alia*, to apply enhanced CDD through enhanced transaction scrutiny in addition to the scrutiny of the source of wealth and the source of funds of the customer.

659. Furthermore, Section 7 of Rule X of the CBK more specifically requires banks and financial institutions not only to conduct ongoing due diligence (the Law only defines the CDD process but does not specifically apply it) on the business relationship but also scrutinize transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile.

660. The requirements under Article 20 as mentioned above for special monitoring of certain transactions do not cover the obligations for ongoing CDD under Recommendation 5 of the FATF Standards, but rather the obligations under FATF Recommendation 11 and FATF Recommendation 21.

661. The AML/CFT Law therefore falls short on this requirement and only tries to apply this requirement for one category of higher risk customers.

662. Otherwise, the same comments as for EC 5.7 above apply for the implementation of EC 5.7.1.

663. It is therefore recommended that this shortcoming in the AML/CFT Law be rectified as part of the overall overview of the application of the CDD measures under Article 17 of the AML/CFT Law as already recommended.

Ongoing maintenance of Customer Due Diligence documents, data and information – Essential Criterion 5.7.2*

664. EC 5.7.2 requires the updating of the CDD documents, data and information through periodic reviews, particularly for higher risk customers. It should be noted that the Criterion makes emphasis on higher risk customers but does not limit the requirement to higher risk situations.

665. As already indicated for EC 5.7 above the AML/CFT Law is silent on the ongoing monitoring of business relationship. The reference to item (5.4) of paragraph (5) of Article 21 dealing with enhanced due diligence for PEPs and which requires banks and financial institutions to ensure continuous and strengthened monitoring of the bank relationship does not specify the obligation for periodically reviewing the CDD documents, data and information.

666. As part of the obligations to undertake CDD measures under Section 6 of Rule X of the CBK, Section 6.6 requires banks and financial institutions to gather and maintain customer information on an ongoing basis. In this regard, documents, data, or information collected under the CDD process (the Law only defines the CDD process but does not specifically apply it) are required to be kept up to date and relevant by undertaking periodic reviews of existing records, including transaction records.

667. On the other hand, Advisory Letter 2007/1 of the CBK is silent on this matter.

668. The obligation to meet the requirement on ongoing monitoring of CDD documents, data and information is only found in Rule X of the CBK. However, the concerns expressed in this Report on the validity of some of the provisions of the Rule and the concerns expressed in this Report, reflecting the concerns of the industry that the Rule at times goes beyond the requirements under the AML/CFT Law, also apply in this case – even though Rule X is clearly reflected the international standard more than the AML/CFT Law itself.

669. Otherwise, the same comments as for EC 5.7 above apply for the implementation of EC 5.7.2.

670. It is therefore recommended that this shortcoming in the AML/CFT Law be rectified as part of the overall overview of the application of the CDD measures under Article 17 of the Law as already recommended.

Risk: Enhanced due diligence for higher risk customers, business relationships and transactions – Essential Criterion 5.8

671. In requiring financial institutions to undertake enhanced due diligence for higher risk customers, business relationships and transactions, EC 5.8 provides examples of such situations which however are not exhaustive.

672. Article 21 of the AML/CFT Law requires the reporting subjects to apply enhanced due diligence to customers in the presence of a higher risk of money laundering or terrorist financing. Article 21 further specifically requires this obligation in situations where there is a non-face-to-face relationship, correspondent banking relationships and relationships with PEPs. In this regard the Law specifies the enhanced measures to be applied in such circumstances.

673. The AML/CFT Law however does not specify the type of enhanced measures to be applied by reporting subjects in other situations and relationships that present a higher risk.

674. The Advisory Letter 2007/1 of the CBK provides a non-exhaustive list of categories of customers and situations that could present a higher risk. In doing so, the Advisory Letter also provides indicative measures of enhanced due diligence that could be applied *In addition to scrutiny of the source of wealth and the source of funds of the customer.*

675. Section 6.3 of Rule X of the CBK, in dealing with the application of CDD, requires that banks and financial institutions apply enhanced CDD for customers, business relationships, and transactions that are likely to pose a higher risk of money laundering and terrorist financing. It requires that business relationships with a PEP shall always be deemed to involve higher risk. It does not however include what enhanced measures are to be applied except for a reference to the source of wealth and source of funds.

676. Although both the AML/CFT Law, the Advisory Letter 2007/1 and Rule X of the CBK, without prejudice to the concerns expressed as to the extent of the validity of the latter two, require the application of enhanced CDD to customers that pose a higher risk, yet none of the three sources provide for an obligation on banks and financial institutions to apply a risk sensitivity process to identify, categorize and rate higher risk customers.

677. Moreover, in the specific cases where the AML/CFT Law requires the application of enhanced due diligence measures, it does not specify that such enhanced measures are to be applied in addition to the application of the normal CDD measures – notwithstanding that the Law does not provide for the application of the full CDD measures.

678. The lack of a requirement under the AML/CFT Law for reporting subjects to apply full CDD (the requirement is only to apply the identification and verification processes) becomes further inconsistent and conflicting with the requirements under the same Law to apply enhanced CDD in higher risk situations.

679. Moreover, there is complete lack of guidance to the industry on how to apply a risk based approach and on the type of enhanced due diligence measures to apply in situations of higher risk beyond those specified by the Law itself. Indeed it is only the Advisory Letter 2007/1 that provides some guidance on enhanced measures.

680. The lack of guidance and the uncertainty on the application of a risk based approach are concerns expressed by the industry itself and therefore it is clearly shown that this is having a negative impact the effectiveness of the system.

681. It is therefore strongly recommended that provisions in Rule X and the Advisory Letter 2007/1 that refer to higher risk situations be reviewed in accordance with a revision of the AML/CFT Law to introduce an obligation on reporting subjects to:

- develop and establish effective procedures to identify the risk posed by each customer, including the categorisation of customers according to risk;
- develop and apply the institutions' risk appetite in the acceptance of risk related to money laundering and the financing of terrorism;
- develop and institute effective customer acceptance policies in line with the institution's risk appetite; and
- develop and establish procedures for the application of enhanced CDD measures according to risk.

682. The above recommendation should form part of the previous recommendations to ensure that full CDD measures are applied under Article 17 of the AML/CFT Law as opposed to the identification and verification procedures.

683. Moreover, the Law should provide that enhanced due diligence measures are to be applied in addition to the application of the normal CDD measures as defined in the Law.

Risk: Application of reduced or simplified measures for low risk situations – Essential Criterion 5.9

684. EC 5.9 allows for the application of reduced or simplified measures where there are low risks of money laundering or the financing of terrorism. The Criterion provides an indicative list of situations where the risk could be considered low having regard to the type of customer, product or transaction, or the location of the customer, i.e. the geographical risk factor.

685. The AML/CFT Law is silent on low risk situations and hence does not distinguish on the level of measures to be applied in such situations.

686. Likewise, both the Advisory Letter 2007/1 and Rule X of the CBK remain silent on the application of reduced or simplified measures for low risk situations.

687. Indeed, in requiring banks and financial institutions to create and maintain a customer profile for each customer, Section 6.4 of Rule X of the CBK does not provide for the customer profile to be used to apply reduced or simplified CDD measures, but more specifically to determine whether enhanced due diligence measures are necessary.

Notwithstanding, the maintenance of a customer profile does not necessarily follow a risk assessment process of the customer to identify the level of risk posed by that customer.

688. The application of reduced or simplified CDD measures in situations that pose a lower risk is not mandatory under the FATF Standards. However, the non application of reduced or simplified due diligence measures has wider implications, for example in bank to bank transactions for their own account.

689. It is not clear whether the option of applying reduced or simplified due diligence measures has been omitted in the AML/CFT Law on purpose following a risk assessment exercise or whether this was done through an oversight.⁹⁵

690. Notwithstanding, should the Kosovo Authorities eventually decide to include this option then it is advisable that:

- this option is taken following a risk assessment of those areas and situations that present a lower risk of money laundering and the financing of terrorism;
- it is limited to situations prescribed by the Law (reference to the examples in the FATF Methodology for EC 5.9 would be appropriate);
- banks and financial institutions should develop internal procedures on the application of reduced or simplified due diligence measures;
- such procedures should form part of the risk based sensitivity process for customers;
- such procedures should form part of the overall review of the application of CDD measures as opposed to the identification and verification procedures as currently contemplated through Article 17 of the AML/CFT Law and as already recommended in this Report; and
- other related issues as detailed under Essential Criteria 5.10 to 5.12

Risk: Applying reduced or simplified measures to customers from other jurisdictions – Essential Criterion 5.10

691. EC 5.10 requires that where reduced or simplified due diligence measures are allowed for customers from other jurisdictions, such jurisdictions should be those that are in compliance with and have effectively implemented the FATF Recommendations.

692. As detailed under the analysis of EC 5.9 above the prevention of money laundering and financing of terrorism preventive system in Kosovo does not recognise the application of reduced or simplified CDD.

693. Should the Kosovo Authorities decide to include this option in the legislation, then, further to the measures recommended under the analysis of EC 5.9 above, they should ensure that banks and financial institutions have appropriate procedures in place to identify those countries that do not, or inappropriately apply, the FATF Recommendations.

694. Otherwise, comments and recommendations made under the analysis of EC 5.9 above likewise apply to EC 5.10.

⁹⁵ The draft Amending Law amending the AML/CFT Law will be introducing measures to this effect.

Risk: Applying reduced or simplified measures where there is suspicion or higher risk scenarios – Essential Criterion 5.11

695. EC 5.11 requires that reduced or simplified due diligence measures are not to be applied where there is suspicion of money laundering or terrorist financing or where higher risk scenarios apply.

696. As detailed under the analysis of EC 5.9 above the prevention of money laundering and financing of terrorism preventive system in Kosovo does not recognise the application of reduced or simplified CDD.

697. Should the Kosovo Authorities decide to include this option in the legislation, then, further to the measures recommended under the analysis of EC 5.9 above, they should ensure that banks and financial institutions are prohibited by law from applying reduced or simplified due diligence measures in the circumstances as contemplated by EC 5.11.

698. Otherwise, comments and recommendations made under the analysis of EC 5.9 above likewise apply to EC 5.11.

Risk: Guidance issued by the relevant authorities – Essential Criterion 5.12

699. EC 5.12 requires that where financial institutions are permitted to determine the extent of CDD measures to be applied, they are further required to follow guidelines issued by the competent authorities. This requirement for financial institutions in turn poses an obligation on the relevant competent authorities to issue appropriate guidelines in such circumstances.

700. It is only Article 21 of the AML/CFT Law that refers to a determination of the extent of CDD but only to the extent that enhanced due diligence measures are applied in higher risk situations. This is further supplemented by Section 6.3 of Rule X of the CBK which replicates the provisions of Article 21 – kindly refer further to the analysis of EC 5.8 above.

701. It is only Advisory Letter 2007/1 of the CBK that provides limited indication on the type of additional enhanced due diligence measures that could be applied.

702. As indicated in the analysis of EC 5.8 above, there is no clear obligation on banks and financial institutions to apply a risk based approach and hence there is little guidance on the extent of the application of CDD – particularly in the light that the AML/CFT Law falls short on the application of CDD procedures in the first instance.

703. Hence, further to the lack of a legal requirement for banks and financial institutions to establish risk based procedures for the acceptance of customers, the lack of guidance on the application of the CDD measures on a risk sensitivity basis is a serious concern for the industry and is negatively impacting the effectiveness of the system.

704. It is highly recommended that, further to the recommendation made under the analysis of EC 5.8 above for the imposition of an obligation for banks and financial institutions to follow a risk based approach, the authorities develop and publish effective guidance on the risk based approach providing best practices on developing risk methodologies – references to the best practice guidance issued by the FATF in this regard is recommended.

Timing of verification – Essential Criterion 5.13

705. EC 5.13 stipulates that financial institutions should be required to verify the identity of the customer before or in the course of establishing the business relationship, or conducting an occasional transaction for occasional customers.

706. Article 18 of the AML/CFT Law establishes the timing of the verification of the identity of the customer. According to Article 18, the verification of the customer identity should be completed before:

- opening an account;
- taking stocks, bonds, or other securities into safe custody;
- granting safe-deposit facilities;
- otherwise establishing a business relationship; or
- engaging in any single transaction in currency of more than € ten thousand (10,000). Multiple currency transactions shall be treated as a single transaction if the bank or financial institution has knowledge that the transactions are conducted by or on behalf of one person or entity and total more than € ten thousand (10,000) in a single day.

707. Both Advisory Letter 2007/1 and Rule X of the CBK are silent on the timing of the verification of the identification process.

708. Article 18 of the AML/CFT Law adequately covers the provision of EC 5.13. The fourth bullet point *otherwise establishing a business relationship* should be interpreted in its wider intent to cover any other instance of providing a service to a customer that is not covered under the bulleted circumstances.

709. However, as already explained under the analysis for EC 5.5 above, the concept of the beneficial owner and the consequent identification and verification process are missing in the AML/CFT Law and hence the timing of the verification of the identification of the beneficial owner is likewise missing.

710. It is therefore advisable that, further to the recommendations made above for the inclusion of the full CDD measures, the timing of the verification of the identification of the beneficial owner should also be addressed – refer also to analysis re EU Third AML Directive Article 7b below.

Timing of verification: Option to complete the verification process following the establishment of the business relationship – Essential Criterion 5.14.

711. EC 5.14 provides for an option for financial institutions to complete the verification process following the establishment of the business relationship under condition that:

- this occurs as soon as is reasonably practicable;
- this is essential not to interrupt the normal conduct of business;
- the money laundering risks are effectively managed.

712. The Methodology further provides examples where it may be essential not to interrupt the normal conduct of business

713. The AML/CFT Law is silent on this matter in a direct way but, through the provisions of Article 18 on the timing of the verification as detailed above in the analysis of EC 5.13, such an option does not appear to be available.

714. The provisions of Article 18 of the AML/CFT Law currently cover the requirements under EC 5.14.

715. However, should the authorities eventually decide to adopt the option of allowing business relationships to proceed under certain conditions prior to the verification process, it is advisable that this is done under clear legal provisions and appropriate guidance to the industry in order to avoid situations where transactions are undertaken which may later be identified as being suspicious.

Timing of verification: Risk management procedures – Essential Criterion 5.14.1

716. EC 5.14.1 requires that financial institutions adopt risk management procedures where a customer is permitted to use the business relationship prior to the verification process.

717. There is currently no requirement on banks and financial institutions to have in place risk management procedures for allowing customers to use the business relationship prior to the verification process since the AML/CFT Law prohibits such situations.

718. Should the authorities eventually decide to adopt this option, then it is recommended that relevant changes to the law should ensure the obligation on banks and financial institutions to have appropriate and effective risk management procedures in place defining the conditions under which this may occur.

719. Such procedures, which should be approved by the relevant competent authority, should, *inter alia*, cover:

- an assessment of the risk posed by the customer and the management of such risk;
- the timing within which the verification process should be complete;
- procedures to be applied if the verification cannot be completed within the time specified;
- the type of activity that the customer may be allowed to undertake within the verification scheduled timing;
- the reversal of transactions should the business relationship be terminated (for example if an account has been opened and deposits accepted, the ways through which that money is returned without the institution having assisted in *cleaning* it); and
- the objective for not interrupting the normal conduct of business (reference to the examples provided in the FATF Methodology is recommended).

Failure to complete the customer due diligence process – Essential Criterion 5.15

720. EC 5.15 requires that where a financial institution cannot complete the required CDD measures, it should not be permitted to open the account, commence a business relationship or perform a transaction. In such circumstances the financial institution should further be required to considering filing an STR.

721. Article 18(6) of the AML/CFT Law requires that if a bank or financial institution is unable to verify the identity of a client, the business relationship shall be terminated, any

account closed and the property returned to its source. Moreover, such actions shall be without prejudice to the obligation of the bank or financial institution to report suspicious acts or transactions pursuant to Article 22(1) and to report additional material information pursuant to Article 22(2) of the AML/CFT Law.

722. Advisory Letter 2007/1 of the CBK is silent on this matter.

723. In reflecting, to an extent, the provision of Article 18(6) of the AML/CFT Law, Section 6.5 of Rule X of the CBK, however states that: *In cases where a bank or financial institution is unable to verify the identity of a customer in accordance with section 3.7 of Regulation 2004/2, the bank or financial institution shall refuse the transaction and consider filing a suspicious transaction report as provided in section 3.9 of Regulation 2004/2.*

724. Although it appears that Article 18(6) may be covering the requirements for banks and financial institutions in accordance with EC 5.15, there are divergences that seriously impact on the implementation.

725. EC 5.15 refers to the non completion of obligations under Essential Criteria 5.3 – 5.6 which require:

- identification of the customer and the verification of that identification against independent reliable source (EC 5.3*);
- for legal persons or legal arrangements the verification that a person acting on behalf of the legal person is so authorised; identification and verification of such representative; verification of the legal status of the legal person or legal arrangement (EC 5,4);
- identification of beneficial owner and verification of that identity; determination whether the applicant is acting on behalf of another person; identification and verification of the third party on whose behalf the applicant is acting; understanding the ownership and control structure of legal persons and arrangements including the natural persons who ultimately have control (EC 5.5); and
- obtaining information on the purpose and intended nature of the business relationship (EC 5.6)

726. By comparison, Article 18(6) requires that where the bank or financial institution *is unable to verify the identity of a client* it should take the measures contemplated by EC 5.15.

727. Moreover, Section 6.5 of Rule X of the CBK still makes references to UNMIK Regulation 2004/2 *which* has been completely repealed with the coming into force of the AML/CFT Law and is therefore irrelevant for the purposes of this assessment for EC 5.15.

728. The identified divergences as delineated above are again the result that the AML/CFT Law only defines what constitutes the CDD concept but fails to apply it.

729. It is therefore highly recommended that in reviewing the AML/CFT Law in the context of applying the full CDD measures through Article 17, the provisions of Article 18(6) be reviewed accordingly and brought in line with the requirements under the FATF Standards by referring to the relevant items of the CDD process as opposed to the verification process only.

Failure to complete the customer due diligence process where business relationship has commenced – Essential Criterion 5.16

730. EC 5.16 requires that where the business relationship has already commenced, financial institutions should be required to terminate the business relationship and consider making an STR.

731. As already stated under the analysis of EC 5.14 above the AML/CFT Law is silent on the matter of allowing the use of the business relationship before the completion of the CDD process (the Law only refers to the application of the identification process and the verification process) in a direct way but, through the provisions of Article 18 on the timing of the verification as detailed above in the analysis of EC 5.13, such an option is not available.

732. However, Section 6.7 (Termination of Customer Relationship) of Rule X of the CBK states that: *If the bank or financial institution is unable to comply with the customer due diligence required for a customer, it shall terminate the customer relationship and determine if it should file a suspicious transaction report as provided in section 3.9 of Regulation 2004/2.*

733. Since the AML/CFT Law does not allow the use of the business relationship prior to the completion of the verification process, it primarily appears that the requirements under EC 5.16 may not be applicable.

734. However, EC 5.16 should not be interpreted only in situations where a customer is allowed to use the business relationship prior to the verification process (EC 5.14), but also to situations where eventually there are doubts on the veracity and adequacy of the customer identification data (EC 5.2(e)) and for existing customers (EC 5.17).

735. Section 6.7 of Rule X of the CBK seems to imply situations for existing customers. However, the validity of this Section, also for reasons explained earlier in this Report, is debatable since:

- it makes reference to compliance with the CDD required for a customer, when the AML/CFT Law only defines the CDD process but does not fully apply it as is done through Rule X – thus rendering Rule X to provide for obligations beyond the AML/CFT Law without a legal basis; and
- the Section refers to UNMIK Regulation 2004/2 which has been repealed through the coming into force of the AML/CFT Law and may therefore be creating a conflict.

736. This situation again arises consequent to the non application of the full CDD process by the AML/CFT Law through Article 17.

737. It is therefore recommended that this issue is revised in a review of the application of the full CDD process through the AML/CFT Law and relevant other provisions.

Application of Customer Due Diligence process to existing customers – Essential Criterion 5.17

738. EC 5.17 requires financial institutions to apply the full CDD requirements to existing customers on the basis of materiality and risk and to conduct due diligence on such existing relationships at appropriate times.

739. There does not appear to be any obligation under the AML/CFT Law for Banks and financial institutions to apply the CDD requirements to existing customers or to conduct due diligence on such existing relationships.

740. The Advisory Letter 2007/1 of the CBK is also silent on the application of the CDD requirements to existing customers.

741. However Section 15.2 of Rule X of the CBK requires that *For all customer relationships in existence at the date on which this Rule comes into effect, banks and financial institutions shall apply the customer due diligence measures as set out in Section 6 by April 30, 2007*. CBK has confirmed that this has been done.

742. The application of the CDD requirements to existing customers, even if on a materiality and risk basis, is important for the effectiveness of the system.

743. Although the AML/CFT Law does not directly require banks and financial institutions to undertake full CDD requirements in the case of existing customers, it does not exclude it. Hence, whenever the Law speaks of obligations of banks and financial institutions, for example the ongoing monitoring of relationships, the Law does not make distinctions between new and existing accounts.

744. The obligation under Section 15.2 of Rule X covers this requirement however only to the extent that the application of CDD requirements is only required under the Rule. Moreover it is dated and hence is no longer valid since 30 April 2007.

745. Notwithstanding, the main issue that the AML/CFT Law is not applying the full CDD requirements although it defines them, is further reflecting on compliance with this Criterion.

746. It is therefore recommended that, as part of the review of the application of the full CDD measures under Article 17, the AML/CFT Law includes a specific provision that the CDD requirements are to be applied on an ongoing basis to existing customer, on the basis of materiality and risk – in which case this obligation should be linked with the risk based approach.

Application of Customer Due Diligence requirements to existing anonymous accounts – Essential Criterion 5.18

747. EC 5.18 requires financial institutions to undertake full CDD measures for existing anonymous accounts.

748. The AML/CFT Law does not include such a requirement. Likewise Advisory Letter 2007/1 of the CBK.

749. Rule X of the CBK includes a dated (30 April 2007) obligation on banks and financial institutions to undertake full CDD in accordance with the Rule (the Law does not provide for the application of CDD but only for identification purposes) on all existing customer relationships which, in its generic interpretation, could include existing anonymous accounts.

750. The CBK holds that there are not nor have there ever been any anonymous accounts as the Law has always prohibited them. The AML/CFT Law prohibiting anonymous accounts came into force in September 2010 and hence, unless specifically prohibited by the now repealed UNMIK Regulation 2004/2 – which is not the case - banks and financial institutions could have established such accounts.

751. It is assumed that if banks and financial institutions have complied with the requirements under Section 15.2 of Rule X of the CBK then any anonymous accounts held up to 30 April 2007 would have been converted into nominative ones. The period between April 2007 and September 2010 remains uncovered from any obligation to undertake CDD on any existing anonymous accounts.

752. If this is the case, then it is advisable that a revision of the AML/CFT Law includes provisions for the application of full CDD measures to existing anonymous accounts also.⁹⁶

Position regarding passbooks in fictitious names – EU Third AML Directive Article 6

753. Article 6 of the EU Third AML Directive prohibits financial institutions from keeping anonymous accounts or anonymous passbooks and requires such institutions to undertake full CDD measures on the owners of such accounts and passbooks. Article 6 of the EU Third AML Directive does not however prohibit accounts in fictitious names⁹⁷ but requires that all accounts be subject to CDD measures.

754. The AML/CFT Law prohibits anonymous accounts but does not prohibit accounts in fictitious names which are normally still subject to CDD measures.

755. The issue of passbooks in fictitious names is addressed under the analysis of EC 5.1 above regarding anonymous accounts of this Report.

Threshold for occasional transactions – EU Third AML Directive Article 7b

756. Whereas according to the FATF Standards financial institutions are required to undertake full CDD measures for occasional transaction *above* the designated threshold, Article 7b of the EU Third AML Directive imposes this obligation for transaction or linked transaction that are equivalent to or more than the designated threshold of €15,000.

757. Article 17(2) of the AML/CFT Law requires the application of the identification procedures (the Law falls short of applying full CDD measures) for occasional transaction or linked transactions that are of an amount equal to or above €10,000. The Article further requires that *If the amount of the transaction is unknown at the time of the operation, the identification shall be done as soon as the amount becomes known or the threshold is reached.*

758. Article 18 of the AML/CFT Law further requires the verification of the identification data for customer before *engaging in any single transaction in currency of more than € ten thousand (10,000). Multiple currency transactions shall be treated as a single transaction if the bank or financial institution has knowledge that the transactions are conducted by or on behalf of one person or entity and total more than € ten thousand (10,000) in a single day.*

759. Advisory Letter 2007/1 and Rule X of the CBK do not add material guidance on the provisions of Article 17 and Article 18 of the AML/CFT Law in this regard.

⁹⁶ The Draft Amending Law amending the AML/CFT Law is proposing provisions to this effect.

⁹⁷ Accounts in fictitious names could be similar to numbered accounts but carry a fictitious name as opposed to a predetermined number. However numbered accounts are easily identified and allowed under both the EU and the FATF Standards provided that full customer due diligence measures are applied accordingly. Numbered accounts are mainly used in private banking and should be subject to enhanced monitoring both by the institution and the supervisory authorities.

760. Although, at least to the extent of identifying the customer and verifying that identification, the AML/CFT Law seems to cover both the FATF Standard and the EU Third AML Directive since the Law sets a lower threshold of €10,000 as opposed to the FATF and EU threshold of €15,000, there is an inconsistency between Article 17 (identification) and Article 18 (verification) of the Law.

761. Article 17 imposes the identification obligation for occasional transactions or linked transactions that are *in an amount equal to or above ten thousand (10,000) Euro*, while Article 18 of the Law imposes the verification obligation for occasional transactions or linked transactions that are *of more than € ten thousand (10,000)*. This creates the anomaly as to whether the identification process for occasional transactions that are equal to €10,000 are to be followed with the verification process.

762. Moreover, Article 17 imposes the identification obligation for linked occasional transactions where the total amount is not known *as soon as the amount becomes known or the threshold is reached*. On the other hand Article 18 imposes the verification obligation for linked occasional transactions on behalf of one person or entity if these *total more than € ten thousand (10,000) in a single day*. Thus whereas the identification obligation can be imposed even if the amount of the linked transactions is identified beyond a single day, the verification process can only be applied if the amount is exceeded within a single day.

763. These anomalies would have even higher consequences in the application of the full CDD measures as is recommended.

764. It is therefore advisable that the provisions of both Article 17 and Article 18 are harmonised since the identification process is synonymous to the verification process within the context of the recommended review of the Law for the application of full CDD. Any period for measuring linked transactions could be established by regulation guiding the industry on the application of the CDD process – please refer also to analysis of EC 5.13.

Definition of beneficial owner – EU Third AML Directive Article 3(6)

765. Although the definition of a beneficial owner in the FATF Glossary and in the EU Third AML Directive are similar, the latter provides more detailed information for the beneficial owner in the case of legal persons mainly by setting a shareholding percentage threshold of 25% plus one share. The EU Third AML Directive further defines the beneficial owner within the context of legal arrangement such as foundations or trusts.

766. As already defined in the analysis for EC 5.5* the definition of beneficial owner under the AML/CFT Law is very similar to that of the FATF but does not include the additional criteria for the EU Third AML Directive – please refer to the analysis of EC 5.5 above for more detailed analysis.

767. In discussions with the industry concern was expressed on the difficulties encountered in meeting the obligations related to the beneficial owner. One of the concerns expressed is with regard to the definition of beneficial owner which does not include a threshold as is included in the EU Third AML Directive.

768. Although the inclusion of a threshold seems to provide guidance yet it brings with it additional obligations. Having a threshold – say 25% plus one share – means that financial institutions would need to identify all persons holding 25% plus one share. Moreover if no such person exists, the financial institutions would have to identify the natural person who otherwise exercises control over the management of the legal entity.

769. The definition of beneficial owner in the AML/CFT Law does not include an extension of the beneficial owner concept for legal arrangements such as trusts and foundations as defined in the EU Third AML Directive.

770. Without prejudice to, and further to the recommendations made in the analysis of EC 5.5 in this Report, it is recommended that consideration be given to:

- the inclusion of a threshold for the identification of the beneficial owner for legal persons;
- extending the definition of beneficial owner to the beneficial owner of legal arrangements in accordance with the provisions of the EU Third AML Directive and as legal arrangements are recognised under the laws of Kosovo;
- provide adequate and appropriate written guidance to the industry on the application of the CDD measures for beneficial owners.

Effectiveness (overall for Recommendation 5)

771. This Report finds serious concerns on the effectiveness of the system in applying the concept of the Customer Due Diligence. First because the AML/CFT Law only provides a definition of the concept but does not provide for its full application. Second because of divergences between the Law and the Rules issued by the CBK – although the provisions of Rule X of the CBK in this regard are more harmonised with international standards, and finally because the industry consequently provides for its own interpretation in applying this concept.

772. The effectiveness of the system is further negatively impacted through conflicts in the timing of the application of the customer identification process and the verification process. This is further impacted in weaknesses identified where there is failure to complete the identification process.

773. Moreover, the identified weakness in the appropriate application of the notion of the beneficial owner and the concerns raised by the industry on this matter further contribute to the concerns on effectiveness.

774. Finally, the effectiveness of the system is further negatively impacted through the lack of guidance, requirements and identified weakness in the application of a risk based approach.

3.2.2 Recommendations and Comments (overall for FATF Recommendation 5)

775. As can be seen from the above analysis of the Essential Criteria for Recommendation 5, the AML/CFT Law, the Advisory Letter 2007/1 and Rule X of the CBK leave a number of gaps which, together with the concerns expressed by the industry in the implementation of their obligations in some specific areas, have negative repercussions on the effectiveness of the preventive system through the CDD process.

776. This Report expresses concerns regarding the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context that the UNMIK Regulation 2004/2 has been entirely repealed by the coming into force of the AML/CFT Law while UNMIK Regulation 1999/21 and UNMIK Regulation 2008/28 have both been repealed by the coming into force of the Law on Banks, leaving any rules or regulation issued there-under valid to the extent that there

is no conflict with the law. The Advisory Letter and Rule X still make specific reference to all these Regulations irrespective of their position according to the law.⁹⁸

777. This Report also expresses concern on the definitions of ‘financial institution’ in the respective laws which differ in some instances.

778. This Report further finds that the distribution and application of United Nations and other lists of designated persons and entities need to be addressed.

779. The identified gaps or weaknesses in the legislation and the system as applied mainly focus on:

- non-application of the CDD measures by the AML/CFT Law as opposed to the application of the identification and verification procedures – with serious repercussions on various other provisions of the AML/CFT Law (EC 5.1);
- non-prohibition of maintaining accounts in fictitious names (EC 5.1 and EUD Article 6);
- clarity on timing when CDD is required (EC 5.2);
- need for refinement of verification process (EC 5.3 and EC 5.4);
- strengthening and legal clarity for obligations for the identification of beneficial owner (EC 5.5 and EUD Article 3(6));
- strengthening of requirement to identify ownership and control structure of legal persons (EC5.5.2)
- strengthening of obligation to establish purpose and intended nature of business relationship (EC 5.6);
- no obligation for ongoing due diligence on business relationships (EC 5.7 and 5.7.1/5.7.2);
- absence of a risk based approach (EC 5.8);
- lack of guidance on the risk based approach (EC 5.12)
- timing of verification for beneficial owner (EC 5.13 and EUD Article 7(b));
- failure to complete CDD (EC 5.15);
- failure to apply CDD (EC 5.16); and
- application of CDD to existing customer (EC 5.17).

780. In the light of the various identified gaps as detailed above, detailed recommendations for improving the legislation, and consequently the system, are made in the analysis of the respective EC above.

781. It is advisable that recommendations made are read through and within the context of the analysis of the respective specific EC. Notwithstanding, the main recommendations focus on:

- a review of Rule X⁹⁹, incorporating Advisory Letter 2007/1, of the CBK within the context of the new legislation and the repeal of the UNMIK Regulations;
- harmonisation of the definition of ‘financial institution’ in the respective laws and regulations;

⁹⁸ The CBK has informed that it is in the process of reviewing and updating Rule X and Advisory Letter 2007/1 upon the coming into force of the amendments to the AML/CFT Law.

⁹⁹ The Central Bank has advised that it has reviewed Rule X but this will not become effective pending legislative changes to the main AML/CFT Law.

- legal obligation for the application of the full CDD measures as defined in the AML/CFT Law as opposed to the application of the identification and verification processes which only form a component of the CDD concept;
- a review of the distribution and application of the United Nations and other lists of designated persons and entities;
- a general review of the AML/CFT Law in specific areas related to enhanced and reduced CDD within the context of the application and guidance on the risk based approach and the harmonisation of provisions as indicated in the respective Essential Criteria.

3.2.3 Rating for Recommendation 5

| | Rating | Summary of factors underlying rating |
|--------|--------|---|
| Rec. 5 | PC | <ul style="list-style-type: none"> • no legal obligation to apply full CDD measures; • no explicit prohibition for keeping accounts in fictitious names; • threshold for wire transfers not clear; • where doubts arise on the veracity or adequacy of previous obtained customer identification data applies only for occasional transactions; • insufficient legal obligation to identify beneficial owner; • strengthening of the obligation to understand the ownership and control structure of the customer; • strengthening of the obligation to understand the purpose and intended nature of the business relationship; • strengthening of the obligation to exercise ongoing monitoring of business relationship and transaction in all circumstances beyond high risk customers; • strengthening of the obligation for financial institutions to apply a risk based approach; • lack of guidance on implementing a risk based approach; • inconsistencies in the timing of the verification process against the timing of the identification process; • failure to complete CDD process applies only to the verification process; • failure to complete CDD where business relationship already exists is not adequately covered; • obligation to apply CDD to existing customers is dated and only provided under Rule X in relation to repealed UNMIK Regulations; • better distribution and application of lists of designated persons; and • effectiveness issues with regard to the scope and extent of application of CDD, identification of the beneficial owner and application of the risk-based approach |

3.3 Politically Exposed Persons (PEPs) (R.6)

3.3.1 Description and Analysis

782. The FATF Glossary to the Methodology defines PEPs as *individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of*

State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

783. The EU Third AML Directive defines PEPs as *natural persons who are or have been entrusted with prominent public functions and immediate family members or persons known to be close associates of such persons.*

784. The EU Commission Implementation Directive¹⁰⁰ provides further guidance on the definition of PEPs by defining ‘prominent public function’ in similar terms to the FATF Standard while excluding middle ranking and more junior officials from the purposes of the definition. It also provides guidance to the definition of who constitutes ‘immediate family members’ and ‘persons known to be close associates’.

785. Paragraph (1.26) of Article 2 of the AML/CFT Law defines a PEP as *any person who is or has been entrusted with prominent public functions in any country, as well as members of such person’s family or those closely associated with him/her.*

786. Advisory Letter 2007/1 and Rule X of the CBK do not add further guidance to the interpretation of the definition of PEP.

787. Although the definition of PEP in the AML/CFT Law is very close to that of the FATF and the EU Directive, yet the definition falls short in providing a definition or guidance as to what constitutes ‘a prominent public function’, ‘members of such person’s family’ and ‘those closely associated with him/her’.

788. Guidance on these definitions to the industry, who has expressed concern on the proper definition and implementation procedures in general, would be a step in the right direction for an effective implementation of this obligation.

789. It is therefore recommended that the definition of PEP be revised to include, either directly or through guidance issued by the relevant authorities, extended definitions for the appropriate and consistent interpretation of ‘a prominent public function’, ‘members of such person’s family’ and ‘those closely associated with him’.

790. Moreover the definition in the AML/CFT Law does not exclude middle ranking and more junior officials from the purposes of the applicability of the definition.

791. Unless there is a specific reason for the definition in the AML/CFT Law to cover also middle ranking and more junior official, in which case it would be more appropriate to specifically include them, the authorities may wish to consider amending the definition accordingly.

792. Moreover, whereas the definition of a PEP refers to *a person who is or has been entrusted with prominent public functions in any country*, Article 21 of the AML/CFT Law imposes the enhanced due diligence and enhanced monitoring of PEPs *residing out of Kosovo*. Consequently the enhanced due diligence and enhanced monitoring would not apply in all circumstances where a person has been entrusted with a public function within Kosovo

¹⁰⁰ Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis. *OJ L 214, 04.08.2006, pp 29-34.*

or in another country but who resides in Kosovo – see also the analysis of Additional Criterion 6.5 below.

Appropriate risk management systems – Essential Criterion 6.1

793. EC 6.1 requires financial institutions to have risk management systems in place to determine whether a potential customer, a customer or the beneficial owner is a PEP.

794. As already explained under the analysis of EC 5.8 in this Report the AML/CFT Law does not provide for an obligation for banks and financial institutions to develop risk sensitive procedures and hence apply a risk based approach on their customers. However, of relevance for EC 6.1 is the provision in Article 21 of the AML/CFT Law which requires that with regard to transactions, relationships or services provided to PEPs residing out of Kosovo, the reporting subject must have appropriate risk based procedures to determine whether the customer is a PEP.

795. Although Advisory Letter 2007/1 and Rule X of the CBK make reference to PEPs representing a higher risk, they do not provide for or require banks and financial institutions to have risk management systems in place to determine PEP status of customers.

796. Lack of provisions and guidance on a risk based approach has wide repercussions on the effective implementation of the system. Indeed the industry itself has expressed concern on guidance in this respect.

797. It appears that the only reference to banks and financial institutions to have risk managements system to determine the risk of a customer is only found in Article 21 of the AML Law and this only with reference to PEPs, thus referring to the obligations under EC 6.1.

798. Notwithstanding it should be noted that the provisions under Article 21 of the AML/CFT Law only apply to potential customers, possibly extending to current customers, and in situations where the person resides out of Kosovo – keeping in mind that the definition of PEP refers to ‘any country’.¹⁰¹ Nonetheless these provisions do not cover beneficial owners and is only applied under enhanced due diligence circumstances.

799. It is therefore recommended that, in a review of the AML/CFT Law to introduce appropriate measures for a risk based approach as recommended in the analysis of EC 5.8 in this Report, and including consequent guidance for implementation, consideration be given for such measures to identify whether a potential customer, a customer or a beneficial owner is a PEP as part of the risk based approach and outside the enhanced due diligence procedures to be applied for higher risk customer.

Senior management approval for PEP business relationships – Essential Criterion 6.2

800. EC 6.2 requires financial institution to obtain senior management approval for establishing a business relationship with a PEP. The FATF Standard does not define ‘senior management’ for this purpose.

801. Article 21 of the AML/CFT Law requires banks and financial institutions to obtain the approval of the Director General, his designated person or an employee performing an

¹⁰¹ In defining a PEP, in relation to the term ‘any country’, Advisory Letter 2007/1 states that *In line with FATF (Financial Action Task Force) Recommendation 6, the CBAK may choose whether to retain this requirement only for foreign PEPs, or to apply it also to domestic PEPs.*

equivalent function before establishing business relationships with PEPs residing out of Kosovo.

802. While the Advisory Letter 2007/1 is silent on this issue, Rule X of the CBK provides a more generic obligations in that *A bank or financial institution shall not enter into or maintain a business relationship with a higher risk customer unless a senior member of the management of the bank or financial institution has given approval in writing.*

803. For the purposes of EC 6.2, the requirements appear to be adequately fulfilled through Article 21 of the AML/CFT Law and Rule X of the CBK.

Continuation of business relationship with PEPs – Essential Criterion 6.2.1

804. EC 6.2.1 requires that senior management approval is obtained for the continuation of the business relationship where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.

805. As detailed in the previous analysis, Article 21 of the AML/CFT Law requires senior management approval before the establishment of a business relationship with a PEP residing outside of Kosovo. Otherwise, the Law is silent on measures to be taken when a customer has already been accepted.

806. The provisions under Article 21 as detailed above only apply before a bank or a financial institutions starts a relationship with the person who is identified as being of a PEP status.

807. Hence there is no obligation to apply the same procedures for obtaining senior management approval for the continuation of the business relationship if the customer or the beneficial owner eventually is found to be or becomes a PEP.

808. Moreover, the obligation does not apply in the first instance to beneficial owners. Also the AML/CFT Law does not contemplate ongoing assessments as to whether a customer has become of a PEP status but only requires ongoing strengthened monitoring where the customer has already been identified as a PEP.

809. Therefore, further to the recommendations under the analysis of EC 6.1 above it is important that any provisions introduced in the Law for the identification of the PEP status of a potential customer, an existing customer or a beneficial owner and the application of the appropriate enhanced measures, these be also extended on an ongoing basis to identify whether a customer or a beneficial owner has eventually acquired the status of a PEP and to apply the contemplated measures in such circumstances.

Source of wealth and Source of funds – Essential Criterion 6.3

810. EC 6.3 requires that part of the enhanced due diligence measures to be applied to a person who is identified to fall within the defined PEP status is for financial institutions to take reasonable measures to establish the source of wealth and the source of funds.

811. Article 21 of the AML/CFT Law requires that with regard to transactions, relationships or services provided to PEPs residing out of Kosovo, banks and financial institutions take adequate measures to establish the origin of the assets and funds used in the relationship or transactions.

812. Moreover, in addressing the application of enhanced CDD for higher risk customers, Advisory Letter 2007/1 of the CBK establishes other measures to be applied in addition to the

scrutiny of the source of wealth and the source of funds of the customer. This is likewise reflected in Rule X of the CBK.

813. Although Article 21 of the AML/CFT Law and the provisions of the Advisory Letter 2007/1 of the CBK appear to cover the obligations under EC 6.3, there is a minor shortcoming in the Law which is then covered by the Advisory Letter.

814. It should first be mentioned that EC 6.3 requires two measures to be taken. First the establishment of the source of wealth that the customer possesses and may have accumulated over the years. Second is the source of funds to be applied to the first and following transactions undertaken by the customer within his status as a PEP.

815. The words ‘the origin of the assets and funds used in relationship or transaction’ in Article 21 of the AML/CFT Law may be subject to interpretation as to whether they are referring to the source of the accumulated wealth or to the source of the funds that will establish the relationship and the transactions.¹⁰²

816. It is therefore recommended that the text of the Article 21 of the AML/CFT Law be revised in line with that used in the Advisory Letter and Rule X of the CBK for the sake of consistency and to avoid any ambiguity to the industry.

Enhanced on-going monitoring of a PEP relationship – Essential Criterion 6.4

817. EC 6.4 requires financial institutions to undertake enhanced ongoing monitoring of the relationship. While not providing guidance as to what constitutes ‘enhanced ongoing monitoring’, this is understood to refer for example to more frequent monitoring of the accounts and transactions; more frequent updating of the CDD information; more frequent assessment of the customer profile; and similar.

818. Article 21 of the AML/CFT Law requires that with regard to transactions, relationships or services provided to PEPs residing out of Kosovo, banks and financial institutions *ensure continuous and strengthened monitoring of the bank relationship or the spot operation.*

819. Section 7 of Rule X of the CBK requires that: *Banks and financial institutions shall apply intensified monitoring for higher risk customers. Every bank and financial institution should set key indicators for such accounts taking note of the background of the customer, such as the country of origin and source of funds, the type of transactions involved, and other risk factors as set out in section 6 of this Rule.*

820. Article 21 of the AML/CFT Law seems to adequately cover the requirements under EC 6.4.

821. Notwithstanding, the industry, and consequently the effectiveness of the system, would benefit from guidance on the application of enhanced ongoing monitoring of high risk accounts and business relationships, such as those with PEPs. The CBK has confirmed that this issue is being addressed in the review of Rule X.

PEPs who hold prominent public functions domestically – Additional Criterion 6.5

822. Additional Criterion 6.5 enquires whether the obligations for PEPs with a prominent public function in another country are also applicable to PEPs who have a domestic prominent public function.

¹⁰² This divergence in interpretation could be linguistic in nature consequent to translation.

823. According to the definition of PEP in the AML/CFT Law which refers to any person who has been entrusted with a prominent public function *in any country* a PEP could also be a domestic person.

824. However, when imposing enhanced due diligence measures and enhanced monitoring through Article 21, the AML/CFT Law makes references to a PEP who resides out of Kosovo. This reflects the position for PEPs in the EU Third AML Directive.

825. According to the provisions of Article 21, the enhanced due diligence and enhanced monitoring would only apply to a domestic or a foreign person who has been entrusted with a prominent public function in any other country provided that person resides outside Kosovo.

826. On the other hand, the enhanced measures would not apply to a foreign person who has been entrusted with a prominent public function in Kosovo but resides in Kosovo whereas these would apply if that person, although having a prominent public function in Kosovo, resides outside.

827. The industry has expressed concerns in understanding the notion of PEPs particularly as they are under the understanding that the CBK applies the obligations to both foreign and domestic PEPs in conflict with the AML/CFT Law. According to an analysis of Advisory Letter 2007/1 it transpires that the CBK only states (in a footnote in within the context of the term any other country in the definition of PEP) that *In line with FATF (Financial Action Task Force) Recommendation 6, the CBAK may choose whether to retain this requirement only for foreign PEPs, or to apply it also to domestic PEPs.* It is not however excluded that in practice the CBK applies the obligations under the AML/CFT Law even to domestic PEPs. Notwithstanding the AML/CFT Law does not empower the CBK to choose on the application since in Article 21 of the AML/CFT Law it specifically refers to persons residing out of Kosovo. The only choice, within the interpretation of the definition of PEP that the CBK can make is to ensure that banks and financial institutions at least identify domestic PEPs. The CBK has in fact confirmed accordingly that it undertakes such measures on its on-site visits to banks.

828. While it is appropriate to note that the 2012 FATF Standards have now included domestic PEPs (although at a different level than foreign PEPs and depending on a risk sensitivity basis), it might be appropriate to clarify the issues in a revised Rule X of the CBK should the CBK be designated as the supervisory authority for the purposes of the AML/CFT Law.

United Nations Convention against Corruption (2003) – Additional Criterion 6.6

829. Additional Criterion 6.6 seeks to establish whether the country has signed, ratified and fully implemented the United Nations Convention against Corruption of 2003.

830. According to the replies to the relevant question in the Questionnaire, Kosovo has not signed the Convention.

EU Commission Directive 2006/70/EC – Third AML Directive Article 3(8)

831. Article 2(4) of the EU Implementation Directive 2006/70/EC with respect to Article 3(8) of the EU Third AML Directive provides that, on a risk sensitive basis, countries shall require their financial institutions to no longer consider a person to be within the PEP status if that person has ceased to be entrusted with a prominent public function for a period of 12 months.

832. The AML/CFT Law is silent on this matter.

833. Kosovo appears not to have adopted this provision of the EU Implementation Directive 2006/70/EC.

Effectiveness (overall for Recommendation 6)

834. Various factors identified in the assessment of the application of the PEP notion impact on the effectiveness of the application of the concept.

835. First there are the shortcomings in the definition of a PEP and in particular the non-inclusion of extended definition for ‘a prominent public function’, ‘members of such person’s family’ and ‘those closely associated with him’ which render the application of the definition subject to interpretation. This situation is further accentuated by the lack of guidance on the applicability of the concept on a risk sensitivity basis and the ongoing monitoring of customers with or for an eventual PEP status.

3.3.2 Recommendations and Comments (overall for FATF Recommendation 6)

836. Although the AML/CFT Law addresses the issue of PEPs there are some gaps in the Law that need to be addressed for better harmonisation with the provisions of FATF Recommendation 6.

837. In general this Report expresses concern on the definition of PEP in consistency with the definition provided by the FATF Methodology and the EU AML Directives. In brief, the definition of a PEP in the AML/CFT Law does not exclude middle ranking and more junior officials from the purposes of the definition and does not provide guidance on who constitute and what is ‘prominent public function’, ‘members of such person’s family’ and ‘those closely associated with him’. Moreover the enhanced due diligence and enhanced monitoring may not apply to PEPs under all circumstances, in particular where a person who is entrusted with a prominent function in another country resides in Kosovo.

838. The gaps and weaknesses identified in the AML/CFT Law within the context of the Essential Criteria for FATF Recommendation 6 could be summarised as follows, although a reading of the Description and Analysis for the specific criteria should not be excluded:

- the definition of a PEP is incomplete and not fully consistent with the FATF definition (EC 6.1);
- no guidance on what constitutes ‘prominent public function’ (EC 6.1);
- no guidance on who constitute ‘members of such person’s family’ and ‘those closely associated with him’ (EC 6.1);
- the obligation to apply enhanced due diligence and enhanced monitoring to PEPs residing outside Kosovo excludes instances where a foreign PEP resides in Kosovo (EC 6.1);
- the obligation to have appropriate risk management systems to identify PEPs does not require the identification of the status of the beneficial owner (EC 6.1);
- the obligation for senior management approval for the continuation of relationships with customer who are eventually identified as PEPs is missing (EC 6.2.1); and
- the obligation to establish the source of wealth in the AML/CFT Law is not clear (EC 6.3)

839. In the light of these gaps or weaknesses various recommendation are made to update the AML/CFT Law to meet the criteria for Recommendation 6. It is advisable that recommendations made are read within the context of the Description and Analysis of the specific EC.

- harmonise the definition of a PEP with the FATF definition in the AML/CFT Law;
- impose legal obligation to identify if a beneficial owner of a legal entity falls within the definition of PEP;
- amend Article 21 of the AML/CFT Law to ensure that procedures are applied to identify if a customer or a beneficial owner is eventually identified as a PEP or becomes a PEP;
- clarify in Article 21 of the AML/CFT Law that the identification of the source of funds is applicable on an ongoing basis to all transactions with PEPs;
- provide guidance to the industry.

3.3.3 Rating for Recommendation 6

| | Rating | Summary of factors underlying rating |
|--------|--------|---|
| Rec. 6 | PC | <ul style="list-style-type: none"> • shortcomings in the definition of a PEP; • non application of enhanced measures to foreign PEPs residing in Kosovo • no obligation to identify if a beneficial owner is a PEP; • no obligation for senior management approval for continuation of business with a PEP; • legal obligation to identify source of wealth not clear; and • industry concerns on the application of the PEP notion; and • effectiveness issues related to extended definition of PEP, guidance on continued monitoring and beneficial owner status. |

3.4 Secrecy laws consistent with the Recommendations (R.4)

3.4.1 Description and Analysis

840. Recommendation 4 requires that relevant secrecy laws do not inhibit the effective implementation of the FATF Recommendations. According to EC 1 for Recommendation 4 in the FATF Methodology *Areas where this may be of particular concern are the ability of competent authorities to access information they require to properly perform their functions in combating ML or FT; the sharing of information between competent authorities, either domestically or internationally; and the sharing of information between financial institutions where this is required by R.7, R.9 or SR.VII.*

841. Article 37 of the AML/CFT Law provides that: *Notwithstanding any contrary provisions of applicable law, professional secrecy may not be invoked as a ground for refusal to provide information that shall be disclosed pursuant to this Law; or that is collected and maintained pursuant to this Law and is sought by either the FIU or the police in connection with an investigation that relates to money laundering and is ordered by, or carried out under the supervision of, a Prosecutor or Pre-Trial Judge.* This provision is without prejudice to information that is subject to lawyer-client privilege.

842. Advisory Letter 2007/1 and Rule X of the CBK are silent on the confidentiality issue.

843. Under Article 79, the Law on Banks empowers the CBK to exchange information on supervisory matters with financial supervisory authorities in Kosovo and in other countries. According to the Law the exchange of such information may include confidential information, provided that the CBK has satisfied itself that the information will be used for supervisory purposes and will be subject to confidentiality treatment that is similar to that which the CBK would be required to apply.

844. Moreover, under Article 80 the Law on Banks further provides that any non-public information collected by the CBK from a bank and any non-public information provided to the CBK by any other regulatory or supervisory authority to carry out CBK responsibilities under the Law on Banks shall be subject to the requirements of the Law on the CBK and may only be disclosed outside the CBK as provided in that Law.

845. On its part, through Article 74(2), the Law on the CBK provides that notwithstanding the strict prohibition of disclosing information provided through paragraph (1) of Article 74, non public information may be disclosed outside the CBK, in accordance with procedures established by the Executive Board, if such disclosure:

- is made in accordance with the express consent of the natural or legal person about whom the information relates;
- fulfills a duty to disclose as imposed by criminal Law, including to assist criminal Law Enforcement or on the order of a court acting on criminal matter;
- is made to the external auditors of the CBK;
- is given to regulatory and supervisory authorities or to public international financial institutions, in the performance of their official duties; or
- is required by the interests of the CBK itself in legal proceedings requiring disclosure.

846. On analysis, Recommendation 4 requires the lifting of confidentiality provisions particularly in instances for:

- access of information by relevant competent authorities;
- sharing of information between competent authorities, domestically and internationally;
- sharing of information between financial institutions for correspondent banking services;
- sharing of information between financial institutions for reliance on third parties for part of the CDD requirements where such reliance is allowed by law; and
- information sharing on wire transfer services.

847. With the exception of the sharing of information for third party reliance as this measure is not allowed by the Law, the AML/CFT Law provides for all instances above listed for the provision and sharing of information in all other instances as defined above.

848. Consequently, the lifting of confidentiality provided for in any other law through Article 37 of the AML/CFT Law in situations where the information is required to be disclosed pursuant to the AML/CFT Law would meet the requirements for Recommendation 4 to a large extent.

849. It should however be noted that the power of the CBK to exchange information in accordance with Article 79 of the Law on Banks is limited to supervisory matters of the CBK

within the Law on Banks. Hence the empowerment refers to information for prudential purposes since, as will be demonstrated under the analysis for Recommendation 23 of this Report, the Law on Banks does not provide supervisory powers to the CBK for the purposes of the AML/CFT Law.

850. Moreover, whereas the gateways provided under Article 74(2) of the Law on the CBK do not specifically cover the requirements under Recommendation 4, the exception to the general prohibition under Article 74(1) of the Law on the CBK - *except when necessary to fulfil any task or duty imposed by this Law or any other Law* - is more subject to interpretation, particularly when read within the context of the provisions of Article 37 of the AML/CFT Law which deals with professional secrecy.

851. Thus, since the CBK has supervisory powers for prudential purposes for the financial sector and since all confidentiality gateways under the Law on Banks and the Law on the CBK are therefore meant to cover situations related to situations of prudential supervisory matters, it is recommended to strengthen legal certainty for the lifting of confidentiality for the purposes of the AML/CFT Law.

Effectiveness (overall for Recommendation 4)

852. The current provisions for lifting of confidentiality for the purposes of the provisions of the AML/CFT Law do not impact on the effectiveness of the overall regime.

3.4.2 Recommendations and comments

853. It is therefore recommended that, in order to remove any divergences in interpretation and thus to ensure legal clarity a new bullet point be added to Article 74(2) of the Law on the CBK, in particular if the CBK is eventually given supervisory powers under and for the purposes of the AML/CFT Law, as follows:

- is made to the FIU for the purposes of its obligations under the Law on the Prevention of Money Laundering and the Financing of Terrorism.

3.4.3 Rating for Recommendation 4

| | Rating | Summary of factors underlying rating |
|--------------|---------------|--|
| Rec 4 | LC | <ul style="list-style-type: none"> • There is a need for legal clarity for lifting confidentiality for the CBK with regards to the provisions of the AML/CFT Law beyond prudential matters. |

3.5 Record Keeping (R.10*)

3.5.1 Description and Analysis

854. Recommendation 10 requires financial institutions to maintain appropriate records on transaction and identification requirements for a period of five (5) years and to make such records available to the relevant competent authorities upon appropriate authority. Although the FATF Methodology provides some guidance on the type of records to be maintained, transaction records should generally be those that can assist the authorities to reconstruct a transaction. Identification records mainly refer to the CDD information and should be such that a customer can be re-identified.

855. According to the FATF Methodology, the obligation on financial institutions to maintain records as stipulated should be provided for in law or regulation and should therefore be mandatory.

856. The analysis that follows identifies the obligation for record keeping for banks and financial institutions mainly through the requirements under the AML/CFT Law but does not exclude the possibility of record retention obligations under other laws.

Obligation to maintain necessary records on all transactions – Essential Criterion 10.1

857. EC 10.1 requires financial institutions to maintain all necessary records on both domestic and international transactions for at least five (5) years following the completion of the transactions. Upon proper authority, the relevant competent authorities may require financial institutions to maintain such records for a longer period in specific cases.

858. Paragraph (6) of Article 17 of the AML/CFT Law requires banks and financial institutions to maintain adequate information such that a transaction can be reconstructed where:

- a transaction has been executed;
- there is an attempted execution of a transaction;
- there are complex and unusual transactions; and
- there are transactions with persons and entities from countries that do not apply adequate measures for the prevention of money laundering and the financing of terrorism.

859. The AML/CFT Law does not empower any competent authority to extend the retention period in specific cases over those established by the Law.

860. Banks and financial institutions are required to retain the above detailed records for a period of five (5) years after the execution or attempted execution of the transaction. It is worth noting that the AML/CFT Law goes beyond the FATF Standards and requires the maintenance of records even for attempted transactions – a requirement that should be commended

861. The obligation to retain records as specified in the above last two bullet points is further re-enforced under paragraph (3) of Article 20 of the AML/CFT Law.

862. Advisory Letter 2007/1 of the CBK does not provide any additional guidance on the retention of transaction records except to the extent that it requires Foreign Exchange Offices and Money Transfer Operators, in the absence of an ongoing business relationship, to keep copies of the transaction data for a period of five (5) years following a transaction.

863. Section 8 of Rule X of the CBK reflects the obligation under the AML/CFT Law to retain a record of all transactions. Moreover, in further reflecting the five (5) year retention period, Section 8 of Rule X of the CBK extends the retention period for banks and financial institutions for longer if requested by CBK, the FIU (the Rule still makes reference to the Financial Intelligence Centre) or any other competent authority in specific cases.

864. Moreover, Section 8 of Rule X requires that *Where the bank or financial institution is aware that records relate to on-going investigations, such records should be retained until it is confirmed by the relevant law enforcement agency that the case has been closed.*

865. The obligation to maintain records of transactions under Article 17 of the AML/CFT Law for a period of five (5) years following the completion of the transaction appear to adequately cover parts of the obligations under EC 10.1.

866. The AML/CFT Law and Rule X however fall short in establishing the commencement of the five (5) year period for the retention of records of occasional linked transactions that together meet or exceed the threshold of €10,000 established by the AML/CFT Law. The usual standard is for the five (5) year retention period to commence with the completion of the last transaction in such a series of transactions.

867. Moreover, the AML/CFT Law does not reflect the additional requirement under EC 10.1 for financial institution to retain records for a longer period if so requested by competent authorities under proper authority.

868. This empowerment is however reflected in Rule X of the CBK under Section 8. There are two main issues challenging this extended power through Rule X. First the standard requirement should be found under primary law or regulation as in this case the CBK is assuming powers beyond those provided by the Law. Second the validity of most parts of Rule X of the CBK is questioned through this Report and, in any case, Rule X does not meet the criteria for a 'regulation' in terms of the FATF Methodology.

869. Even if accepted, the empowerment under Rule X would not apply to all reporting subjects and is thus creating an uneven playing field in the implementation of the AML/CFT Law.

870. Thus this Report finds that the timing for the five (5) year maintenance period for series of occasional linked transactions and the power for the relevant authorities to extend the five (5) year retention period under proper authority are absent in the AML/CFT Law.

871. It is therefore recommended that paragraph (6.2) of Article 17 of the AML/CFT Law be amended to include the following sentence at the end:

Article 17 para. (6.2): Where the record refers to a series of linked occasional transactions the five (5) year retention period shall commence with the execution of the last transaction in the series.

872. It is further recommended that a new paragraph (7) to Article 17 is added as follows empowering only the FIU to extend the retention period since the FIU is the authority to receive and process STRs and would have information on the status of the report:

Article 17 para. (7) In specific cases determined by the FIU for the purposes of its functions in analysing suspicious transaction reports, the FIU may extend the period of five (5) years by written order to the reporting subjects concerned.

Record sufficient to permit reconstruction of individual transactions – Essential Criterion 10.1.1

873. EC 10.1.1 requires that the details maintained in a transaction record be sufficient for the authorities to reconstruct an individual transaction such that it can provide evidence in any eventual possible prosecution of a criminal activity.

874. Article 17 of the AML/CFT Law in creating the obligation to maintain transaction records to enable reconstruction of transaction falls short in providing guidance accordingly.

875. While Advisory Letter 2007/1 is silent on this issue, in reflecting the provisions of the Law for the maintenance of transaction records, Section 8 of Rule X of the CBK provides guidance on the type of records of the components of a transaction that should be retained. These include:

- the name of the customer and the beneficial owner (and holder of a power of attorney, if applicable) and their addresses or other identifying information as normally recorded by the bank or financial institution;
- the nature and date of the transaction;
- the type and amount of currency involved; and
- the type and identifying number of any account involved in the transaction.

876. The provisions for guidance under Section 8 of Rule X of the CBK contribute extensively for banks and financial institutions to maintain appropriate transaction records that are conducive to the reconstruction of the transaction.

877. By way of commenting on the effectiveness of the entire preventive system under the AML/CFT Law the Kosovo Authorities may wish to consider that guidance under Rule X is applicable only to the financial sector thus, in this case, creating an uneven playing field with the rest of the reporting subjects in the implementation of the AML/CFT Law.

878. Although further guidance on the method of retaining records – electronic, physical, or otherwise – would further benefit the system, the requirements under EC 10.1.1 are currently adequately met for the financial sector.

Records of identification data, account files and business correspondence - Essential Criterion 10.2

879. EC 10.2 requires financial institutions to maintain all necessary records of the identification data, account files and business correspondence for at least five (5) years following the termination of an account or a business relationship. Upon proper authority, the relevant competent authorities may require financial institutions to maintain such records for a longer period in specific cases.

880. Paragraph (6) of Article 17 of the AML/CFT Law requires banks and financial institutions to maintain copies of documents that attest the identity of a client, property holders, taken in compliance with Article 17, account files and business correspondence, for at least five (5) years, following the termination of the business relationship.

881. This obligation is further reinforced through paragraph (7) of Article 18 of the AML/CFT Law which however requires the five (5) year retention period to commence *after the account has been closed or the relations with the client have ended, whichever is later.*¹⁰³

882. The AML/CFT Law does not empower any competent authority to extend the retention period in specific cases beyond the period established under the Law.

883. Section 8 of Rule X of the CBK requires that: *Banks and financial institutions shall also retain all necessary records relating to the customer, beneficial owner, or holder of power of attorney, account files, and business correspondence for at least five years following the termination of the business relationship, or in specific cases for a longer period if requested by the CBAK, FIC, or other competent authority. The records shall identify the staff*

¹⁰³ The proposed amendments to the AML/CFT Law foresee the deletion of paragraph (7) of Article 18 of the current Law.

member who carried out the identification of the customer (and beneficial owner, where applicable). Thus Section 8 also provides additional guidance.

884. Moreover, as already detailed above, Section 8 of Rule X further requires that *Where the bank or financial institution is aware that records relate to on-going investigations, such records should be retained until it is confirmed by the relevant law enforcement agency that the case has been closed.*

885. Although *prima facie* it appears that the requirements under EC 10.2 may be met through the provisions of the AML/CFT Law and Rule X of the CBK, an analysis of these provisions indicates some important gaps, weaknesses or discrepancies.

886. EC 10.2 requires that the identification records are maintained for a five (5) year period following the closure of an account or the termination of the business relationship. Paragraph (6) of Article 17 of the AML/CFT Law sets this period commencing from the termination of the business relationship only. On the other hand, paragraph (7) of Article 18 of the AML/CFT Law, in reinforcing the maintenance of identification records, establishes the commencement of the five (5) year period *after the account has been closed or the relations with the client have ended, whichever is later* thus being in accordance with the Standard.¹⁰⁴ Rule X on the other hand reflects Article 17 of the AML/CFT Law by requiring the period of five (5) year to commence following the termination of the business relationship.

887. Such divergences in the obligations, particularly where the divergence appears in the same Law (Article 17 vs Article 18) creates conflicts for the industry with negative implications on the effective implementation of the legal requirements.

888. Moreover, likewise for EC 10.1, the AML/CFT Law does not reflect the additional requirement under EC 10.2 for financial institutions to retain identification records for a longer period if so requested by competent authorities under proper authority.

889. Similarly as for EC 10.1, the empowerment to extend the retention period is however reflected in Rule X of the CBK under Section 8. Consequently, there are two main issues challenging this extended power through Rule X. First the standard requirement should be found under primary law or regulation. Second the validity of most parts of Rule X of the CBK being questioned through this Report and, in any case, Rule X does not meet the criteria for a 'regulation' in terms of the FATF Methodology.

890. Even if accepted, the empowerment under Rule X would not apply to all reporting subjects and is thus creating an uneven playing field in the implementation of the AML/CFT Law.

891. Thus this Report finds that there is a conflict in the Law itself on the timing for the commencement of the five (5) year maintenance period for identification records while the power for the relevant authorities to extend the five (5) year retention period under proper authority for identification records is absent in the AML/CFT Law.

892. It is therefore recommended to amend paragraph (6.1) of Article 17 of the AML/CFT Law to read as follows: *upon closing of an account or upon the termination of the business relationship, whichever is later.*

¹⁰⁴ The proposed amendments to the AML/CFT Law foresee the deletion of paragraph (7) of Article 18 of the current Law thus removing the discrepancy but bringing the Law not compliant with the standard.

893. With regards to the extension of the retention period, the recommendation made under the analysis of EC 10.1 above for a new paragraph (7) to Article 17 refers.

Availability of records on a timely basis to domestic competent authorities – Essential Criterion 10.3

894. EC 10.3 requires financial institutions to ensure that all customer and transaction records and information maintained according to the established standards are available on a timely basis to domestic competent authorities upon appropriate authority.

895. Article 17 of the AML/CFT Law requires banks and financial institution to ensure that the maintained documentation and information as required are ready and available to the FIU, and to other competent authorities

896. The obligation to retain detailed records of complex and unusual large transactions under paragraph (3) of Article 20 of the AML/CFT Law specifies that the transaction information retained shall be made available if requested by a *supervisory authority* further to the FIU and other competent authorities as required under Article 17.

897. Section 8 of Rule X of the CBK requires banks and financial institutions to make available *on request* to the CBK, the FIU (the Rule still makes reference to the Financial Intelligence Centre), and any other competent authority all records and available information on a customer, beneficial owner, or holder of a power of attorney and all requested transaction records, in a form and manner that is comprehensive, timely, and comprehensible.

898. In substance the main requirements under EC 10.3 appear to be in place through the AML/CFT Law and Rule X of the CBK, the latter without prejudice to the concerns expressed in this Report. But since the Methodology requires that the requirements under Recommendation 10 should be covered by law or regulation and moreover the validity of Rule X as ‘regulation’ in terms of the Methodology is questionable, compliance with the requirements of EC 10.3 must be assessed against the AML/CFT Law only.

899. In this regard it should be noted that in specifying the transaction records to be maintained, including those for special monitoring transactions under Article 20 of the AML/CFT Law, there seems to be an inconsistency on the availability of such information to the competent authorities. Whereas Article 17 requires banks and financial institutions to make records of transactions as specified in the Article available to the FIU and to other competent authorities, Article 20 requires banks and financial institutions to make available information retained there-under to the FIU, *supervisory authorities* and other competent authorities *if requested*. Thus it is not clear why under Article 20 supervisory authorities are specifically referred to and why under Article 17 information is not made available if requested.

900. It is therefore recommended to harmonise the provisions of Article 17 and Article 20 in this regard.

Effectiveness (overall for Recommendation 10)

901. As already indicated in the analysis for Recommendation 10, some of the identified weaknesses or shortcomings could impact negatively on the effectiveness of the implementation of the record keeping obligations.

902. Among these weaknesses one could refer to the ambiguities in the AML/CFT Law on the commencement of the five (5) year retention period and the lack of a reference to the commencement period for a series of related transactions. The inconsistency in the Law and

Rule X on the obligation to maintain records for a longer period and the lack of legal power for the FIU or other authority to demand such extended period further negatively contribute to the effectiveness of the system. Such conflicting legal provisions extend to the availability of retained records to the relevant competent authorities.

903. Moreover, any guidance provided by the CBK on this issue can be applied only to the financial sector thus creating an uneven playing field with negative impact on the entire system.

3.5.2 Recommendations and Comments – FATF Recommendation 10

904. Although in principle the provisions of the AML/CFT Law reflect the main criteria for Recommendation 10 there are serious conflicts, discrepancies or weaknesses that, if left unattended could develop into concerns on the effective implementation of the Law.

905. The conflicts, gaps and weaknesses identified in the AML/CFT Law within the context of the Essential Criteria for FATF Recommendation 10 could be summarised as follows, although a reading of the analysis for the specific criteria should not be excluded:

- lack of provisions for the commencement retention period for a series of linked occasional transactions (EC 10.1);
- lack of guidance on the type and methodology of retention records (EC 10.1.1);
- lack of legal power for the relevant authorities to extend the five (5) year retention period under proper authority for transaction records (EC 10.1);
- lack of legal power for the relevant authorities to extend the five (5) year retention period under proper authority for identification records (EC 10.2);
- inconsistencies in the Law itself on the timing for the commencement of the five (5) year maintenance period for identification records (EC 10.2); and
- ambiguity within the Law on the availability of information to competent authorities (EC 10.3).

906. A number of recommendations are made in the analysis for the specific EC to amend the preventive legal framework in this regard. Whereas it is advisable that such recommendations are read within the context of the analysis of each specific EC, the main recommendations refer to:

- amending paragraph (6.2) of Article 17 in connection with the timing of the retention period for a series of linked occasional transactions;
- inserting a new paragraph (7) to Article 17 empowering the FIU to extend the retention period in specific cases;
- amending paragraph (6.1) of Article 17 consistent with paragraph (6) of Article 18; and
- harmonising Article 17 and Article 20 on the availability of retained records to competent authorities.

3.5.3 Rating for Recommendation 10

| | Rate | Summary of factors underlying rating |
|--------|------|--|
| Rec 10 | NC | <ul style="list-style-type: none"> • lack of provisions for the commencement retention period for linked occasional transactions; • lack of guidance on methodology of record retention; • lack of legal power for the extension of the five (5) year retention period for both transaction and identification records when |

| | Rate | Summary of factors underlying rating |
|--|------|--|
| | | necessary; <ul style="list-style-type: none"> • legal inconsistency on the timing for the commencement of the retention period for identification records; • ambiguity on the availability of records to competent authorities; and • effectiveness issues related to conflicting or lack of legal provisions and uneven playing field among the entire reporting subjects |

3.6 Suspicious Transaction Reporting (R.13* & SR.IV)

3.6.1 Description and Analysis

907. Article 22 of the AML/CFT Law requires banks and financial institutions to file with the FIU two types of reports. Reports of all suspicious acts and transactions as defined in the Law and reports on all single or linked transactions in currency of €10,000 or more. The following paragraphs refer to the former reporting but some references may be made to the latter as and where necessary.¹⁰⁵

908. The AML/CFT Law defines a ‘suspicious act or transaction’ as *an act or transaction that generates a reasonable suspicion that the property involved in the act or transaction is proceeds of crime and shall be interpreted in line with any guidance issued by the FIU on suspicious acts or transactions;*

909. Obligations to meet the criteria for Recommendation 13 at national level are required to be by law or regulation. In this regard concerns expressed earlier in this Report on the validity of the Advisory Letter 2007/1 and Rule X of the CBK as a ‘regulation’ for these purposes is applicable. Notwithstanding further guidance on the implementation of the AML/CFT Law is considered positively in contributing to the effective implementation of the reporting regime under the Law.

Reporting of suspicious transaction to the FIU – Essential Criterion 13.1

910. EC 13.1 requires a legal obligation for financial institutions to report to the FIU when there is a suspicion or there are reasonable grounds to suspect that funds are the proceeds of a criminal activity, as a minimum being the proceeds of all predicate offences under Recommendation 1. The obligation under the law should be a direct mandatory one.

911. Article 22 of the AML/CFT Law requires banks and financial institutions to report to the FIU, in the manner and in the format specified by the FIU, all suspicious acts or transactions within twenty four (24) hours of the time the act or transaction was identified as suspicious.

912. In the definition of ‘suspicious act or transaction’ the AML/CFT Law makes reference to the property involved in the act or transaction being the proceeds of crime. In turn the AML/CFT Law defines ‘proceeds of crime’ as *any property derived directly or indirectly from a predicate criminal offence. Property derived indirectly from a predicate criminal offence includes property into which any property directly derived from the predicate criminal offence was later converted, transformed or intermingled, as well as*

¹⁰⁵ Currency reporting is addressed under FATF Recommendation 19 which does not form part of this assessment Report.

income, capital or other economic gains derived or realized from such property at any time since the commission of the predicate criminal offence. 'Predicate criminal offence' is in turn defined as any offence, which generates proceeds of crime.

913. Article 22(2) of the AML/CFT Law further requires banks and financial institutions to continue to report to the FIU any additional material information regarding the transaction(s) concerned that becomes available to the bank or financial institution following the submission of the related STR.^{106, 107}

914. Article 22(3) of the AML/CFT Law empowers the FIU to exempt certain transactions or categories of transactions from the reporting obligation where it determines that the transactions or category of transactions are routine and serve a legitimate purpose. The FIU informed that no such exemptions have been applied except for those under Administrative Directive No 11 issued by the FIC in October 2010 in accordance with UNMIK Regulation 2004/2 which has now been repealed by the coming into force of the AML/CFT Law.

915. Moreover, Article 23 of the AML/CFT Law requires banks and financial institutions to have in place internal programmes and procedures for, among others, reporting to the FIU in accordance with the reporting requirements under the Law.

916. Advisory Letter 2007/1 of the CBK, although still with reference to the UNMIK Regulations that have been repealed with the coming into force of the AML/CFT Law, provides important guidance for banks and financial institutions on the identification of suspicious acts or transactions, including an Annex with indicators, which should not be taken as being exhaustive. It also provides guidance on actions to be taken by compliance officers of banks and financial institutions upon being informed internally of a suspicious act or transaction, thus contributing for consistency within the sector in managing the reporting regime.

917. While reflecting the reporting obligation under the AML/CFT Law, Rule X of the CBK likewise provides guidance on the reporting regime but with reference to the obligations promulgated by the UNMIK Regulations that have been repealed by the coming into force of the AML/CFT Law.

918. In an Administrative Guidance Ref FICAD: 49/2011 issued by the Financial Intelligence Centre on 31 May 2011 banks and financial institutions are reminded that all suspicious acts or transaction are to be reported without any filtering process; that all suspicious acts or transactions are to be reported within 24 hours of being identified; and that preferably these should be filed electronically using the GoAML system.

919. The FIU has informed that it has received 145 STRs in 2010 and 125 reports in 2011 from banks. An additional 3 STRs came from non-bank MVT service providers. At the same time the assessment team notes several drawbacks in the goAML reporting form, which may have an impact on the quality and effectiveness of reporting (see section 2.6 of this Report). Additionally the assessment team had concerns with the overall number of STRs filed and the fact that they were reported primarily by the banking sector.

¹⁰⁶ The Law makes reference to reports submitted in terms of paragraph (1) of Article 21 but the reference is taken to be in connection with Article 22 which establishes the reporting obligation for banks and financial institutions.

¹⁰⁷ The FIU informed that it uses the obligation under Article 22(2) to get information from banks and financial institutions that is not available to it but that is requested by foreign FIUs. The assessment team does not share this interpretation of Article 22(2) in providing such powers to the FIU since Article 22(2) is only invoked if an institution has already filed an STR and such information that is eventually available is linked to that STR – see comments under Recommendation 26 in this Report.

920. In addition to the reporting of suspicious transactions to the FIU Article 22 of the AML/CFT Law also requires the filing with the FIU of CTRs for currency transactions of €10,000 or more.

921. The FIU has informed that in 2010 it received a total of 2,431 CTRs (1,377 from banks and 1,054 from exchange bureaux) while in 2011 it has received 3,261 CTRs (1,284 from banks and 1,977 from exchange bureaux). It is worth noting, as indicated above, that in the same periods the FIU received 145 and 125 STRs respectively from banks and none from exchange bureaux.

922. The reporting obligation under paragraph (1) of Article 22 of the AML/CFT Law read within the definition of what constitutes a ‘suspicious act or transaction’, including the definitions of ‘proceeds of crime’ and ‘predicate criminal offence’ provide an adequate legal obligation for banks and financial institutions to report to the FIU.

923. However, while the definition of suspicious transaction refers to ‘an act or transaction’, the obligation to report does not appear to cover situations where banks or financial institutions have ‘information available’ that a person may be involved in money laundering or the financing of terrorism. Such situations may, subject to interpretation, be covered by the Annex to Advisory Letter 2007/1 of the CBK which provides guidance through suspicious indicators.

924. It is recommended that a revision of the definition of ‘suspicious acts or transactions’ should include the following at the end;

(definition) The definition shall include situations where information available indicates that a person or entity may be or may have been involved in criminal activities.

925. Moreover the wide difference between the number of CTRs and STRs received by the FIU from banks and exchange bureaux as indicated above raises concerns on the effectiveness of the system. It appears, although no evidence is available to the assessment team, that reporting subjects in filing a CTR which may also be a suspicious act or transaction in terms of the AML/CFT Law do not follow by filing a separate STR. Thus a transaction that may be suspicious will not be investigated by the FIU since the FIU retains CTRs for intelligence and reference purposes only.

926. It is therefore recommended that the FIU takes appropriate measure first to ensure that this is not happening and further to raise more awareness to the reporting subjects on the differences and consequences of filing two separate reports (CTR and STR) where a CTR under the definition of the AML/CFT Law is also considered as a suspicious act or transactions as also defined in the Law.

Reporting of suspicions of financing of terrorism – Essential Criterion 13.2 and Special Recommendation Essential Criterion IV.1

927. EC 13.2 and SR EC IV.1 require financial institutions to file an STR where there are reasonable grounds to suspect or where there is suspicion that the funds in the transaction are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations or by those who finance terrorism.

928. As detailed above, Article 22 of the AML/CFT Law requires banks and financial institutions to report to the FIU, within the stipulated time, all “suspicious acts or transactions” as defined in the Law. Otherwise the Law is silent on references to financing of terrorism in its reporting obligations provisions.

929. The obligation to report suspicious transactions is therefore linked to the definition of ‘suspicious acts or transactions’ in the AML/CFT Law where it transpires that the definition does not make references to the financing of terrorism.

930. In providing guidance and indicators on what constitutes a suspicious act or transactions, Advisory Letter 2007/1 of the CBK does not make references to reporting obligations for suspicions of financing of terrorism, although some indicators in the Annex make reference to financing of terrorism – e.g Transfers of large amounts, or frequent transfers to or from countries producing illegal drugs or known for terrorist activities.

931. Section 10 of Rule X of the CBK reflects the reporting obligation under Article 22 of the AML/CFT Law and provides guidance accordingly. Section 10 however includes a paragraph which states: *[Banks and financial institutions shall report to the FIC any customer or transaction that they have reasonable grounds to suspect may be linked to the financing of terrorism or to individuals who support terrorism. Attention should be devoted to monitoring and keeping up to date the list of organizations and individuals related to terrorists or terrorism based on information received from the FIC, or other available sources. Attention shall be paid to non-profit and humanitarian organizations, especially if the activities are not in accordance with the registered activity, if the source of funds is not clear, or if such organizations receive assets from suspicious sources.]*

932. For some reason not clarified to the assessment team this paragraph in Rule X, maybe because it goes beyond the provisions of the AML/CFT Law, is in square brackets ([]).

933. The FIU has informed that in 2010 it had 10 cases regarding financing of terrorism, 5 cases in 2011 and 3 cases in 2012 up to the time of the onsite visit.

934. The industry has informed that although there is no clear legal obligation, they would be cautious and file an STR if they had suspicion that a transaction may be linked to the financing of terrorism.

935. The AML/CFT Law links the reporting obligation to the definition of ‘suspicious act or transaction’ which definition does not include any reference to the financing of terrorism. Indeed the definition refers to ‘proceeds of crime’ while the financing of terrorism may not necessarily be done through proceeds of crime.

936. Moreover, the square bracketed provision in Section 10 of Rule X of the CBK is beyond the provisions of the Law and, in any case, the validity of the Rule as a regulation for the purposes of the FATF Methodology is questionable.

937. Through the above analysis of the framework for the obligation for banks and financial institutions to report suspicious acts and transactions or persons it follows therefore that there is no legal obligation under the AML/CFT Law for reporting transactions or persons suspected to be linked to the financing of terrorism.

938. It is therefore recommended that Article 22 of the AML/CFT Law be amended as follows, also covering attempted acts or transactions that may be related to the financing of terrorism (*italics*):

Article 22 (1.1). all suspicious acts or transactions, or suspicions that an act or transaction or an attempted act or transaction may be related to the financing of terrorism, or that a person or an entity may be involved in the financing of terrorism, within twenty four (24) hours of the time the act or transaction was identified as suspicious;

939. The proposed amendment to Article 22 may require additional amendments to other articles of the AML/CFT Law referring to the reporting obligation of other reporting subjects not within the financial sector.

Reporting of attempted transactions – Essential Criterion 13.3 and Special Recommendation Essential Criterion IV.2

940. EC 13.3 and SR EC IV.2 require that all suspicious transactions, included attempted ones, should be reported irrespective of the amount involved.

941. According to Article 22(1) of the AML/CFT Law all suspicious acts or transactions are to be reported to the FIU without any threshold.

942. Article 22(1) of the AML/CFT Law however does not make any references to attempted transactions but only to ‘suspicious acts or transaction’ which therefore follows the definition of the term in the Law and which definition does not refer to attempted transactions.

943. Under Article 22(5) of the AML/CFT Law banks and financial institutions are required to notify the FIU prior to taking any action in connection with any suspicious act or transaction, which would result in the release or transfer of the property subject to the transaction from the control of the bank or the financial institution.

944. Advisory Letter 2007/1 of the CBK is silent on attempted transactions.

945. On the other hand, and without prejudice to the position taken by this Report on its validity as a regulation for the purposes of the FATF Methodology, Section 10 of Rule X of the CBK requires that where a bank or a financial institution decides not to enter into a business relationship because of suspicion of money laundering or terrorist financing, it shall report the matter to the Financial Information Centre (now FIU) immediately.

946. The reporting obligation under Article 22(1) of the AML/CFT Law is linked to the definition of ‘suspicious act or transaction’. Although the definition does not indicate whether it is in the past i.e. the transaction has already been undertaken, or in the present i.e. that the transaction is being undertaken or proposed to be undertaken, a faithful interpretation would be that the definition is referring to acts or transactions that have occurred.

947. The reporting obligation under Article 22(5) may be interpreted as being mandatory before the transaction is undertaken – indeed the spirit of the provision is so as otherwise the transaction cannot be suspended by the FIU in time. However this is subject to interpretation. The words *which would result in the release or transfer of the property subject to the transaction from the control of the bank or the financial institution* indicate that the transaction is in the past as in an attempted transaction the ‘property subject to the transaction’ would not have passed under the control of the bank or the financial institution.¹⁰⁸

948. The provision of Section 10 of Rule X of the CBK is more related to the establishment of a business relationship as opposed to an attempted transaction – even if the provisions of Rule X are taken as applicable within the context of the FATF Methodology as a regulation.

¹⁰⁸ As the suspension of a transaction does not fall within the criteria for Recommendation 13 the Kosovo Authorities may wish to take note within the context of reviewing the Law accordingly for the suspension of transactions.

949. This Report concludes therefore that the current reporting framework of suspicious transactions does not include attempted transactions that may not be executed.

950. It is therefore recommended that the AML/CFT Law be amended to provide for the reporting obligation to apply also for attempted transaction as required under the FATF Standard.

951. One way of including this obligation while retaining the present reporting framework within the AML/CFT Law is to amend the definition of ‘suspicious act or transaction’ by including references to ‘attempted acts or transactions’.¹⁰⁹

Reporting of suspicious transactions that may involve tax matters – Essential Criterion 13.4 and Special Recommendation Essential Criterion IV.2

952. EC 13.4 and SR EC IV.2 require that the reporting obligation for suspicious transactions applies even in circumstances where the transaction may involve tax matters.

953. The AML/CFT Law is basically silent on referring directly to this matter since the reporting obligation is linked to the definition of ‘suspicious act or transaction’ and which in its definition includes references to ‘proceeds of crime’ and which in turn in its definition refers to any property derived directly or indirectly from a predicate criminal offence i.e. any offence, which generates proceeds of crime.

954. Advisory Letter 2007/1 and Rule X of the CBK are silent on the matter.

955. Paragraph (1) of Article 313 (Tax evasion) of the Criminal Code states that: *Whoever, with the intent that he or she or another person conceal or evade, partially or entirely, the payment of taxes, tariffs or contributions required by the law, provides false information or omits information regarding his or her income, property, economic wealth or other relevant facts for the assessment of such obligations shall be punished by a fine and by imprisonment of up to three (3) years.*

956. Moreover, paragraph (1) of Article 314 (False Tax related Documents) of the Criminal Code states that: *Whoever makes a false statement or issues a false document when the submission of a truthful statement or document is required by law, or whoever does not issue a document whose issuance is required by law, shall be punished by a fine and by imprisonment of up to three (3) years.*

957. It follows therefore that for the purposes of the Criminal Code tax evasion, including the submission of false tax related documents, is a criminal offence and would therefore be captured under the definition of ‘suspicious acts or transactions’ under the AML/CFT Law.

958. Consequently the reporting obligation under Article 22 of the AML/CFT Law applies for the purposes of EC 13.4 and SR EC IV.2.

Reporting where funds are suspected to be proceeds of all criminal acts constituting a predicate offence – Additional Criterion 13.5

959. Additional Criterion 13.5 requires that the obligation for financial institutions to report is extended to suspicions or reasonable grounds of suspicion that funds in a transaction are the proceeds of all criminal acts that would constitute a predicate offence for money laundering domestically.

¹⁰⁹ It should be noted that the draft Amending Law amending the AML/CFT Law already includes this proposal.

960. As stated above the reporting obligation for banks and financial institutions under Article 22(1) of the AML/CFT Law is linked to the definition of ‘suspicious act or transaction’ with references to ‘proceeds of crime’ and which in turn in its definition refers to any property derived directly or indirectly from a predicate criminal offence i.e any offence, which generates proceeds of crime.

961. The obligation to report under Article 22(1) of the AML/CFT Law covers all criminal acts constituting a predicate offence through the definition of ‘suspicious acts or transactions’.

962. The words ‘that would constitute a predicate offence for money laundering domestically’ renders the requirement under Additional Criterion 13.5 subject to interpretation. It could be referring to situations where the criminal act is committed domestically or to situations where the criminal act is committed outside the country where the money is being laundered.

963. The AML/CFT Law in linking the reporting obligation to the definition of ‘suspicious act or transaction’ does not distinguish whether the proceeds are of a crime that has been committed domestically or internationally.

964. Moreover, banks and financial institutions are not obliged to identify the predicate offence and whether such offence is domestic or foreign since the obligation to report is only subject to the reasonable suspicion that the funds in the transaction are proceeds of criminal activity.

Effectiveness (overall for Recommendation 13 and Special Recommendation IV)

965. The weaknesses identified above and as indicated below negatively impact the effectiveness of the reporting regime. This is the result of the quality and quantity of STRs received by the FIU which could be impacted through the CTR reporting system. Also as a result of the shortcomings in the reporting obligation itself with regards to the financing of terrorism and attempted transactions.

966. The lack of feedback from the FIU to reporting entities with regard to the outcome of cases, as well as any general feedback on typologies negatively impact the quality of STRs.

3.6.2 Recommendations and Comments (overall for FATF Recommendation 13* and Special Recommendation IV)

967. The analysis of Recommendation 13 on the reporting obligation and SR IV on the reporting obligation for financing of terrorism identifies serious weaknesses in the framework for the preventive regime for banks and financial institutions in Kosovo.

968. This Report has expressed overall concerns on the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context of the repealed UNMIK Regulations to which both documents refer and hence their status within the FATF Methodology. This Report finds that both documents cannot be considered as ‘regulation’ even because at times they go beyond the provisions of the Law itself.

969. Within this context, the major weaknesses identified in the AML/CFT Law within the context of the EC for FATF Recommendation 13* and SR IV could be summarised as follows, although a reading of the Description and Analysis for the specific criteria is primarily recommended:

- the reporting obligation does not cover situations where information available indicates that a person may be or may have been involved in money laundering or the financing of terrorism (EC 13.1);
- the low number of STRs filed and hence concerns over the wide difference in number of CTRs and STRs filed which could be negatively impacting the reporting regime (EC 3.1);
- the reporting obligation does not cover reporting of transactions or acts that may be related to the financing of terrorism (EC 13.2 and SR IV.1); and
- the reporting obligation does not cover attempted transactions (EC 13.3 and SR IV.2).

970. Recommendations to rectify the identified weaknesses are made in the analysis for the specific EC. While it is advisable that recommendations are read within the context of the analysis of the specific EC, the main recommendations refer to:

- amending the definition of ‘suspicious acts and transactions’ to include situations where information available indicates that a person or entity may be involved in criminal activities;
- amending Article 22 to introduce the reporting obligation for the financing of terrorism;
- amending the definition of ‘suspicious acts or transactions’ to included attempted acts and transactions; and
- FIU to undertake measures to ensure that CTRs that raise suspicions are also reported as STRs and to create awareness accordingly.

3.6.3 Rating for Recommendation 13 and Special Recommendation IV

| | Rate | Summary of factors underlying rating |
|---------------|-----------|--|
| Rec 13 | PC | <ul style="list-style-type: none"> • No reporting obligation in situations where information available indicates possible money laundering or financing of terrorism activities; • Rigid reporting forms and absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on the FIU and industry; • no reporting obligation for financing of terrorism; • no reporting obligation of attempted suspicious acts or transactions; • low number of STRs; • concern over non-filing of suspicious CTRs as STRs; and • effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs. |
| SR IV | NC | <ul style="list-style-type: none"> • no reporting obligation in situations where information available indicates possible money laundering or financing of terrorism activities; • Rigid reporting forms and absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on the FIU and industry; • no reporting obligation for financing of terrorism; • no reporting obligation of attempted suspicious acts or transactions; • low number of STRs; |

| | Rate | Summary of factors underlying rating |
|--|------|--|
| | | <ul style="list-style-type: none"> • concern over non-filing of suspicious CTRs as STRs; and • effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs. |

3.7 Protection and no tipping off (R.14)

3.7.1 Description and Analysis

971. The requirements under Recommendation 14 are twofold. Recommendation 14 requires that financial institutions, their directors, officers and employees be protected by legal provisions from any criminal and civil liability for breach of confidentiality when they report and disclose information to the FIU in good faith and in accordance with the provisions of law. Recommendation 14 further requires that financial institutions, their directors, officers and employees be prohibited from disclosing that an STR or related information is being reported to the FIU.

Protection for reporting to the FIU – Essential Criterion 14.1

972. EC 14.1 requires that financial institutions, their directors, officers and employees, whether permanent or temporary, be protected by law from any criminal or civil liability when they report in good faith to the FIU.

973. Article 35 of the AML/CFT Law states that *Notwithstanding any contrary provisions of applicable law, no civil or criminal liability action may be brought nor any professional sanction taken against any person or entity based solely on the good faith transmission of information, submission of reports, or other action taken pursuant to this Law, or the voluntary good faith transmission of any information concerning a suspicious act or transaction, suspected money laundering or suspected financing of terrorist activities to the FIU.*

974. Advisory Letter 2007/1 and Rule X of the CBK are silent on this matter.

975. The AML/CFT Law provides protection to ‘any person or entity’. Within the context of the AML/CFT Law, the term ‘any person or entity’ could be interpreted to cover reporting subjects under Article 16 of the Law and any other person or entity required to report to the FIU under the Law – for example NGOs and Political Parties. It is difficult to interpret this term to refer to directors, officers and employees of the reporting subject.

976. The protection under the AML/CFT Law is provided *notwithstanding any contrary provisions of applicable law*, thus ensuring that, as the *lex specialis* (special law), the AML/CFT Law overrides any other provisions in any other law that may impose criminal or civil liability for breach of confidentiality. However the protection is conditioned by the fact that any disclosure is done in good faith and within the provisions of the AML/CFT Law.

977. Notwithstanding, Article 35 of the AML/CFT Law could be slightly amended to adequately cover EC 14.1 by the inclusion of the words *and their directors, officers and employees, whether temporary or permanent* immediately following the words “person or entity”.

Prohibition of disclosure of reporting to FIU (tipping off) – Essential Criterion 14.2

978. EC 14.2 requires that financial institutions, their directors, officers and employees, whether permanent or temporary be prohibited from disclosing to any person, including the person suspected, the fact that an STR or related information is being reported or provided to the FIU.

979. It should be further noted that Article 28 of the EU Third AML Directive establishes the prohibition of disclosure of information not only where a report has been filed or information provided to the FIU, but also in situations where a money laundering or financing of terrorism investigation is being or may be carried out.

980. Paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, to any person or entity, including any person or entity involved in the transaction which is the subject of the report, other than the FIU or the CBK. Article 22 however provides for disclosures if so authorized in writing by the FIU, a Prosecutor, or a Court.

981. Advisory Letter 2007/1 and Rule X of the CBK are silent on this matter.

982. Paragraph (4) of Article 22 appears to adequately cover the requirements of EC 14.2. However, the analysis of the provisions in the Article against the requirements of EC 14.2 identifies some gaps.

983. Paragraph (4) of Article 22 of the AML/CFT Law does not prohibit the bank or financial institution itself but only its directors, officers, employees and agents from making disclosures.

984. Article 22 does not specify employees as being permanent or temporary and the term ‘agents’ cannot be interpreted accordingly.

985. The prohibition is not from disclosing the fact that the report has been filed or is being filed with the FIU but rather from providing the report or information therein to third parties including the subject person of the report itself. Therefore although going beyond the EC, it does not cover the EC.

986. The prohibition does not cover the fact that an investigation is being or may be carried out.

987. It is therefore recommended that paragraph (4) of Article 22 of the AML/CFT Law be amended as follows (in italics bold) for the purposes of the FATF Recommendation 14. However, it is further advisable to refer below in this Report for proposed further amendments for consideration within the context of Article 28 of the EU Third AML Directive and the analysis below re Article 7 of the Council of Europe Convention:

Banks and financial institutions, their directors, officers, employees (whether permanent or temporary) and agents who make or transmit reports pursuant to the present article, or who are aware of such fact including where a money laundering or financing of terrorism investigation is being or may be carried out, shall not provide disclose the fact that the report has been filed or is in the process of being filed, or communicate any information whether or not contained in the report or regarding the report, including where such information is being prepared to be filed accordingly, or that a money laundering or financing of

terrorism investigation is being or may be carried out, to any person or entity, including any person or entity involved in the transaction which is the subject of the report *or the investigation*, other than the FIU or CBK, unless authorized in writing by the FIU, a Prosecutor, or a Court.

988. It is further recommended to extend such prohibition to other areas of reporting under the AML/CFT Law relating to NGOs, political parties and ‘covered professionals’¹¹⁰ and to all other reporting subjects.

Confidentiality of names and personal details of employees making report – Additional Criterion 14.3

989. Additional Criterion 14.3 seeks to establish the protection that is provided to the confidentiality of the identity of staff of financial institutions that make and file STRs to the FIU.

990. Paragraph (1.17) of Article 14 of the AML/CFT Law imposes an obligation on the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit, and that such information may only be used for the purposes stipulated in the AML/CFT Law.

991. Paragraph (1.3) of Article 15 of the AML/CFT Law however provides a gateway and establishes the data that may be disclosed by the FIU and the circumstances under which such data may be disclosed. One such data that the FIU may disclose, provided this is done in accordance with paragraph (2) of Article 15, constitutes *any data concerning a person or entity which has provided information or records to the FIU that would directly or indirectly identify the person or entity*.

992. Paragraph (2) of Article 15 of the AML/CFT Law as reproduced below provides for the FIU to disclose the information above mentioned:

- 2.1. to the appropriate unit of the police, the Financial Investigation Unit, the Kosovo Intelligence Agency, the competent prosecutor, the Kosovo Customs , the Tax Administration Department of the Ministry of Economy and Finance or KFOR, if the information would be relevant to investigations within its competence, or to a body outside Kosovo with similar functions to the FIU ;
- 2.2. to a public or governmental body of Kosovo if such disclosure of information is necessary for the FIU.
- 2.3. to bodies responsible for law enforcement, or performing a similar role to the FIU, outside Kosovo, if such disclosure is necessary or of assistance to the FIU in performing its functions.

993. Advisory Letter 2007/1 and Rule X of the CBK are silent on this issue.

994. The AML/CFT Law seems to provide a gateway from the absolute confidentiality under the AML/CFT Law for disclosure of *any data concerning a person or entity which has provided information or records to the FIU that would directly or indirectly identify the person or entity*.

¹¹⁰ Such provisions are already contemplated under the draft Amending Law and this recommendation is meant to confirm acknowledgement of such change.

995. Moreover, paragraph (2) of Article 15 of the AML/CFT Law provides for an array of domestic and foreign authorities (for some reason including the FIU itself) to whom the FIU can disclose this information – the reason being unclear.

996. The term ‘a person or entity which has provided information’ is interpreted to cover reporting subjects under Article 16 of the Law and any other person or entity required to report to the FIU under the Law – for example NGOs and Political Parties – consistent with the interpretation given by this Report under the analysis of EC 14.1.

997. It also appears that, although paragraph (3) of Article 15 limits such disclosures for intelligence purposes only, the FIU may disclose such information to the mentioned authorities for reasons other than investigations of money laundering or the financing of terrorism.

998. It therefore appears that, subject to the interpretation given by this Report to the term ‘any person or entity’ within the context of the AML/CFT Law, the Law indirectly protects the identity of employees making reports or providing information.

999. It is therefore advisable to ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution or any other reporting subject or entity making the report or providing the information.

1000. Notwithstanding, it is advisable to review paragraph (2) of Article 15 of the Law, first to remove duplication (for example: reference to a body outside Kosovo with similar functions as the FIU in 2.1 and in 2.3) but more importantly to limit the entities or authorities to whom the information could be provided to those to whom the FIU would have forwarded its analysis report – although preferably such information should not be disclosed at all.

1001. Refer also to the section below concerning Article 27 of the EU Third AML Directive.

Protection of employees from threats or hostile actions – EU Third AML Directive Article 27

1002. Article 27 of the EU Third AML Directive imposes an obligation on Member States to take all appropriate measures to protect employees of reporting persons and entities under the Directive who report suspicions of money laundering or terrorist financing either internally or externally to the FIU from being exposed to threats and hostile action.

1003. The ‘Description and Analysis’ under the analysis of Additional Criterion 14.3 above also applies to Article 27 of the EU Third AML Directive.

1004. The comments made under the analysis for Additional Criterion 14.3 in general apply also to Article 27 of the EU Third AML Directive.

1005. Notwithstanding the conclusions of this Report under Additional Criterion 14.3 above the AML/CFT Law does not provide for the type of protection of employees as promulgated by Article 27 of the EU Third AML/CFT Directive.

1006. In this regard, and further to the Recommendations under Additional Criterion 14.3 above, it is recommended that a new paragraph (4) is added to Article 15 which obliges any authority that for any reason has personal information on employees of reporting subjects who have filed a report or provided information to protect such information and keep it confidential, as follows:

Article 15 (4) The FIU, any investigating, prosecuting, judicial or administrative authority and reporting subjects or other persons and entities who are in possession of personal information of employees of reporting subjects who report suspicions of money laundering or the financing of terrorism or who provide related information, either internally or to the FIU, shall protect and keep confidential such personal information.’

Lifting of prohibition of disclosure (‘tipping off’) – EU Third AML Directive Article 28

1007. As indicated above in the analysis for EC 14.2, Article 28 of the EU Third AML Directive establishes the prohibition of disclosure of information not only where a report has been filed or information provided to the FIU, but also in situations where a money laundering or financing of terrorism investigation is being or may be carried out.

1008. Article 28 of the EU Third AML Directive however provides categorised situations where the prohibition of disclosure (tipping off) can be lifted:

- disclosure to competent supervisory authorities or for law enforcement purposes;
- disclosure between banks and financial institutions falling within the same financial services group;
- disclosure between the accountancy and legal profession firms or their employees within the same legal person or ‘network’;¹¹¹
- disclosure between banks, financial institutions, and the accountancy and legal profession where the disclosure involves the same customer and the same transactions and that the reporting persons or entities are from the same professional category.

1009. The lifting of the prohibition under Article 28 applies between Member States or with non-Member States that impose requirements for the prevention of money laundering or the financing of terrorism that are equivalent to those imposed by the Directive.

1010. As detailed under the above analysis of EC 14.2 in this Report, paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, to any person or entity, including any person or entity involved in the transaction which is the subject of the report, other than the FIU or the CBK. Article 22 however provides for disclosures if so authorized in writing by the FIU, a Prosecutor, or a Court.

1011. Paragraph (4) of Article 22 of the AML/CFT Law in general can be interpreted to be covering Article 28 of the EU Third AML Directive in that it gives power to the FIU, a Prosecutor, or a Court to lift such prohibition. Moreover the prohibition does not include the CBK, as the current “acting” supervisory authority.¹¹²

1012. It does not appear however that there is any guidance under what circumstances and for what purpose the FIU or a Prosecutor can lift the disclosure prohibition.

1013. Part of the industry, in particular those banks and financial institutions forming part of larger international groups have expressed concern that they are prohibited from sharing

¹¹¹ The EU Directive defines a ‘network’ as ‘a larger structure to which the person belongs and which shares common ownership, management or compliance control’.

¹¹² Please refer to Section 3.9 and Section 3.10 as regards the supervisory authority and powers of the CBK for the purposes of the AML/CFT Law.

information within the group they form part of unless they are so authorised as provided for under the Law.

1014. It is worth noting that under the new Recommendation 18 of the 2012 FATF Standards (previously Recommendations 15 and 22) the requirement is partly that financial group programmes for the prevention of money laundering and the financing of terrorism should include the sharing of information for CDD and risk management purposes – which is interpreted to include sharing of information where there is suspicion of money laundering or the financing of terrorism which could be at group level.

1015. It is therefore recommended that the Kosovo Authorities consider the provisions of Article 28 of the EU Third Directive, and the 2012 FATF Standards in this regard, with the aim of either amending the AML/CFT Law accordingly or amending the AML/CFT Law with the aim of empowering the FIU, to provide guidance under what circumstances it would be prepared to give approval for disclosure other than as provided by Law. It is further important for the Kosovo Authorities to consider this within the context of international banks operating in Kosovo.

Prohibition of disclosure – CETS 198 Article 7¹¹³

1016. Article 7 of CETS 198 requires signatories to the Convention to adopt legislative or other measure to enable them to:

- a determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;
- b obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;
- c monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts

1017. Paragraph (2d) of Article 7 of CETS 198 in turn requires signatories to the Convention to have legislative or other measures in place to ensure that banks do not disclose to the person concerned or to third parties that such information has been sought or that an investigation is being carried out.

1018. Paragraph (1.17) of Article 14 of the AML/CFT Law imposes an obligation on the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit, and that such information may only be used for the purposes stipulated in the AML/CFT Law.

1019. Paragraph (4) of Article 22 of the AML/CFT Law prohibits directors, officers, employees and agents of any bank or financial institution who make or transmit reports pursuant to the Law from providing the report, or communicating any information contained in the report or regarding the report, to any person or entity, including any person or entity involved in the transaction which is the subject of the report, other than the FIU or the CBK. Article 22 however provides for disclosures if so authorized in writing by the FIU, a Prosecutor, or a Court.

¹¹³ Council of Europe Treaty Series (CETS) 198 refers to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed in Warsaw on 16 May 2005 to which Kosovo is not a signatory as at the time of this Report.

1020. The prohibition of disclosure (tipping off) within the context of the FATF Standards (Recommendation 14) has already been discussed in the above analysis of EC 14.2 in this Report. However, as can be seen from Article 7 of CETS 198, the disclosure prohibition under the Convention covers other issues not included in the FATF Standards or the EU Third AML Directive.

1021. In general paragraph (1.17) of Article 14 of the AML/CFT Law imposing confidentiality on staff of the FIU may be extendedly interpreted to cover situations under Article 7 of the Convention. However, even the present AML/CFT Law recognizes that specific provisions prohibiting disclosure are necessary as may be found under paragraph (4) of Article 22 of the AML/CFT Law.

1022. However, the prohibition under paragraph (4) of Article 22 of the AML/CFT Law, even with the proposed amendment as in the above analysis of EC 14.2 would not meet the obligations under Article 7 of CETS 198.

1023. It is therefore proposed for consideration by the Authorities, since Kosovo is not a signatory to the Convention, that should it become a signatory to the Convention, or should it irrespectively wish to adopt such measures as good practice to better co-operate internationally then a new paragraph (4A) should be included under Article 22 of the AML/CFT Law as follows:

Article 22 para 4A Furthermore, banks and financial institutions, their directors, officers, employees (whether permanent or temporary) and agents who have information in this regard, shall not disclose to any person or entity, including any person or entity involved, the fact that the bank or financial institution has been requested to:

- determine and provide information whether a natural or legal person is a holder or beneficial owner of one or more accounts,;
- obtain the particulars of specified bank accounts and banking operations which have been carried out during a specified period; or
- monitor specified bank accounts and banking operations which have been carried out during a specified period.

1024. A positive consideration of the above recommendation would further entail various other amendments to the AML/CFT Law empowering the FIU to undertake the measures specified in paragraphs (a), (b), and (c) of Article 7 of the Convention.

Effectiveness (overall for Recommendation 14)

1025. The divergences in the relevant legal provisions of the AML/CFT Law from the international standard as identified could negatively impact the implementation of the prohibition of disclosure (tipping off).

3.7.2 Recommendations and Comments (overall for FATF Recommendation 14)

1026. The AML/CFT Law includes provisions which positively create the prohibition of disclosure (tipping off) to the person concerned and to third parties where a report has been filed with or related information provided to the FIU.

1027. The Analysis however shows that there remain some gaps and weaknesses in the system which are not in compliance with the international standards and upon which some parts of the industry has expressed concern.

1028. Although a full reading of the Description and Analysis section for the specific criteria is advisable, the following are highlights of the main weaknesses or gaps identified:

- the safe harbour protection for good faith disclosure under the Law does not clearly apply to directors, officers and employees, temporary or permanent (EC 14.1)
- the prohibition from disclosure does not apply to banks and financial institutions themselves (EC 14.2);
- the prohibition from disclosure does not specify whether it applies to both permanent and temporary employees (EC 14.2);
- the prohibition from disclosure does not cover information that a report has been filed but the provision of the report itself to a third party (EC 14.2);
- the prohibition does not cover the fact that an investigation is being or may be carried out (EC 14.2);
- need to strengthen the protection and confidentiality of personal data of employees making reports (AC 14.3 and EUD Art 27);
- lifting of the prohibition of disclosure can only be done by the FIU, a Prosecutor or the Courts but there is no guidance under which circumstances (EUD Article 28);
- there are no provisions for prohibition of disclosure under the Council of Europe Convention – but Kosovo is not a signatory (CETS 198 Article 7).

1029. The Report makes recommendations to rectify the identified weakness under each specific section. The following are indicators of proposed amendments which should not be read as a substitute for the full reading of the specific section and recommendations:

- amend Article 35 of the AML/CFT Law to extend protection to directors, officers and employees, temporary or permanent;
- amend paragraph (4) of Article 22 imposing the prohibition of disclosure in accordance with the international standards;
- consider extending the prohibition of disclosure to other reporting subjects and entities;
- ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution making the report or providing the information;
- review paragraph (2) of Article 15 of the Law to limit the entities or authorities to whom the information could be provided to those to whom the FIU forwards its reports;
- add a new paragraph (4) to Article 15 of the AML/CFT Law which obliges any authority that for any reason has possession of personal information on employees of reporting subjects who have filed a report or provided information, to protect such information and keep it confidential;
- consider the provisions of Article 28 of the EU Third Directive on the lifting of the disclosure prohibitions in specific circumstances; and
- consider inserting a new paragraph (4A) to Article 22 of the AML/CFT Law imposing a prohibition of disclosure in circumstances as provided under the Council of Europe Convention (CETS 198)

3.7.3 Rating for Recommendation 14

| | Rating | Summary of factors underlying rating |
|--------|--------|--|
| Rec 14 | NC | <ul style="list-style-type: none"> • not clear that safe harbour protection for disclosures applies to directors, officers and employees, temporary or permanent; |

| | Rating | Summary of factors underlying rating |
|--|--------|--|
| | | <ul style="list-style-type: none"> • prohibition of disclosure (tipping off) does not apply to banks and financial institution as entities; • prohibition of disclosure (tipping off) does not specify whether it applies to both permanent and temporary employees; • prohibition of disclosure (tipping off) covers situations where the report itself is provided to the third party; • prohibition of disclosure (tipping off) does not cover situations where an investigation is being or may be carried out; • legal uncertainty on the protection of personal data of employees making the report or providing information; • limitations on lifting of prohibition of disclosure in specific circumstances; and • effectiveness issues due to divergences from the international standard. |

3.8 Shell Banks (R.18)

3.8.1 Description and Analysis

1030. In its Glossary to the Methodology the FATF defines a ‘shell bank’ as *a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial services group that is subject to effective consolidated supervision*. It further defines ‘physical presence’ as constituting meaningful mind and management located within the country and therefore the existence simply of a local agent or low level staff does not constitute physical presence.

1031. The AML/CFT Law defines a ‘shell bank’ as *a bank, or an institution engaged in equivalent activities, established in a country where it has no physical presence, which makes possible to exercise an actual direction and management without being affiliated with any regulated financial group*.

1032. The definition of ‘shell bank’ in the AML/CFT Law closely reflects the definition in the FATF Methodology. Hence the following paragraphs assessing compliance of the relevant provisions of the AML/CFT Law with the Essential Criteria for Recommendation 18 have a similar basis for the term ‘shell bank’.

1033. Established practices have shown that in assessing compliance with Recommendation 18 it is important to analyse the licensing provisions for banks and financial institutions in the relevant banking laws and regulations on licensing that may have been issued by the relevant supervisory and regulatory authorities.

Prohibition on establishment or continued operations of shell banks – Essential Criterion 18.1

1034. EC 18.1 requires countries to have in place licensing procedures for the establishment of banks and that require such licensed banks to operate in the country that has issued the licence.

1035. Since the AML/CFT Law is not the law that provides for the licensing requirements of banks or financial institutions, the Law is silent on this matter.

1036. According to Article 4 of the Law on Banks the CBK has sole responsibility for issuing licences to banks and financial institutions. The CBK is further charged by the Law on Banks to maintain a central register of all banks and financial institutions that have been licensed by it which, among others, shall include the name and the head office and branch office addresses.

1037. Indeed paragraph (1) of Article 5 of the Law on Banks further imposes that no person shall engage in the business of banking or conduct any financial activity without an effective licence issued by the CBK in accordance with the provisions of the Law on Banks.

1038. Moreover, paragraph (4) of Article 5 further requires that foreign banks shall be permitted to engage in the business of banking in Kosovo only if the foreign bank has obtained a licence issued by the CBK to conduct such activity through a branch office in Kosovo or has established a subsidiary bank in Kosovo for which a licence has been issued by the CBK in accordance with the provisions of the Law on Banks.

1039. Part II of the Law on Banks provides for the procedures to be followed for the licensing of banks. Among the prudential, operational, governance and administrative requirements, the Law on Banks requires that the organizational structure of the proposed bank and its affiliates will permit the CBK to effectively exercise supervision on a consolidated basis, and that the ownership structure of the bank will not hinder effective supervision (Article 8). Moreover, a licence may be issued subject to various conditions such as information on the hiring and training of the staff of the bank and information on the lease, purchase or occupancy of bank premises from which the business will be undertaken.

1040. Part IV of the Law on Banks further provides for the governance and ownership of banks, including the procedures for the general meetings of shareholders, the structure and procedures for the Board of Directors and the structure of senior management.

1041. According to Article 92 of the Law on Banks, the licensing provisions for banks under Part II of the Law likewise apply to the licensing and registration of microfinance institutions and other non-bank financial institutions as defined in the Law.

1042. Part XVII of the Law on Banks provides for the organization, management and administration of microfinance institutions and non-bank financial institutions. In this regard the Law provides for the governance of these institutions including the structure and operations of the Board of Directors, the internal committees and senior management structure.

1043. Within its licensing remit the CBK has issued various rules and regulations governing the licensing procedures of banks, microfinance institutions and non-bank financial institutions including insurance companies and intermediaries.

1044. The legal provisions, supplemented by rules and regulations of the CBK for the licensing framework for banks, microfinance institutions and other non-bank financial institutions is robust and clearly prohibits the establishment of shell banks since the licensing regime requires that the mind and management of the bank or financial institution is located in Kosovo with operational premises and required staff levels.

1045. The Law on Banks does not address the issue of the prohibition of continued operation of shell banks. But this is understandable since, as indicated above, in the first instance the licensing legal regime does not allow for the licensing of shell banks.

1046. It appears therefore, that the requirements under EC 18.1 are fulfilled through the licensing regime under the Law on Banks and the rules and regulations of the CBK.

Correspondent banking relationships with shell banks – Essential Criterion 18.2

1047. EC 18.2 requires that financial institutions are not permitted to enter into or continue correspondent banking business relationships with shell banks.

1048. The Glossary to the FATF Methodology defines ‘correspondent banking’ as *the provision of banking services by one bank (the “correspondent bank”) to another bank (the “respondent bank”). Large international banks typically act as correspondents for thousand of other banks around the world. Respondent banks may be provided with a wide range of services, including cash management (e.g. interest bearing accounts in a variety of currencies), international wire transfers of funds, cheque clearing, payable through accounts and foreign exchange services.*

1049. The AML/CFT Law does not provide a definition of correspondent banking.

1050. Paragraph (6) of Article 21 of the AML/CFT Law requires that financial intermediaries do not open or maintain correspondent accounts with a shell bank or a bank which is known *to allow a bank to be used by shell their accounts.*

1051. Without prejudice to the concerns expressed in this Report regarding Advisory Letter 2007/1 of the CBK, in reflecting the provisions of the AML/CFT Law the Advisory Letter requires that a bank should not establish or continue a correspondent banking relationship with a non-resident respondent bank incorporated in a jurisdiction in which the bank has no presence and which is unaffiliated with a regulated financial group (i.e., a shell bank).

1052. On the other hand, Rule X of the CBK is silent on this issue.

1053. The terminology ‘financial intermediaries’ in paragraph (6) is not defined in the Law but for the purposes of this analysis it is interpreted to be referring to ‘banks and financial institutions’ in accordance with the general use of this term in the Law.

1054. The words *to allow a bank to be used by shell their accounts* in paragraph (6) of Article 21 is not understood. The proper terminology used in the international standards is *to allow its accounts to be used by shell banks.*¹¹⁴

1055. Notwithstanding, the provisions of paragraph (6) of Article 21 of the AML/CFT Law addresses only one side of the correspondent banking relationship and that is the prohibition for banks to open or maintain correspondent accounts with a shell bank. Article 21 does not address the issue where a bank in Kosovo provides correspondent banking relationships to a respondent bank from another country. Indeed whereas the EC speaks of correspondent banking relationships with shell banks, paragraph (6) of Article 21 addresses the opening and maintenance of accounts with a shell bank.

1056. The Advisory Letter on the other hand appears to addresses the issue from the view of correspondent banking relationships with ‘respondent’ institutions and that is where the bank in Kosovo is providing banking services as opposed to receiving such services as is indicated in paragraph (6) of Article 21 of the AML/CFT Law.

¹¹⁴ The draft Amending Law is amending the AML/CFT Law is amending the paragraph but the text basically remains the same *a bank which is known to allow use of shell accounts* where again the terminology ‘shell accounts’ is not understood.

1057. In the light of the definition of ‘correspondent banking’ provided by the Glossary to the FATF Methodology as reproduced above, banks should be prohibited from acting both as a ‘respondent’ and as a ‘correspondent’ institution with or for shell banks.

1058. It follows therefore that the provisions of the Advisory Letter are going beyond what the AML/CFT Law intended, even though they provide for a better transposition of the requirements under EC 18.2.

1059. In the circumstances it is advisable to review the provisions of paragraph (6) of Article 21 of the AML/CFT Law to read as follows:

Article 21 para. (6) Banks and financial institutions shall not enter into or continue correspondent banking relationships with a shell bank or a bank that allows its accounts to be used by shell banks.

1060. For the sake of legal clarity it is further recommended that the term ‘correspondent banking relationships’ is defined in the AML/CFT Law on the basis of the definition of the FATF Glossary:

Correspondent banking relationships – the provision of banking services by one bank (the correspondent bank) to another bank (the respondent bank). Banks in Kosovo will be acting as ‘respondent banks’ when they establish relationships for the receipt of banking services by another bank (the correspondent bank) or as ‘correspondent banks’ when they establish relationships for the provision of banking services to another bank (the respondent bank).

Accounts used by shell banks – Essential Criterion 18.3

1061. EC 18.3 requires that financial institutions be obliged to satisfy themselves that respondent financial institutions in foreign countries to which they provide banking services do not allow their accounts to be used by shell banks.

1062. In providing for correspondent banking relationships with banks from foreign countries, paragraph (4) of Article 21 establishes enhanced measures for such relationships but it does not provide for banks and financial institutions to confirm that the respondent institution does not allow its accounts to be used by shell banks.¹¹⁵

1063. As detailed within the context of the above analysis of EC 18.2 in this Report, AML/CFT Law together with the provisions of Advisory Letter 2007/1 aim to cover the requirements of the EC 18,3 by prohibiting banks and financial institutions to open or maintain such relationships.

1064. There is therefore no specific requirement for banks and financial institutions to satisfy themselves that respondent banks in a foreign jurisdiction do not permit their accounts to be used by shell banks.

1065. The proposed amendment under the analysis of EC 18.2 above prohibiting the establishment of or the maintenance of correspondent banking relationships with shell banks or banks that allow their accounts to be used by shell banks shall contribute for better harmonisation with the FATF Standards.

¹¹⁵ Paragraph (4) of Article 21 of the AML/CFT Law attempts to transpose the obligations under FATF Recommendation 7. References to paragraph (4) are not meant to assess whether or not it meets the requirements of Recommendation 7 but only as a reference within the context of Recommendation 18.

1066. Notwithstanding, it would be appropriate to amend paragraph (4) of Article 21 by the addition of a new paragraph (4.6) as follows:

Article 21 para 4.6 ensure that the respondent banking institution does not allow its accounts to be used by shell banks.

Effectiveness (overall for Recommendation 18)

1067. The lack of legal clarity between correspondent and respondent institutions complemented by the lack of the definition of ‘correspondent banking relationships’ could contribute negatively to the effectiveness of the system as the industry could provide for different interpretations of the obligations under the AML/CFT Law.

3.8.2 Recommendations and Comments

1068. The provisions of the Law on Banks covering licensing requirements and procedures for banks and financial institutions are comprehensive and ensure that any bank or financial institution so licensed has its mind and management in Kosovo and operates in and out of Kosovo from business premises located in Kosovo. Hence EC 18.1 is adequately covered.

1069. The analysis of the legal and other provisions covering other requirements under Essential Criteria 18.2 and 18.3 for Recommendation 18 identifies weakness and gaps that need to be addressed.

1070. Although a full reading of the Description and Analysis for the specific criteria is advisable, the following are indications of the main weaknesses or gaps identified:

- there is lack of legal clarity in distinguishing between correspondent and respondent banks (EC 18.2);
- there is no definition of correspondent banking relationship incorporating both correspondent and respondent institutions (EC 18.2);
- there is no obligation for banks to ensure that respondent institutions do not allow their accounts to be used by shell banks (EC18.3).

1071. In this regard the Report makes recommendations for legal amendments for better harmonisation of the AML/CFT Law with the EC for Recommendation 18:

- redraft paragraph (6) of Article 21 to remove legal uncertainties;
- insert a definition of ‘correspondent banking relationship’ incorporating both ‘correspondent’ and ‘respondent’ institutions in accordance with the definition in the FATF Glossary to the Methodology;
- insert a new paragraph (4.6) to Article 21 of the AML/CFT Law to ensure that banks confirm that their respondent institutions do not allow the use of their accounts by shell banks.

3.8.3 Rating for Recommendation 18

| | Rate | Summary of factors underlying rating |
|---------------|-------------|--|
| Rec 18 | PC | <ul style="list-style-type: none"> • lack of legal clarity in distinguishing between correspondent and respondent banks; • no definition of correspondent banking relationship; • no obligation for banks to ensure that respondent institutions do not allow their accounts to be used by shell banks; and • effectiveness concerns due to lack of legal clarity, |

3.9 Ongoing Supervision and Monitoring and Market Entry (R.23)

3.9.1 Description and Analysis

1072. The provisions of the Law on the CBK, the Law on Banks, UNMIK Regulation No. 2001/25 for the insurance sector, and the Law on Pension Funds all provide for the powers for prudential regulation and supervision of the relevant competent authorities (CBK and its forerunner the Banking and Payments Authority of Kosovo (BPK)) in accordance with the respective laws. Indeed Article 8 of the Law on the CBK states in paragraph (1) that the tasks of the CBK in pursuit of the objectives set forth in Article 7 and in other provisions of the Law on the CBK shall include to regulate, license, register and supervise financial institutions as further specified in this Law or any other Law. Moreover Article 23 of the Law on the CBK further states that the CBK shall be exclusively responsible for the regulation, licensing, registration and supervision of banks and other financial institutions as further specified in the relevant Laws.

1073. But the AML/CFT Law does not give regulatory or supervisory powers to the CBK or any other competent authority for the purposes of the prevention of money laundering and the financing of terrorism. The AML/CFT Law gives supervisory powers to the FIU over all reporting subjects except the financial sector – banks and financial institutions as defined in the Law itself.

1074. Moreover, in its replies to the Questionnaire under Section 2.6 and elsewhere, the FIU states that “Current legislation in Kosovo does not give authority to any institution to carry out inspections of banks, financial institutions and casino, in order for this to be compliant with the Law No. 03-L/196 on the Prevention of Money Laundering and Terrorist Financing.”

1075. Indeed while the now repealed UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related Criminal Offences imposed the supervisory responsibility on the Financial Information Centre (as forerunner of the FIU) it provided for supervisory cooperation with the CBK (as BPK).

1076. Paragraph (2) of Article 83 of the Law on Banks requires banks and financial institutions to comply with the AML/CFT while obliging the CBK and the FIU to cooperate in accordance with the Laws into force.

1077. Similar provisions for microfinance institutions and non-bank financial institutions are found in paragraph (2) of Article 113 of the Law on Banks with paragraph (3) of the same Article requiring these institutions to comply with all laws, regulations, rules, instructions, procedures and orders relating to anti-money laundering and anti-terrorism financing.

1078. An assessment of the compliance of the CBK as the supervisory authority with the Basel Core Banking Principles¹¹⁶ undertaken by the International Monetary Fund has identified similar supervisory issues as detailed above and has consequently assessed BCP 18 on the abuse of financial services for criminal activities as ‘non compliant’.

¹¹⁶ The *Core Principles for Effective Banking Supervision* were first issued by the Basel Committee on Banking Supervision in September 1997 and complemented by the assessment Methodology in 1999. The Core Principles have been revised in 2006 with a Consultative Document for a further revision having been issued in 2011. The objective of the Core Principles is to assess a country’s standard of banking supervision. Principle 18 deals with the prevention of the abuse of the financial system being used for money laundering and financing of terrorism activities.

1079. The assessment of the Basel Core Banking Principles expresses concern on the legal basis of the supervisory powers of the CBK for the purposes of the AML/CFT Law and hence on the soundness of the AML/CFT compliance regime. The assessment states that *Reportedly, the previous law (still an UNMIK Regulation) granted authority to the Financial Information Center (i.e. the predecessor of the FIU) to conduct on-site compliance inspections of banks in coordination with the predecessor of the CBK, the Central Banking Authority of Kosovo.* It appears that the assessment is referring to UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related Criminal Offences which has been repealed with the coming into force of the AML/CFT Law and hence its provisions are no longer valid.

1080. Although Article 83 and Article 113 of the Law on Banks requires banks and financial institutions to comply with the AML/CFT Law and any related rules and regulations this obligation does not empower the CBK to exercise supervisory powers over banks and financial institutions for the purposes of the AML/CFT Law since the specific law, the AML/CFT Law, does not give this power to the CBK or any other authority.

1081. Unless there are other provisions in other laws to this effect, then the regulatory and supervisory powers of the CBK or any other competent authority for the purposes of the prevention of money laundering and the financing of terrorism, with the exception of the FIU, is presumably assumed under the prudential powers provided to them by other specific laws. As argued later in this Report, this situation could however create conflicts and ambiguities in the implementation of legislative provisions.

1082. Notwithstanding this situation this Report positively acknowledges the work being done by the CBK in monitoring banks and financial institutions on their compliance with the obligations under the AML/CFT Laws and regulations issued by the CBK itself.

1083. However, for the purposes of this assessment, while the paragraphs that follow will, where appropriate, analyse the prudential supervisory powers and procedures of the CBK, the Report cannot take such measures and powers as automatically applicable for the purposes of the AML/CFT Law. In such instances, the Report will indicate the views of the assessors and make recommendations for rectifying this situation.

Financial Institutions subject to adequate AML/CFT regulation and supervision – Essential Criterion 23.1

1084. EC 23.1 requires countries to ensure that financial institutions are subject to adequate regulation and supervision and that they are effectively implementing the FATF Recommendations.

1085. The AML/CFT Law empowers the FIU to supervise all reporting subjects under the Law with the exception of the financial sector.

1086. The Law on the CBK, the Law on Banks and the Law on Pensions all provide for the prudential supervisory responsibilities of the CBK for banks, financial institutions and pension funds.

1087. The AML/CFT Law does not however establish a competent supervisory authority for the financial sector.

1088. Although the CBK has assumed responsibility for the supervision of banks and financial institutions for the purposes of the AML/CFT Law, as described above in the introduction to Section 3.9 the legal basis for this responsibility is missing.

1089. The regulatory and supervisory provisions in the Law on the CBK, the Law on Banks and the Law on Pension Funds empowering the CBK deal only with the prudential aspect of supervision (capital, liquidity, assets, earnings, governance etc) but do not necessarily or automatically appoint the CBK as the supervisor for the purposes of the AML/CFT Law.

1090. However, in practice the CBK supervises the financial sector on compliance with the provisions of the AML/CFT Law and has indeed issued regulations for this purpose. In the circumstances this is commendable but remains without legal basis – reference should be made to the introductory part of Section 3.9.

1091. It is therefore urgently necessary that the legal basis be provided. It is not within the remit of this Report to decide on the competent authority that should be given regulatory and supervisory authority in this regards. This Report will however make recommendations for the appointment of a supervisory authority under the AML/CFT Law for the financial sector.

1092. There are various ways of providing for the legal basis for regulation and supervision of the financial sector on compliance with laws and regulations for the prevention of money laundering and the financing of terrorism, and different countries have adopted different regimes. The supervisory remit could be given to the FIU for all reporting subjects under the AML/CFT Law including the financial sector. The supervision of the financial sector for the purposes of the AML/CFT Law could remain within the remit of the CBK with a sound legal basis, in which case provisions for stronger cooperation with the FIU through the Law and through a thorough revision of the current Memorandum of Understanding between the FIU and the CBK would be necessary. The supervision of the financial sector could be vested within the FIU with legal provisions for the Unit to appoint the CBK as its agent for undertaking AML/CFT supervisory visits and for the development of the necessary guidance and regulations, reporting to the FIU. Again legal provisions for effective cooperation and coordination would be necessary as in this situation the CBK would be reporting to the FIU on its findings and recommended corrective measures and upon which the FIU would have to act.¹¹⁷

Supervision of financial institutions on compliance with AML/CFT obligations – Essential Criterion 23.2

1093. Without prejudice to the above analysis on the lack of legal empowerment for the CBK to supervise banks and financial institutions for the purposes of the AML/CFT Law, the following paragraphs shall describe and analyse the prudential supervisory remit of the CBK in accordance with the Law on the CBK, the Law on Banks and the Law on Pension Funds.

1094. In establishing the tasks of the CBK in pursuit of the Bank's objectives as determined under Article 7 of the Law on the CBK, it is established that these shall include the responsibility of the CBK to regulate, license, register and supervise financial institutions. Article 23 of the Law gives exclusive responsibility to the CBK in this regard, including the imposition of administrative penalties as provided for under the same Law.

1095. Paragraph (1) of Article 65 of the Law on the CBK further empowers the CBK to issue such mandatory regulations, instructions, and orders as may be necessary for carrying out the tasks entrusted to the CBK under this Law or any other Law.

1096. Various provisions in the Law on Banks empower the CBK to issue mandatory regulations for banks and financial institutions dealing with capital requirements; liquidity requirements; exposure limits; dividend payouts; related persons; asset classification; foreign currency exposure; external auditors; etc.

¹¹⁷ The amended AML/CFT Law provides for procedures similar to the latter regime.

1097. According to Article 57 of the Law on Banks each bank and each of its affiliates shall be subject to examinations by the CBK through examiners appointed by the CBK. The examiners may visit banks at such reasonable times as CBK deems appropriate and may take such action as deemed necessary and advisable.

1098. Similar provisions for the supervision of microfinance institutions and non-bank financial institutions are provided under Article 104 of the Law on Banks.

1099. The CBK has explained that in undertaking its supervisory functions the Bank applies a risk based approach which enables the timely identification of risks and thus more effective distribution of supervisory resources. As a result, supervision strategies are adapted to the risk profile of financial institutions by determining the frequency and continuous focus to onsite examinations.

1100. According to its scope, Rule X of the CBK applies to banks and financial institutions as defined in the now repealed UNMIK Regulation 2004/2 operating in Kosovo, including money transfer operators and foreign exchange offices. Rule X has been issued in terms of UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation, which rule has been repealed with the coming into force of the Law on Banks.

1101. The purpose of Advisory Letter 2007/1 issued by the CBK is to provide guidelines for additional assistance to banks and financial institutions when implementing certain aspects of the AML/CFT requirements of the now repealed UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences.

1102. The CBK has informed that it conducts its supervisory remit through off-site examinations and on-site visits. According to the table below provided by the CBK in its replies to the Questionnaire on-site inspections seem to have reduced and have focussed more on Foreign Exchange Bureaux while it appears that there have been no off-site examinations unless this is a continuous process through reporting done by banks and financial institutions. The CBK has further confirmed that the examinations in the table below are not AML/CFT focussed ones but are of a prudential nature with an AML/CFT component.

Table 16: Inspections carried out by the CBK including the AML/CFT area

| Year | Banks (Full scope) | | Banks (Partial) | | NBFIs & MFIs | | Saving & Loan | | Exchange Bureaux | | Postal Services | |
|------|--------------------|----------|-----------------|----------|--------------|----------|---------------|----------|------------------|----------|-----------------|----------|
| | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site | On site | Off site |
| 2008 | 6 | | | | | | | | | | | |
| 2009 | 7 | | | | | | | | 3 | | | |
| 2010 | 5 | | | | 5 | | | | 2 | | | |
| 2011 | 4 | | 1 | | 2 | | | | 30 | | | |

1103. The provisions in the Law on the CBK, the Law on Banks and the Law on Pension Funds empowering the CBK to issue rules and regulations refer to the *prudential* regulation and supervision of the financial sector.

1104. There are no provisions in any law, including the AML/CFT Law empowering the CBK to issue rules or regulations for the purposes of the prevention of money laundering and the financing of terrorism. It appears that such power was provided for through UNMIK Regulations which have now been repealed with the coming into force of the relevant laws such as the AML/CFT Law.

1105. Moreover, as already explained in Section 3.1 of this Report, the risk based approach applied by the CBK for supervisory purposes, the CAMEL approach, only takes into consideration prudential issues (Capital, Assets, Management, Earnings and Liquidity) and hence is not the tool for a risk assessment methodology that should be applied for assessing the risk of money laundering in the individual institutions for supervisory purposes.

1106. Notwithstanding this Report positively acknowledges the supervisory work done by the CBK in ensuring compliance with the AML/CFT Law and regulations for the financial sector.

1107. It is however recommended that a supervisory remit through legislative procedures for the CBK (beyond the powers for prudential purposes under Article 85 of the Law on Banks) or any other competent authority to supervise the financial sector for the purposes of the AML/CFT Law – see the analysis of EC 23.1 in this Report - should be accompanied with powers to make binding mandatory regulations.

Prevention of criminals owning or managing financial institutions – Essential Criterion 23.3¹¹⁸

1108. EC 23.3 requires that countries have in place legal provisions or regulatory measures through which supervisory or other competent authorities can prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a senior management function, including supervisory and executive boards, of a financial institution.

1109. According to Article 37 of the Law on Banks the CBK has absolute powers in determining the shareholders of a bank. The Law prohibits any person, acting directly or indirectly, alone or in concert with another person, from becoming a principal shareholder in a bank without obtaining prior written authorisation from the CBK.

1110. Moreover, the Law on Banks further requires that the prior authorisation is obtained from the CBK where a principal shareholder, acting directly or indirectly, alone or in concert with another person, intends to increase ownership interest in a bank above 10, 20, 33, 50 or 75 percent (%) of the equity.

1111. Article 37 of the Law on Banks further requires that banks notify the CBK of any acquisition of shares within five (5) days after the acquisition if the amount of shares acquired equals or exceeds five percent (5%) of the equity but does not exceed ten percent (10%) in accordance with such form and containing such information as the CBK may require.

1112. Paragraph (3) establishes the information that shall accompany applications for increases in shareholding in accordance with Article 37. One of the requirements for each individual natural person is *an official statement from the Court disclosing any convictions for offences by a criminal court, personal bankruptcy filings, disqualifications from practicing a profession, or past or present involvement in a managerial function of a body corporate or other undertaking subject to insolvency proceedings, if any.*

1113. According to Article 38 of the Law on Banks the CBK shall determine whether to approve such application on the basis of the licensing criteria but shall consider the suitability of the proposed shareholders and their standing in the financial markets.

1114. The Law on Banks defines a ‘principal shareholder’ as any person who owns, directly or indirectly, alone or in concert with another person, ten percent (10%) or more of any class

¹¹⁸ Refer also to Section 3.9.4 of the Report on ‘fit and proper criteria’ for senior management.

of voting shares of a bank or company or ten percent (10%) of the equity interest in a bank or company

1115. There are no direct similar provisions on the acquisition of shareholding in microfinance institutions and non-bank financial institutions. However Article 95 of the Law on Banks provides that certain transactions require the prior approval of the CBK. These include situations for the sale or transfer of the institution's business to a different entity; any merger or acquisition of the microfinance institution or the non-bank financial institution; and situations where the microfinance institution or non-bank financial institution is a legal entity and there are transactions changing the list of the shareholders owning ten percent (10%) and more of the share capital and/or of the voting rights of the company.

1116. Article 38 of UNMIK Regulation 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries requires the approval of the CBK for any changes in shareholding of the insurance company or insurance intermediary where a person intends to acquire a significant holding or where a person intends to change the size of a significant holding. Mergers and amalgamations likewise require the prior authorisation of the CBK.¹¹⁹

1117. Moreover, in terms of Article 39 of the UNMIK Regulation changes in the board of directors or officers of insurance companies or insurance intermediaries shall be reported to and explained to the BPK.

1118. Acquisition of shareholding in a bank appears to be adequately covered through the provisions of Article 37 of the Law on Banks. However, there is no obligation to inform the CBK when divesting of shareholding through the same stages as applied by Article 37.

1119. There is no reference in the Law to obligations in the acquisition of voting rights that would indirectly increase the shareholding unless the term 'directly or indirectly' is intended to be interpreted accordingly.

1120. The requirement for a statement from the Courts under paragraph (3.3) of Article 37 of the Law on Banks is a positive element in measuring compliance with the requirements for EC 23.3 for Recommendation 23.

1121. Moreover, the criteria to be applied by the CBK in determining an application for changes in shareholding, in particular in acquisitions, does not take account of money laundering or financing of terrorism implications.

1122. The EU Directive on Mergers and Acquisitions¹²⁰ establishes five (5) criteria upon which a supervisory authority is to determine whether an acquisition of shareholding in a bank can be approved. The fifth (5th) criterion requires : *whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC (*) is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.*

1123. It is therefore recommended that a new paragraph (6) is added to Article 37 of the Law on Banks as follows:

¹¹⁹ A new law for the insurance sector is in progress. In the meantime UNMIK Regulation 2001/25 remains valid and applicable.

¹²⁰ Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector – OJ L247, 05.09.2007, pp 1-16.

Article 37 para (6) A person who, directly or indirectly, alone or in concert with another person, decides to:

- (i) dispose of a principal shareholding in a bank;
- (ii) reduce a principal shareholding so as to cause it to cease to be a principal shareholding;
- (iii) reduce the shareholding so that the proportion of shareholding would fall below 20, 33, 50 or 75 percent (%) of the equity

shall notify the CBK indicating the size of the shareholding and providing any relevant information on the proposed disposal or reduction in holding.

1124. It is further recommended that the paragraph under Article 38 of the Law on Banks be renumbered as paragraph (1) and a new paragraph (2) be added as follows reflecting the criterion under the EU Directive on Mergers and Acquisitions:

Article 38 para (2) The CBK shall further assess whether, in connection with the proposed acquisition, money laundering or the financing of terrorism within the meaning of the Law on the Prevention of Money Laundering and the Financing of Terrorism is being or has been committed or attempted, or that as a result of the proposed acquisition there could be an increased risk of money laundering or the financing of terrorism.

1125. Consequent to the above recommendation, it is also recommended to amend paragraph (3) of Article 39 on mergers, consolidations and acquisitions of the Law on Banks as follows (amendments in italics):

Article 39 para (3) For the purposes of making a determination on an application filed under this Article, the criteria for preliminary approval of an application for a banking license, as set forth in Article 7 and the criteria for acquisition of shareholding as set forth in Article 38 of this Chapter shall apply mutatis mutandis.

1126. The CBK may wish to consider including the above recommendations for microfinance institutions and non-bank financial institutions where these are in the form of a legal entity.

‘Fit and Proper’ criteria for directors and senior management – Essential Criterion 23.3.1

1127. EC 23.3.1 requires that directors and senior management of financial institutions subject to the Basel Core Principles are evaluated on the basis of ‘fit and proper’ criteria including those relating to expertise and integrity.

1128. Article 26 of the Law on Banks requires that each bank is administered by a Board of Directors elected by the bank’s shareholders at a general meeting.

1129. Paragraph (5) of Article 26 establishes criteria where a person cannot become a Chairman of a Board of Directors or a member:

- person convicted of crime or found to be liable for an economic offence within the Penal Code;
- person who, pursuant to the court decision was denied ability to conduct activities within competence of Board of Directors; and
- person older than seventy (70) years of age on the day of appointment.

1130. Article 28 on the other hand establishes the competences of the Board of Directors which includes the appointment of senior management.

1131. According to Article 30 of the Law on Banks the senior management (Chief Executive Office and his Deputy) shall be appointed by the Board of Directors with the approval of the CBK. Moreover, according to Article 34 no person shall become a Director or Senior Manager of a bank without obtaining the prior approval of the CBK.

1132. Similar provisions for the appointment of individuals as members of the Board of Directors and the appointment of senior management and senior managers for microfinance institutions and non-bank financial institutions where appropriate are provided for under Article 97 of the Law on Banks.

1133. Although in accordance with the Law on Pension Funds the CBK is assigned the responsibility of licensing, regulating and supervising pension funds, the Law does not appear to give the power to the CBK to approve the appointment of the Board directors or the appointment of senior management and senior managers. However, the appointment of the Governing Board of the Kosovo Pensions Savings Trust is governed by Article 4 of the Law on Pensions. According to the Law, persons who are appointed to be Governing Board members must be persons of recognized integrity and must have professional expertise and experience in pension, financial, investment and insurance matters. One (1) of the eight (8) members is appointed by the Government as a non-voting member while a Selection Committee chaired by the Governor of the CBK and including the Auditor General and the Minister of Finance makes proposals to the Assembly for the appointment of the other members.

1134. In terms of Article 52 of UNMIK Regulation 2001/25 the directors and officers of an insurance company or insurance intermediary, and the representative officers of a branch, must be “fit and proper” persons to exercise their role. They shall not allow their relationships with an insurance company’s or insurance intermediary’s shareholders, other directors, other officers or employees to affect their fiduciary duty to policyholders in any way.

1135. Article 35 of the Law on Banks requires that Board Director and Senior Management are persons who are fit and proper for such positions and meet criteria established by the CBK on qualifications, experience and integrity. In practice the CBK undertakes a thorough fit and proper test on the expertise and integrity of individual persons nominated to be appointed as directors of the Boards of banks and financial institutions, senior management and senior managers. The CBK has informed that to this effect it has drawn up a Regulation treating the ‘fit and proper’ criteria to be applied and the procedures thereto. The Regulation has not been made available to the assessment team.

Similar fit and proper test are undertaken for the insurance sector in terms of the UNMIK Regulation 2001/25.

1136. CBK has informed that its Regulation 24 on Corporate Governance of Insurance Companies and Insurance Intermediaries treats the issue of “fit and proper” criteria for directors, senior officers and other officers of the institutions. Moreover, the CBK has further informed that the Licensing Manual (internal) treats specific “fit and proper” criteria for persons who pursuant to the UNMIK Regulation and Regulation 24 are required to meet the “fit and proper” criteria.

1137. The analysis however identifies that the Law on Pension Funds provides for the appointment of the Governing Board of the Kosovo Pension Savings Trust, but appears to be silent on the appointment of senior management and pension fund. The CBK has informed that the determination of the senior management remains the responsibility of the Governing Board of the Trust according to the Law on Pension Funds (04/L-101). The Board then informs the CBK regarding its decision.

Application of prudential regulatory and supervisory measures – Essential Criterion 23.4

1138. EC 23.4 provides for the application of prudential regulatory and supervisory measures which are also relevant to money laundering in a similar manner for anti-money laundering and terrorist financing for financial institutions that are subject to the Core Principles – banking, insurance, and securities.

1139. Prudential measures that would include references to the prevention of money laundering and the financing of terrorism and which are normally applicable would include licensing procedures, governance of the appointment of Board Directors and senior management, internal controls and preventive procedures.

1140. The Law on Banks, the Law on Pension Funds and the UNMIK Regulation 2001/25 do not specifically refer to such application as there is no link between the relevant provisions in these laws or regulations and the AML/CFT Law.

1141. In practice, the CBK, notwithstanding the absence of a legal basis, supervises the financial sector on its compliance with the provisions of the AML/CFT Law and has issued rules and regulations regulating the way banks and financial institutions should operate in compliance with their anti-money laundering and financing of terrorism obligations.

1142. Notwithstanding, an assessment by the International Monetary Fund on the compliance of Kosovo with the Basel Core Banking Principles has concluded that, due to the absence of the legal basis granting authority to either the CBK or the FIU to conduct on-site compliance reviews on AML/CTF obligations by banks and financial institutions is an important weaknesses in the current regulatory framework, which coupled with the lack of sufficient coordination between the two institutions and also the inadequate internal arrangements of the CBK for the prevention of money laundering activity in the banking sector result in the non-compliant rating for Basel Core Principle 18.

1143. It should however be noted that, as indicated and analysed above, licensing rules and regulations and governance issues applied for prudential purposes by the CBK are also applicable for the purpose of the prevention of money laundering and financing of terrorism. Recommendations made above in this regard should ensure the link between prudential regulations and prevention of money laundering and the financing of terrorism as appropriate in such provisions which can only be found in the specific financial legislation. It is for this purpose that, within the context of the AML/CFT Law, this Report is making recommendation referring, for example, to the criteria for shareholding acquisition.

1144. It is however recommended that any future legal provisions giving responsibilities to a competent authority to regulate and supervise banks and financial institutions for the purposes of the AML/CFT Law be accompanied by powers to issue relevant rules and regulations and to apply appropriate prudential supervisory powers accordingly – in this regard please refer to recommendations under Section 3.10 of this Report.

Licensing or registration of money value transfer and currency exchange services – Essential Criterion 23.5

1145. EC 23.5 requires that persons or entities providing a MVT service or currency exchange services to be subjected to a licensing or registration process by a nominated competent authority.

1146. According to Article 8 of the Law on the CBK establishing the Bank's tasks, paragraph (1.2) thereof establishes one of the tasks of the Bank being to regulate, license,

register and supervise financial institutions as further specified in this Law or any other Law. In terms of the Law on the CBK, a ‘financial institution’ is defined as: *entities such as banks, foreign exchange offices, insurance companies, pension funds, and other entities conducting financial activities, as defined in any Law relevant for the purposes of this Law, for which the Central Bank is given supervisory authority by Law.* The Law on the CBK however falls short from defining a ‘financial activity’.

1147. Article 4 of the Law on Banks likewise provides that: *The CBK shall have sole responsibility for the issuance of licenses to all banks and registration of all Microfinance Institutions and NBFIs.*

1148. In turn the Law on Banks defines a ‘financial institution’ as incorporating all banks, non-bank financial institutions and microfinance institutions regulated under the Law itself. The Law further defines a ‘non-bank financial institution’ as: *a legal entity that is not a bank and not a microfinance institution that is licensed by the CBK under this Law to be engaged in one or more of the following activities: to extend credit, enter into loans and leases contracts financial-leasing, underwrite, trade in or distribute securities; act as an investment company, or as an investment advisor; or provide other financial services such as foreign exchange and money changing; credit cards; factoring; or guarantees; or provide other financial advisory, training or transactional services as determined by CBK.*

1149. Complementary to the Law on the CBK in the definition of a ‘financial institution’, the Law on Banks provides a definition of a ‘financial activity’ under Article 44 which, although providing for payment transfer services and currency exchange services, is however limited to banks.

1150. The definition of services that may be provided by non-bank financial institutions under Article 94 of the Law on Banks includes *transfers and remittances of money, or payment services, on payments originating within or outside the country* but does not include currency exchange services.

1151. In its definition of a ‘financial institution’ the AML/CFT Law includes¹²¹ the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system; and money and currency changing.

1152. UNMIK Regulation 1999/21 on the Bank Licensing, Supervision and Regulation, which has been repealed by the coming into force of the Law on Banks, defined a ‘financial institution’ as: *a juridical person that is not a bank that is licensed by the BPK to engage in one or more of the following activities: extending credit; underwriting, dealing in, brokering, or distributing securities; acting as investment company manager or investment advisor or providing other financial services such as equipment leasing finance services, micro-finance services or foreign exchange or other financial informational, advisory or transactional services.* The definition is very similar to that adopted by the Law on Banks which has repealed the UNMIK Regulation.

1153. Moreover Section 25 of the UNMIK Regulation 1999/21 defines a financial activity in the same manner as now defined in the Law on Banks but likewise provides only for activities that can be undertaken by banks.

1154. Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions defines and states that a ‘Foreign Exchange Office’ is considered to be a

¹²¹ For a full definition of the activities of a financial institution for the purposes of the AML/CFT Law please refer to Section 3 of this Report on ‘Scope of coverage of the AML/CFT Law’.

‘financial institution’ as defined in Section 2 of Regulation 1999/21, and means a legal or natural entity that is not a bank and engages in the buying and selling of foreign currencies. Likewise a ‘Money Transfer Office’ is considered to be a ‘financial Institution’ as defined in Section 2 of Regulation 1999/21, and means a legal or natural entity that is not a bank and performs electronic or wire transfer services through an international authorized electronic transfer system. Regulation 1999/21 is now repealed and any references to it become void and hence not applicable.

1155. As already established under Section 3 ‘Scope of coverage of the AML/CFT Law’ there are major and serious divergences in the various definitions of what constitutes a financial institution in the different laws. The paragraphs that follow assess this situation only with regards to those entities providing a MVT service or a currency exchange service.

1156. The definition of a ‘financial institution’ under the Law on the CBK includes a direct reference to foreign exchange offices. Hence the provision of MVT services has to be identified through the definition of financial activities in other related laws.

1157. Likewise the definition of non-bank financial institution in the Law on Banks only makes direct reference to foreign exchange or money changing services and leaves MVT services to the definition of financial activity

1158. The definition of financial activity under Article 44 of the Law on Banks refers only to the activities that can be undertaken by banks. But the activities of a non-bank financial institution as detailed in Article 94 of the Law on Banks includes references to MVT services (not included in the definition directly) but excludes foreign exchange services (included directly on the definition).

1159. It is Rule XVI of the CBK that tries to link both MVT services and foreign exchange services to the definition of a financial institution in UNMIK Regulation 1999/21 – which however has now been repealed by the Law on Banks and therefore any references in Rule XVI become irrelevant.

1160. It transpires therefore that the various definitions of financial institution which differ in substance create a legal uncertainty on the licensing or registration requirements or obligations for MVT services and currency exchange services.

1161. Thus foreign or currency exchange services would legally fall within the licensing or registration regime of the CBK because of the direct reference in the Law on the CBK and the Law on Banks although such activity is not included under Article 94 of the Law on Banks as an activity of a non-bank financial institution.

1162. On the other hand, MVT services are not included in the definition of financial institution in the Law on the CBK and in the Law on Banks but is included as an activity under Article 94 of the Law on Banks for non-bank financial institutions.

1163. The reference in Rule XVI of the CBK to money transfer services and currency exchange to the definition of financial institution in UNMIK Regulation 1999/21 become irrelevant as the UNMIK Regulation has been repealed by the Law on Banks and creates conflicts with the new definitions.

1164. It therefore appears that there is legal uncertainty on the powers of the CBK to license or register MVT services.

1165. It is consequently strongly recommended that the various definitions of a financial institution in the above mentioned laws are harmonised between themselves and in relation to

the activities of non-bank financial institutions for legal certainty in the licensing powers of the CBK.

Monitoring and supervision of money or value transfer services and money or currency changing services – Essential Criterion 23.6

1166. EC 23.6 requires that natural or legal persons providing a MVT service or a money or currency exchange service be subject to effective systems for monitoring and ensuring compliance with domestic requirements to combat money laundering and terrorist financing.

1167. In its definition of a ‘financial institution’ the AML/CFT Law includes¹²² the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system; and money and currency changing.

1168. According to Article 16 of the AML/CFT Law financial institutions as defined in the Law are considered as reporting subjects and hence required to comply with all the applicable obligations for the prevention of money laundering and the financing of terrorism in terms of the Law.

1169. Indeed Article 19 of the AML/CFT Law provides for specific obligations for banks and financial institutions providing wire transfer services and establishes procedures to be followed for the prevention of money laundering and the financing of terrorism in effecting wire transfer.¹²³

1170. As already established in this Report however, the AML/CFT Law appoints the FIU as the supervisory authority for all reporting subjects with the exception of the financial sector and does not appoint or designate an authority for the supervision of the financial sector.

1171. Notwithstanding the CBK has informed that a number of on-site examinations have been undertaken:

Table 17: *On-site visits with an AML component to MVT (money or value transfer) operators*

| | 2008 | 2009 | 2010 | 2011 |
|-----------------------------|-------------|-------------|-------------|-------------|
| MVT operators | | 1 | | 2 |
| Currency Exchange operators | | 3 | 2 | 30 |
| Total | | 4 | 2 | 32 |

1172. Notwithstanding the divergences in the definitions of a financial institution with respect to MVT services and money or currency exchange services, yet the AML/CFT Law puts both types of entities as reporting subjects for the purposes of the prevention of money laundering and the funding of terrorism obligations under the Law.

1173. The appointment or designation of a competent authority to monitor and ensure that these two types of entities comply with the requirements for the prevention of money laundering and the financing of terrorism in accordance with the AML/CFT Law however and as already established is absent, notwithstanding that the CBK has assumed such responsibility and in practice monitors such institutions on their compliance with the AML/CFT Law.

¹²² For a full definition of the activities of a financial institution for the purposes of the AML/CFT Law please refer to Section 3 of this Report on ‘Scope of coverage of the AML/CFT Law’.

¹²³ To an extent these reflect the requirements under FATF SR VII.

1174. It is therefore again strongly recommended that a competent authority is nominated with responsibility to monitor these types of financial institutions (and the entire financial sector) on their compliance with their obligations under the AML/CFT Law.

Licensing, regulation and supervision of all financial institutions not subject to the Core Principles – Essential Criterion 23.7

1175. EC 23.7 requires that all types of financial institutions that do not fall within the Core Principles for banks, insurance companies or investment companies are licensed or registered and appropriately regulated and are subject to supervision or oversight for the prevention of money laundering and the financing of terrorism.

1176. For the sake of completion this analysis will refer to the powers of the CBK in this regard to the entire financial sector but will focus on those entities outside the Core Principles.

1177. As already described under the analysis for EC 23.5 of this Report the Law on the CBK and the Law on Banks provide that the CBK has the sole responsibility to licence and regulate financial institutions as defined in these or other laws.

1178. The Law on Pension Funds likewise provides for the licensing and regulatory responsibilities of the CBK for Pension Funds while UNMIK Regulation 2001/25 provides for the licensing and regulatory powers and responsibilities of the CBK for insurance companies and insurance intermediaries.

1179. Notwithstanding, and as already detailed in this Report, there is no legal provision in the AML/CFT Law appointing or designating a competent authority to supervise financial institutions on compliance with their obligations under the AML/CFT Law.

1180. Without prejudice to the analysis and conclusions under the analysis for EC 23.5 above with respect to MVT services and money or currency exchange service, it appears that all financial institutions providing any financial activity as defined under the respective laws are subject to a licensing or registration regime and are subject to regulation and supervision by the CBK. Indeed the Law on the CBK and the Law on Banks charge the CBK with the prudential supervision of all financial institutions.

1181. As already stated in this Report, in the absence of a legal basis, this Report positively acknowledges the supervisory work being done by the CBK in ensuring that the entire financial sector complies with obligations under the AML/CFT Law for the prevention of money laundering and the financing of terrorism.

1182. It is again therefore clearly apparent that the absence of the specific appointment or designation of a competent authority to supervise and monitor the entire financial sector for the purposes of the AML/CFT Law remains a serious gap in the legislation which prohibits Kosovo from its compliance with various international standards for the prevention of money laundering and the financing of terrorism. It is therefore again strongly recommended that a competent authority is nominated with responsibility to supervise and monitor all types of financial institutions on their compliance with their obligations under the AML/CFT Law.

Structure, funding, staffing and other resources of supervisory authorities – Essential Criterion 30.1

1183. EC 30.1 requires supervisory authorities responsible to ensure compliance by financial institutions with the prevention of money laundering and the financing of terrorism

obligations under the relevant laws be adequately structured, funded, staffed, and provided with sufficient technical and other resources to fully and effectively perform their functions.

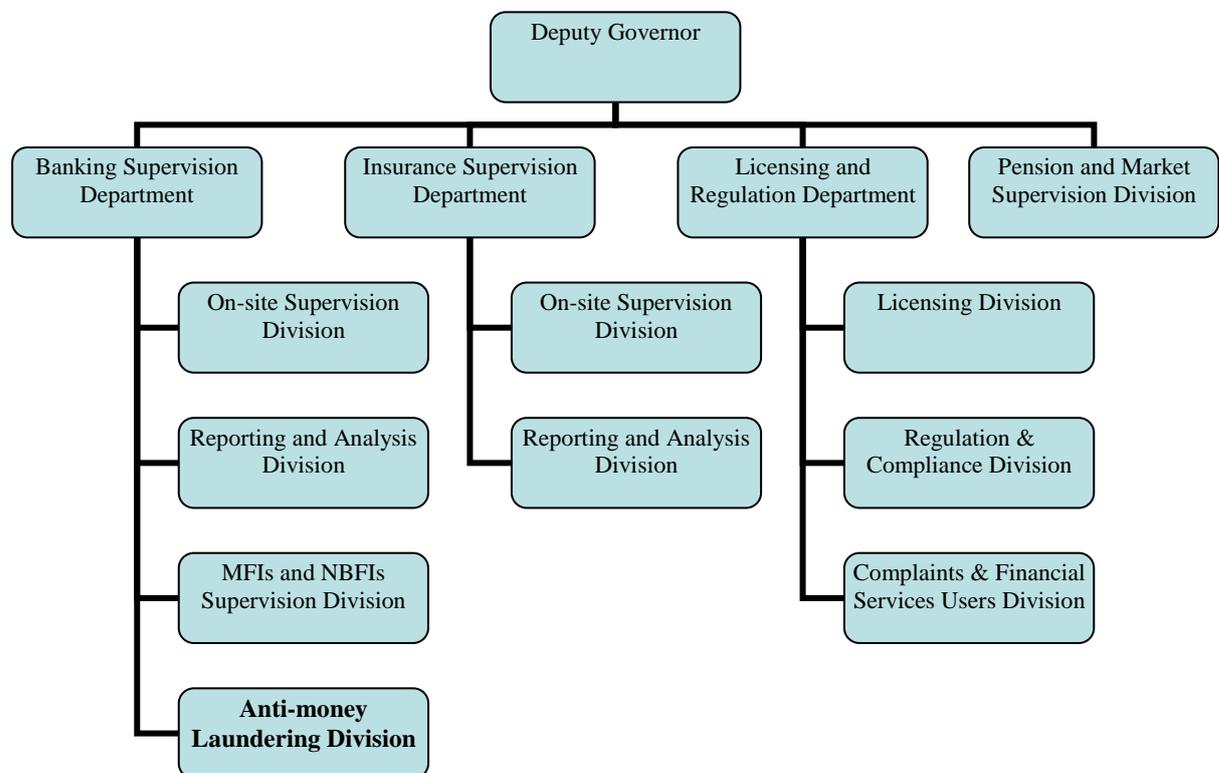
1184. Without prejudice to the arguments raised in this Report on the legal basis of the supervisory powers of the CBK for the purposes of the AML/CFT Law, the CBK exercises this function through its Banking Supervision Directorate which includes an Anti-Money Laundering Division..

1185. The following chart extracted from the web-site of the CBK provides the structure of the Banking Supervision Directorate of which the AML/CFT Division forms part.

1186. There are currently two persons within the Anti-Money Laundering Division. In its assessment of the Basel Banking Core Principles the International Monetary Fund states: *As regards the CBK’s AML Division, it has two staff assigned: i. e. the Head of Division and another examiner. However the BCP assessors were only able to meet the examiner, as the head of the division was on leave to finish her doctoral degree abroad until year end 2012. In addition, the assessors were informed at one meeting held with the CBK staff that the head of the AML Division is closely related by family links to a member of the Kosovo Assembly (i.e. she is his daughter) and as such should be considered a PEP – i.e. a politically exposed person.* Similarly, the PECK assessment team also could not meet with the Head of the AML Division of the Central Bank and therefore several key questions of the assessors could not be answered,

1187. The Anti Money Laundering Division of the CBK is funded through the Budget of the CBK as established under Article 64 of the Law on the CBK and as applicable for all other areas of the Bank while it has access to the Bank’s IT systems and other resources.

1188. The AML/CFT Law establishes the FIU as the supervisory authority for the supervision of all reporting subjects with the exception of the entire financial sector.



1189. Unfortunately, an organisation chart of the FIU has not been made available. According to the 2011 Annual Report of the FIU, the structure of the Unit, excluding EULEX officials and seconded staff,¹²⁴ comprises 14 officers as follows: Director of FIU (1), IT Manager (1), Legal Officer (1), Officer for Budget and Finance (1), Procurement Officer (1), Administrative Assistant (1) and Intelligence Analysts (8).

1190. Notwithstanding the supervisory remit for the FIU as promulgated by the AML/CFT Law, and notwithstanding that the Annual Report 2011 states that a number of compliance visits were undertaken during the period, the structure of the Unit as defined in the Annual Report does not show any officers responsible for compliance unless this function is done by the Intelligence Analysis. Indeed the FIU has confirmed that it has a department for analysis and operations and a department for compliance and inspection. However a number of intelligence analysts are assigned to conduct also compliance inspections. In acknowledging the issue of resources, the assessment team question the ability for intelligence analysts to also undertake compliance visits.

1191. The FIU has its own budget through the Ministry of Finance while it has its own internal IT systems separate from the database.¹²⁵

1192. This Report has not assessed in detail the overall prudential supervisory structure for the financial sector at the CBK which, however, appears to be adequate.

1193. With the focus of this assessment being the availability of resources for the supervision of the financial sector for compliance with the AML/CFT Law and related rules and regulations, this Report only takes into consideration the Anti-Money Laundering Division at the CBK.

1194. With the number of banks and financial institutions that are subject to AML/CFT supervision it appears that the human resources (2 staff, only 1 of whom is an examiner although as informed by the CBK the Head of the Division also participates in examinations) at the Anti-Money Laundering Division is inadequate and inappropriate. Although according to statistics provided by the CBK a number of onsite visits are undertaken, these only represent components of a prudential visit. The CBK therefore lacks resources to undertake full and focussed AML/CFT examinations at banks and financial institutions in a timely and adequate manner and to follow up and ensure that corrective measures are taken where these are recommended on findings of the examinations – this without prejudice to the concern expressed in this Report on the legal basis of the supervisory function of the CBK.

1195. The question of resources at the CBK for AML/CFT supervisory purposes will assume higher concerns should the CBK be given exclusive supervisory powers for the supervision of the entire financial sector for the prevention of money laundering and the financing of terrorism

1196. The structure of the FIU and its resources for fulfilling supervisory functions – which currently do not include the financial sector – may be of a major concern should the FIU eventually be given a remit for the supervision of the financial sector.

1197. It is therefore strongly recommended that a remit to CBK or to the FIU for the supervision of the financial sector for the purposes of the AML/CFT Law should be accompanied with a requirement to reassess and to strengthen resources to adequately and effectively undertake such responsibility.

¹²⁴ EULEX staff 9 (7 internationals and two locals); seconded staff from Customs officer (1), Kosovo Tax Administration (1).

¹²⁵ For more details on the FIU please refer to Section 2.6 of this Report.

High professional standards – Essential Criterion 30.2

1198. EC 30.2 requires that supervisory authorities with a remit to supervise entities on compliance with obligations for the prevention of money laundering or the financing of terrorism maintain high professional standards, including standards concerning confidentiality, integrity and appropriate skills.

1199. As the AML/CFT Law does not nominate a competent authority for the responsibility of supervising the financial sector on compliance with the Law, this analysis will assess the professional standards applied by the CBK as the authority that in practice is currently exercising supervisory oversight in this regard, and the FIU as the nominated competent authority to supervise all reporting subjects with the exception of the financial sector under the AML/CFT Law. Moreover both institutions are potential competent authorities for the purposes of supervising the entire financial sector in a revision of the AML/CFT Law.

1200. Article 6 of the Law on the CBK establishes the independence and autonomy of the institution and its members. The Law requires that the CBK, the members of its decision-making bodies or staff, do not take instructions from any other person or entity, including government entities and that the independence and autonomy of the CBK shall be respected at all times.

1201. Furthermore, Article 40 of the Law on the CBK establishes that to be eligible to serve on the decision-making bodies of the CBK a person must be of integrity and hold a university degree. Such person must have a minimum of ten (10) years professional or academic experience in the fields of economics, finance, banking, accounting, or legal matters.

1202. Moreover, Article 52 of the Law on the CBK further establishes that the appointment and termination of the employment of all members of the staff lies with the Governor of the Bank in accordance with the general terms of employment and conditions adopted by the Executive Board. In this regard the CBK has procedures for recruitment which ensure the integrity and required skills of its employees.

1203. In accordance with Article 69 of the Law on the CBK members of the CBK decision-making bodies and its staff have a fiduciary duty to the CBK and to its customers to place the CBK and its customers' interests before their own interest and shall avoid any situation likely to give rise to a conflict of interest.

1204. In establishing an ethical culture within the Bank Article 69 of the Law on the CBK further requires that members of the decision-making bodies of the Bank and its staff members do not receive or accept from any source any benefits, rewards, remuneration or gifts in excess of a customary or negligible amount, whether financial or non-financial, which benefits, rewards, remuneration or gifts are connected in any way whatsoever to their activities within the CBK. Towards this end, the CBK can establish internal rules and procedures.

1205. Finally, Article 74 of the Law on the CBK imposes the duty of confidentiality, except when necessary to fulfill any task or duty imposed by this Law or any other Law, on all persons who have served or currently serve as members of the Board, the Executive Committee or as a staff member from permitting access to, disclose or publicise non-public information which is obtained in the performance of duties at the Bank or using such information, or allow such information to be used, for personal gain. Article 74 further provides gateways when such confidentiality may be lifted in accordance with the Law.

1206. Article 4 of the AML/CFT Law establishes the FIU as a central independent national institution responsible for requesting, receiving, analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering and terrorist financing. In terms of Article 7 of the Law the Management Board of the Unit has no right to interfere in any way in the ongoing cases of the FIU.

1207. Article 5 of the AML/CFT Law establishes the members of the Management Board of the FIU through *ex officio* positions held and therefore are not named on appointment. Among its competences as established by Law, the Management Board appoints and dismisses the Director of the FIU upon the proposal of the Ministry of Finance and Economy, on the basis of demonstrated knowledge, professionalism and experience. The AML/CFT Law provides for the whole process for the nomination, selection, appointment and dismissal of the Director.

1208. Otherwise the AML/CFT Law is silent on the recruitment of staff of the FIU. The FIU has however informed during the visit that such recruitment is subject to the normal recruitment conditions for civil servants in terms of Regulation 02/2010 of the Ministry of Public Administration on the Recruitment Procedures in Civil Service and Regulation 07/2010 of the Ministry of Public Administration on Appointment of Civil Servants. The FIU is normally represented by the Director in the selection process for the Unit's staff.

1209. Paragraph (1.17) of Article 14 of the AML/CFT Law requires the staff of the FIU to keep confidential any information obtained within the scope of their duties, even after the termination of their duties within the Unit and use such information only within the purposes provided for in accordance with the AML/CFT Law.¹²⁶

1210. The analysis of the legal provisions for the recruitment and functions of staff and the confidentiality obligations indicate that both the CBK and the FIU, as current or potential supervisory authorities for the purposes of the AML/CFT Law maintain high professional standards concerning confidentiality, integrity and skills in accordance with the requirements under FATF EC 30.2.

1211. No further recommendations in this regards are necessary.

Adequate and relevant AML/CFT Training

1212. EC 30.3 requires that relevant staff of supervisory authorities be provided with adequate and relevant training in the prevention of money laundering and the financing of terrorism.

1213. There are no provisions in any law to this effect although paragraph (1.10) of Article 14 of the AML/CFT Law requires the FIU to organize and/or conduct training regarding money laundering, the financing of terrorist activities and the obligations of reporting subjects. This should including training of the FIU own staff. In general, one expects that such training forms part of general training programmes of the relevant supervisory authority.

1214. According to information provided by the FIU various past and present members of staff attended a number of training sessions. Some training provided is not directly related to AML/CFT issues but also covers training in relation to the IT systems (goAML); study visits and operational aspects.

1215. In its replies to the Questionnaire, the CBK has informed that based on the training policy of the CBK, relevant staff (both from the AML Division and other supervisory

¹²⁶ For more details on the FIU please refer to Section 2.6 of this Report.

Divisions of the Bank) have benefited from training organised by the ‘JVI – Joint Vienna Institute’; ‘Banque de France’; US Treasury and Kosovo Police’; ‘International Criminal Investigation Training Assistance Program – ICITAP’ and others.

1216. Information provided indicates that training for relevant staff of supervisory competent authorities, in this case considering the FIU and the CBK is being undertaken forming part of the training programmes and policies of both institutions.

1217. No specific recommendations are necessary but both institutions may wish to reconsider their training programme in this regard in the light of eventual changes in the AML/CFT Law establishing a supervisory authority for the entire financial sector for AML/CFT compliance purposes.

Statistics (EC 32.2)

1218. EC 32.2 requires competent authorities to maintain comprehensive statistics on on-site examinations conducted by supervisors relating to or including AML/CFT and sanctions applied. These and other related statistics should be relevant to measure the effectiveness and efficiency of the implementation of FATF Recommendation 23.

1219. There are no obligations under the AML/CFT Law for competent authorities to maintain statistics of any kind although it appears that in practice some statistics are maintained.

1220. Although Article 25 of the Law on the CBK deals with the collection of statistics by the Bank, such statistics do not refer to those required under FATF Recommendation 32. Indeed there is no obligation under the Law on the CBK or the Law on Banks requiring the maintenance of statistics by the CBK itself whether or not related to the prevention of money laundering and the financing of terrorism.

1221. In its replies to the Questionnaire the CBK has provided statistics on the number of on-site visits (mainly prudential with an AML/CFT component) undertaken since 2008.

1222. The FIU has not provided similar statistics although indicative statistics are provided in the Unit Annual Report for 2011.

1223. Although some statistics have been provided it does not appear that the maintenance of statistics is sufficient to determine the effectiveness of the supervisory regime for the purposes of the AML/CFT Law.

1224. The general maintenance of statistics for measuring the effectiveness of the whole AML/CFT regime may need to be revised and put on a stronger legal footing through the AML/CFT Law. Indeed one of the competences of the FIU is to *compile statistics and records and based thereon make recommendations*.

1225. It is therefore recommended that a new Article 30A under the title “Statistical Data” is introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects and relevant competent authorities as follows:

Article 30A Statistical Data

(1) The FIU, supervisory and other competent authorities with a responsibility for combating money laundering and the financing of terrorism, reporting subjects and other persons or entities with obligations under this Law shall maintain comprehensive statistical data relevant to their area of responsibility.

(2) In maintaining statistical data, persons, entities and authorities referred to in paragraph (1) of this Article shall liaise with the FIU who may determine the type of statistical data it may require.

(3) Statistical data maintained under this Article shall be made available to the FIU within time periods as the FIU may determine to enable it to review the effectiveness of the national system and to make recommendations accordingly as required under Article 14 of this Law.

Effectiveness (overall for Recommendation 23)

1226. Various shortcomings and weaknesses identified in the supervisory structure for the purposes of monitoring banks and financial institutions on their compliance with the legal AML/CFT obligations raise concern on the effectiveness of the AML/CFT supervisory regime.

1227. First is the non-designation of an authority responsible to supervise the financial sector on compliance with the AML/CFT Law complemented by the consequent lack of power to such an authority to issue rules and regulations for implementing the AML/CFT Law with the current Rules issued by the CBK still referring to repealed UNMIK Regulations.

1228. Although licensing procedures for the financial sector are adequate, the legal uncertainty for the licensing or registration of MVTs adds to the effectiveness concerns.

1229. Finally the effectiveness of the system is further negatively impacted through the low number of on-site visits, staffing shortages and lack of adequate and meaningful statistics.

3.9.2 Recommendations and Comments (overall for FATF Recommendation 23)

1230. The analysis on compliance with Recommendation 23 is mainly overshadowed by the absence of a legal basis for the CBK for its remit as the supervisory authority for the financial sector for the purposes of the AML/CFT Law, with the exception of those criteria under Recommendation 23 which are exclusively under the remit of the CBK concerning licensing, shareholding and governance of banks and financial institutions governed by other specific financial legislation.

1231. Notwithstanding, since in practice the CBK is undertaking supervision of the financial sector for AML/CFT purposes, without prejudice to the absence of the legal basis, the analysis of the supervisory process of the CBK finds some shortcomings or weaknesses for Recommendation 23 that need to be addressed:

- absence of legal basis for the CBK or any other competent authority to act as the supervisory authority for the financial sector for the purposes of the AML/CFT Law (EC 23.1; EC 23.6 and EC 23.7);
- no mandate for the CBK to issue rules and regulations for the purposes of the AML/CFT Law (EC 23.2 and EC 23.4);
- no obligation under the Law on Banks for a person or entity divesting of a significant interest in a bank to inform the CBK (EC 23.3);
- criteria in determining an application for changes in shareholding does not take account of money laundering or financing of terrorism implications (EC 23.3); and
- divergences in the definition of ‘financial institution’ leading to legal uncertainty on licensing requirements (EC 23.5).

1232. In the light of the above identified weaknesses or shortcomings for Recommendation 23 various recommendations are made in this Section to strengthen the legislative framework for a more effective system to prevent money laundering and the financing of terrorism. It is important that recommendations made are read within the context of the comments made earlier in this Report for the respective essential criteria for Recommendations 23, 30 and 32:

- introduce a legal basis appointing a competent authority to act as the supervisory authority for the financial sector for the purposes of the AML/CFT Law (EC 23.1; EC 23.6 and EC 23.7);
- a supervisory legal mandate should be accompanied with a mandate for the appointed supervisory authority to issue binding and mandatory rules and regulations for AML/CFT purposes (for the CBK beyond the powers of the CBK in this regard under Article 85 of the Law on Banks for prudential purposes) (EC 23.2 and EC 23.4);
- insert a new paragraph (6) to Article 37 of the Law on Banks requiring a person or entity, alone or in concert with another, divesting of a significant interest or to reduce current shareholding to inform the CBK accordingly (EC 23.3);
- insert a new paragraph (2) to Article 38 of the Law on Banks requiring application of AML/CFT criteria as established under the EU Directive on Mergers and Acquisitions for approval of changes in shareholding (EC 23.3);
- amend paragraph (3) of Article 39 of the Law on Banks on mergers, consolidations and acquisitions consequent to the proposed paragraph (2) to Article 38; and
- harmonise the definitions of ‘financial institution’ in the various laws (EC 23.5).

1233. Some elements of Recommendation 30 dealing with resources have also been assessed and some weaknesses identified:

- inadequate resources at both the CBK and the FIU for AML/CFT supervisory purposes (EC 30.1).

1234. In the light of the shortcomings for Recommendation 30 this Report makes some recommendations which however should be read within the context of the analysis of the current situation;

- a legal mandate appointing a competent authority to supervise the entire financial sector for the purposes of the AML/CFT Law should be accompanied by a review of adequate human and other resources (EC 30.1).

1235. In the analysis of the availability of statistics for the purposes of EC 32.2 under Recommendation 32 the Report finds that there is a need to strengthen this requirement through a legal obligation for maintaining statistics.

1236. The Report recommends that a new Article 30A under the title “Statistical Data” as indicated above is introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects and relevant competent authorities.

3.9.3 Rating for Recommendation 23

| | Rating | Summary of factors underlying rating |
|--------|--------|--|
| Rec 23 | PC | <ul style="list-style-type: none"> • absence of legal mandate for a supervisory competent authority for the financial sector; |

| | Rating | Summary of factors underlying rating |
|--|--------|--|
| | | <ul style="list-style-type: none"> • absence of mandate for a supervisory competent authority to issue AML/CFT rules and regulations; • no obligation to inform CBK on divestment of shareholding; • need to strengthen criteria for approval of changes in shareholding in relation to AML/CFT issues; • divergences in definition of ‘financial institution’; • legal uncertainty in licensing requirement for some financial institutions; • low number of on-site visits; and • effectiveness issues arising out of lack of supervisory legal mandate; lack of legal mandate to issue rules and regulations, and legal uncertainty of licensing for MVTs. • human resources for supervisory authorities are insufficient thus impacting effectiveness; • lack of relevant training programmes for supervisory staff impacts effectiveness; • need for authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. |

3.10 Supervisors (R.29)

3.10.1 Description and Analysis

1237. Recommendation 29 deals with the supervisory powers of supervisors to monitor and to ensure compliance with requirements to combat money laundering and the financing of terrorism, including the authority to conduct onsite inspections.

1238. As already established under this Report in undertaking its supervisory function over the financial sector for the purposes of the AML/CFT Law the CBK does not have a legal mandate.

1239. The absence of a supervisory legal mandate carries with it the absence of a legal mandate for the CBK to use its supervisory powers under the Law on the CBK and the Law on Banks, which powers are established for prudential purposes for those institutions within the remit of the supervisory function of the CBK under these laws and not for AML/CFT purposes.

1240. Consequently, although the paragraphs that follow will analyse and assess the prudential supervisory powers of the CBK this will only be done for assessment purposes without prejudice to the position taken by this Report in the absence of a legal supervisory mandate. Notwithstanding this Report again positively acknowledges the supervisory work being undertaken by the CBK in practice.

1241. The paragraphs that follow will also take account of the supervisory powers under the AML/CFT Law provided to the FIU as the nominated supervisory authority for all reporting subjects with the exception of the financial sector in the light of the pending decision on the nomination of a relevant supervisory competent authority for the financial sector.

Adequate powers to monitor and ensure compliance – Essential Criterion 29.1

1242. EC 29.1 requires that supervisory authorities have adequate powers to monitor and ensure compliance by financial institutions, with requirements to combat money laundering and terrorist financing.

1243. Article 30 of the AML/CFT Law appoints the FIU as the supervisory authority for the purposes of the Law to supervise all reporting subjects under the Law with the exception of the financial sector. In doing so Article 30 provides for the powers of the FIU to effectively undertake its supervisory tasks. In establishing the parameters within which the authorised officials of the FIU may conduct their inspections including the right of entry, Article 30 further obliges the owner or person in charge of the premises being inspected and every person present in the premises to give the authorized officials all reasonable assistance to enable them to carry out their responsibilities

1244. Article 23 of the Law on the CBK establishes the supervisory tasks of the CBK with the exclusive responsibility for the Bank for the regulation, licensing, registration and supervision of banks and other financial institutions. Within this context, Article 30 further provides for the powers of authorised officials of the CBK to visit offices of financial institutions. Finally, Article 30 requires financial institutions to furnish the CBK with such information and records concerning their operations and financial condition as the CBK may require.

1245. Article 57 of the Law on Banks further provides for the supervisory powers of the CBK in fulfilling its supervisory remit under the Law on the CBK for the supervision of banks. Article 57 compels all officers of banks to co-operate with the CBK in carrying out inspections which can be on-site or off-site in nature and thus the CBK may demand, and banks shall comply, any information it may deem necessary to fulfil its supervisory tasks.

1246. In providing for the supervisory powers of the CBK for the purposes of microfinance institutions and other non-bank financial institutions, Article 114 of the Law on Banks empowers the CBK to issue such regulations or orders to visit such offices of microfinance institutions and non-bank financial institutions at such reasonable times as the Bank deems appropriate, to examine accounts, books, documents and other records, and to take such other action as the CBK shall deem necessary or advisable to give effect to the intent of the present Law or Regulations or Orders issued.

1247. In terms of the Law on Pension Funds, various articles provide for the supervisory powers of the CBK. Article 13 provides for the supervisory powers of the CBK for ‘pension funds’, while Article 20 provides for the supervisory powers of the CBK for ‘pensions providers’.

1248. Further to the supervisory powers of the CBK with respect to insurance companies (as part of the definition of a ‘financial institution’), Article 4 of UNMIK Regulation 2001/25 provides for the supervisory powers of the CBK¹²⁷ for the supervision of insurance companies and insurance intermediaries.

1249. The supervisory powers under Article 30 of the AML/CFT Law are directly applicable by the FIU in fulfilling its remit under the Law for the supervision of all reporting subjects with the exception of the entire financial sector.

¹²⁷ UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

1250. As the supervisor for the entire financial sector for prudential purposes the CBK is provided with adequate powers to ensure that banks and financial institutions comply with their prudential obligations under the respective laws.

1251. Although the CBK currently applies these prudential supervisory powers in monitoring the financial sector for AML/CFT purposes there is no legal mandate empowering the CBK to do so.

1252. It follows therefore that, with the absence of an AML/CFT supervisory mandate for the CBK and consequently the non-applicability of the prudential supervisory powers for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 23.1.

1253. In the light of pending decisions on the legal provisions in the AML/CFT Law for the appointment of a competent authority to supervise the financial sector, should the CBK be so appointed, either alone or in conjunction with the FIU, then there is a need to create a legal empowerment for the CBK to apply its prudential supervisory powers – with the exception of the imposition of sanctions under the respective financial laws for prudential purposes – in its AML/CFT supervisory functions.

1254. Should this occur, it is recommended to include a new Article 30B (or paragraph under any new Article appointing or designating a supervisory authority for the financial sector) in the AML/CFT Law in this regard as follows:

Article 30B
Powers of designated supervisory authority

A competent authority that is appointed under this Law to supervise and monitor reporting subjects on compliance with this Law and which authority already has a supervisory mandate for prudential purposes conferred upon it through specific laws shall apply such prudential supervisory powers as conferred upon it and as may be applicable in fulfilling its supervisory remit for the purposes of this Law with the exception of the power to impose administrative or other sanctions and penalties contemplated by such specific laws for infringement of such laws.

1255. The proposed Article 30B excludes the imposition of administrative or other sanctions and penalties as otherwise there will be a legislative conflict on sanctions for AML/CFT purposes contemplated under the AML/CFT Law with sanctions that are of a prudential nature under the specific financial laws.

Authority to conduct inspections of financial institutions – Essential Criterion 29.2

1256. EC 29.2 requires that supervisors have the authority to conduct inspections of financial institutions, including on-site inspections, to ensure compliance through the review of policies, procedures, books and records including sample testing.

1257. Article 30 of the AML/CFT Law empowers the authorised officials of the FIU to enter any premises other than a residence, at any time during ordinary business hours, if there is a reasonable suspicion that records which are maintained pursuant to Articles 16 to 28 of the AML/CFT Law or documents relevant to determining whether obligations under Articles 16 to 28 of the AML/CFCT Law have been complied with are available in such premises. Moreover, authorized officials of the FIU may demand and inspect the records or documents; copy or otherwise reproduce any such record or document; and ask questions in order to locate and understand such records or documents.

1258. Article 23 of the Law on the CBK empowers the staff of the CBK, and other qualified persons appointed by the Executive Board, to visit the offices of financial institutions to

examine such accounts, books, documents and other records, to obtain such information and records from them, and to take such other action as the CBK shall deem necessary or advisable.

1259. In accordance with Article 57 of the Law on Banks the appointed examiners of the CBK may visit banks at such reasonable times as CBK may deem appropriate and may take such action as may be necessary and advisable. The examiners have the right to examine the accounts, books, documents and other records of the bank or affiliates; and may require Directors and Senior Managers, employees and agents of the bank or affiliates under examination to provide all such information on any matter relating to its administration and operations as they shall reasonably request.

1260. Article 114 of the Law on Banks provides for similar powers for examiners when undertaking examinations of microfinance institutions or other non-bank financial institutions.

1261. Articles 13 and 20 of the Law on Pension Funds in providing for the supervisory powers of the CBK specify and limit the supervisory powers and do not directly provide for on-site visits. The CBK may appoint independent auditors for this purpose and, notwithstanding, the CBK can still undertake onsite visits as the supervisory authority for banks and financial institutions, when undertaking such activities.

1262. UNMIK Regulation 2001/25 for the insurance sector provides that the authorised officials of the CBK¹²⁸ may visit offices of insurance companies and insurance intermediaries at such reasonable times as the CBK deems appropriate, to examine such accounts, books, documents and other records, and to take such other action as shall be deemed necessary or advisable to give effect to the intent of the present regulation or rules, orders or guidelines issued there-under;

1263. The supervisory powers for the FIU in terms of Article 30 in general meet the requirements under EC 29.2 but only to the extent that these are applied to the non-financial sector.

1264. As already explained under the above analysis of EC 29.1 it follows that with the absence of an AML/CFT supervisory mandate for the CBK and consequently the non-applicability of the prudential supervisory powers for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 29.2.

1265. Consequently and within the same circumstances as defined, the proposed recommendation in the above analysis of EC 29.1 for a new Article 30B in the AML/CFT Law providing for the application of prudential supervisory powers of the CBK in fulfilling an eventual legal supervisory remit would apply for the purposes of EC 29.2.

Power to compel production of documents – Essential Criterion 29.3

1266. EC 29.3 requires that supervisors have the power to compel the production of or to obtain access to all records, documents or information relevant to monitor compliance.

1267. In accordance with the provisions of Article 30 of the AML/CFT Law authorized officials of the FIU may demand and inspect the records or documents; copy or otherwise reproduce any such record or document; and ask questions in order to locate and understand such records or documents. Moreover, Article 30 requires the owner or person in charge of the premises being inspected and every person present in the premises to assist the authorized

¹²⁸ UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

officials in accessing and copying or reproducing records and documents maintained electronically. Furthermore, in terms of the same Article, in the event that a person under examination refuses to provide documents for reasons specified by Law – for example a document is under lawyer/client relationship – the authorized official conducting the inspection shall place the disputed record or document in an envelope sealed in the presence of the person or his or her representative, and signed by the official and the person or representative. The sealed record or document shall be presented within ten (10) days to a Pre-Trial Judge of the competent District Court, who shall inspect it, and determine whether it, or any part of it, is subject to inspection and copying pursuant to the provisions of the AML/CFT Law.

1268. Article 23 of the Law on the CBK requires financial institutions to furnish the CBK with such information and records concerning their operations and financial condition as the CBK may require.

1269. Likewise in terms of Article 57 of the Law on Banks the CBK authorised officials may require Directors and Senior Managers, employees and agents of the bank or affiliates to provide all such information on any matter relating to its administration and operations as the examiners shall reasonably request.

1270. While not specifically referring to the power to demand any document or information, in providing for the prudential supervisory powers of the CBK over microfinance institutions and other non-bank financial institutions, Article 114 of the Law on Banks provides for a general power *to examine such accounts, books, documents and other records*,

1271. Articles 13 and 20 of the Law on Pension Funds in authorising the CBK to review data and records does not specifically empower the CBK to demand any documents the Bank deems necessary to fulfil its obligations but this necessarily follows as otherwise the CBK would not be able to review data and records.

1272. Finally, UNMIK Regulation 2001/25 provides that, in fulfilling its prudential supervisory responsibilities, the CBK¹²⁹ may request the provision of any information from insurance companies and insurance intermediaries, including their shareholders or owners, administrators and other employees, in whatever manner preferred by the CBK, subject to reasonable notice.

1273. The power of the FIU under Article 30 of the AML/CFT Law to compel the production of any documents or records is linked with the Unit undertaking an on-site examination. The power to compel documents under Article 30 therefore becomes applicable for on-site examinations and the FIU becomes unable to undertake off-site examinations as it cannot compel the production of documents and records for this purpose. In this regard even paragraph (1.13) of Article 14 establishing the duties and competences of the FIU to *request documents and information in accordance with this Law* cannot be applied for off-site examinations unless the AML/CFT Law provides for the FIU to undertake off-site examinations.

1274. As already explained under the above analysis of EC 29.1, it follows that with the absence of an AML/CFT supervisory mandate for the CBK and consequently the non-applicability of the prudential supervisory powers for the purposes of the AML/CFT Law, there is a gap in fulfilling EC 29.3.

1275. Consequently and within the same circumstances as defined, the proposed recommendation in the above analysis of EC 29.1 for a new Article30B in the AML/CFT

¹²⁹ UNMIK Regulation 2001/25 refers to the Banking and Payments Authority of Kosovo (BPK).

Law providing for the application of prudential supervisory powers of the CBK in fulfilling an eventual legal supervisory remit would apply for the purposes of EC 29.3.

1276. Moreover, both for its current supervisory remit, and in the light of pending decisions on the legal provisions in the AML/CFT Law for the appointment of a competent authority to supervise the financial sector, and should the FIU be appointed, the Unit would need clear legal powers to undertake offsite examinations.¹³⁰

1277. It is therefore proposed to insert a new paragraph (6) to Article 30 as follow:

Article 30 para (6) For the purposes of assessing compliance with the provisions of this Law or any rules or regulations issued there-under, the FIU may, by notice in writing served on a reporting subject as defined in paragraph (1) of this Article, require that reporting subject to produce, within the time and at a place as may be specified in that notice, any documents, including those related to internal procedures under this Law or any regulation, as may be required by the FIU to fulfil its responsibilities under this Article on an offsite basis, and the provisions of paragraphs (3), (4) and (5) of this Article shall apply accordingly.

Requirement of court order – Essential Criterion 29.3.1

1278. EC 29.3.1 establishes whether supervisors require a court order to compel the production of or to obtain access records, documents or information for supervisory purposes.

1279. The AML/CFT Law empowers the FIU to demand the production of documents and records that it may need in order to fulfil its on-site supervisory remit for reporting subjects other than the financial sector.

1280. Notwithstanding, Article 30 of the AML/CFT Law allows a reporting subject under examination to refuse to allow the inspection or copying of a record or document if he or she asserts either that the document or record is not held for the purposes of the provisions of the AML/CFT Law and therefore is not relevant, or that the document or record contains information that is subject to lawyer-client privilege.

1281. In such circumstances the AML/CFT Law provides for the document or record to be presented to a Pre-Trial Judge of the competent District Court, who shall inspect it, and determine whether it, or any part of it, is subject to inspection and copying pursuant to the relevant provisions of Article 30 of the AML/CFT Law

1282. The Law on the CBK, the Law on Banks, the Law on Pension Funds and UNMIK Regulation 2001/25 do not foresee the need of a court order for the CBK to undertake prudential examinations and inspections and to compel documents and other information for the purposes of the applicable laws.

1283. The exception under Article 30 where a reporting subject may refuse to provide documents in the course of an on-site visit, even if the FIU is not currently responsible for the AML/CFT supervision of the financial sector, is considered as a precaution rather than a prohibition for the FIU to obtain documents and records for supervisory purposes. The FIU has informed that in practice this provision has never been applied.

1284. It is assumed that should eventual legislative amendments to the AML/CFT Law provide the legal basis for the CBK as the supervisory authority for the financial sector for the

¹³⁰ Authority to undertake off-site examinations for the FIU would still be necessary even if the FIU retains its present supervisory remit for the non-financial sector.

purposes of the AML/CFT Law, through the introduction of the proposed Article 30B under the analysis of EC 29.1, likewise there will be no need for court orders in this respect.

1285. Consequently this Report concludes that the power to compel the production of documents or to obtain access is not hindered by the requirement of court orders.

Adequate powers of enforcement and sanctions – Essential Criterion 29.4

1286. EC 29.4 requires that supervisors have adequate powers of enforcement and sanction against financial institutions, and their directors or senior management for failure to comply with or properly implement requirements to combat money laundering and terrorist financing.

1287. Article 31 of the AML/CFT Law empowers the FIU to impose administrative penalties which however are limited in scope being applicable to third parties as opposed to reporting subjects: *A determination made by the FIU notifying the obligor of a failure to comply with the requirements under sub-paragraph 1.3, paragraph 1 Article 14 of this law shall constitute a violation of the obligations set under the this Law which shall be subject to an administrative sanction in a form of a fine of € five hundred (500) for each day of non-compliance following the date of notification.*

1288. Sub-paragraph (1.3) of paragraph (1) of Article 14 of the AML/CFT Law refers to situations where the FIU, for purposes of analysing suspected money laundering or financing of terrorist activities, requests and receives records, documents and information from public or governmental bodies or any international or intergovernmental body or organization (in Kosovo) concerning a person, entity, property or transaction

1289. Article 67 of the Law on the CBK empowers the Executive Board of the CBK, by decisions, to impose administrative penalties upon all legal and natural persons operating in breach of the Law on the CBK.

1290. According to Article 67 of the Law on the CBK administrative penalties include money penalties and other administrative measures, such as written warnings or orders, suspension and dismissal of administrators of supervised financial institutions, revocation of licenses and other measures, as specified in the Law on the CBK, or in any other Law.

1291. According to Article 58 of the Law on Banks the CBK can take remedial measures against the bank, the directors and senior managers, employees, principal shareholders, or those holding significant interests in a bank, if it is determined that the bank or any such person has violated a provision of this Law or of any regulation or order of the CBK, has violated any condition or restriction attached to an authorization issued by the CBK, or has engaged in unsafe or unsound practices in the judgment of the CBK. Such measures include penalties that may be applied on a graduated basis depending on the severity of the offence, ranging from the issue of written warnings to the revocation of the licence. On the other hand Article 82 provides for civil penalties that may be imposed on the bank or its directors or senior management for major violations of the Law on Banks.

1292. Article 105 of the Law on Banks provides for penalties and remedial measures that may be imposed on a microfinance institution, a non-bank financial institution or any of its senior managers or directors or holders of a significant interest if, in its findings, the CBK determines that an institution or such person has violated a provision of any Regulation or Order of the CBK or has engaged in unsafe or unsound practices. However, unlike the situation for banks, the Law on Banks does not provide for civil penalties that may be imposed on microfinance institutions and non-bank financial institutions for prudential purposes.

1293. Similar provisions for remedial measures are found in Article 32 of the Law on Pension Funds for breaches of the provisions of the Law or for have engaged in unsafe or unsound practices. Remedial measures may be applied to the institution and its directors

1294. Likewise, UNMIK Regulations 2001/25 for the insurance sector provides for similar measures to be taken against the institution and persons under similar circumstances as provided for in the Law on Banks.

1295. Penalties that can be imposed by the FIU are limited in scope and cannot be applied to directors and senior management.

1296. While various financial sector legislation provides for remedial measures that can be taken against a financial institution or its directors and senior management, such penalties can only be applied for infringements of the respective law or regulations of the CBK and hence are applicable only for prudential purposes.

1297. Moreover, the absence of a supervisory mandate for the purposes of the AML/CFT Law and the absence of any legal provision empowering the CBK to apply its remedial measures provided by law for prudential purposes for infringements of the AML/CFT Law, renders such measures inapplicable for the purpose of the AML/CFT Law.

1298. Consequently, the supervisory authorities in Kosovo have no adequate powers of enforcement and sanctions against financial institutions and their directors or senior management for failure to comply with the provisions of the AML/CFT Law.

1299. For recommendations in this respect please refer to the analysis of Recommendation 17 - *Sanctions* of this Report.

Effectiveness for Recommendation 29

1300. The analysis in this section has identified certain shortcoming and weakness that negatively impact on the effectiveness of the supervisory system for AML/CFT purposes.

1301. In brief these could be summarised under the lack of a legal mandate for the CBK to apply its prudential supervisory tools for AML/CFT purposes, being complementary to the lack of a legal mandate for supervisory purposes under the AML/CFT Law; the lack of FIU power to demand documents and information to undertake off-site compliance examinations and the serious shortcomings in powers of enforcement.

3.10.2 Recommendations and Comments

1302. The absence of a legal basis for the CBK to undertake supervisory responsibilities for the purposes of the AML/CFT Law for the entire financial sector leaves serious gaps in the application of the prudential supervisory powers under the specific financial legislation for the purposes of the AML/CFT Law.

1303. Moreover, although the AML/CFT Law provides for the supervisory powers of the FIU, these are limited in scope and not applicable to the financial sector since the FIU does not have a supervisory remit for the financial sector.

1304. Although a full reading of the complete analysis and comments on the respective EC for Recommendation 29 is extremely important, the main weaknesses and gaps identified can be grouped as follows:

- absence of legal mandate for supervisory remit for the financial sector for the purposes of the AML/CFT Law (EC 29.1; EC 29.2)
- absence of supervisory powers that may be applied for the supervision of the financial sector for the purposes of the AML/CFT Law (EC 29.1; EC 29.2)
- absence of a legal mandate to apply prudential supervisory powers for the purposes of the AML/CFT Law (EC 29.1; EC 29.2);
- absence of a mandate for the FIU to undertake offsite examinations particularly should it be appointed as supervisor for the financial sector (EC 29.3)¹³¹;
- no adequate powers of enforcement and sanctions against financial institutions and their directors or senior management for failure to comply with the provisions of the AML/CFT Law (EC 29.4).¹³²

1305. In this regard, the following recommendations, which should be read within the context of the analysis and comments for the respective EC, are made in addition to the previous recommendations to provide a legal basis for the appointment of a supervisory authority for the financial sector for the purposes of the AML/CFT Law:

- insert a new Article 30B in the AML/CFT Law to the effect that a supervisory authority appointed under the AML/CFT Law that already has a supervisory remit under other legislation may apply its prudential supervisory powers under the respective laws for the purposes of supervising compliance under the AML/CFT Law with the exception of the application of administrative or other penalties and sanctions under these laws as these are contemplated under the AML/CFT Law; and
- insert a new paragraph (6) to Article 30 of the AML/CFT Law providing for the off-site examination powers of the FIU.

3.10.3 Rating for Recommendation 29

| | Rate | Summary of factors underlying rating |
|--------|------|--|
| Rec 29 | NC | <ul style="list-style-type: none"> • absence of legal mandate for a supervisory competent authority for the financial sector for the purposes of the AML/CFT Law; • absence of supervisory powers that may be applied for the supervision of the financial sector for AML/CFT purposes; • absence of a legal mandate to apply prudential supervisory powers for the purposes of the AML/CFT Law; • absence of a mandate for the FIU to undertake offsite examinations; • no adequate powers of enforcement and sanctions; and • effectiveness issues arising out lack of legal supervisory mandates and powers of enforcement; • human resources for supervisory authorities are insufficient thus impacting effectiveness; • lack of relevant training programmes for supervisory staff impacts effectiveness; • need for authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. |

¹³¹ This recommendation is also applicable for the FIU under its present supervisory remit under the AML/CFT Law.

¹³² Recommendations to rectify this weakness are provided under Section 3.11 on Sanctions.

3.11 Sanctions (R.17)

3.11.1 Description and Analysis

1306. Recommendation 17 obliges countries to ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural and legal persons covered by the AML/CFT obligations that fail to comply with their requirements for the prevention of money laundering and the financing of terrorism.

1307. In the light of the situation where the CBK does not have a legal mandate to undertake supervision of the financial sector for the purposes of the AML/CFT Law, and consequently the CBK has no power to invoke sanctions, penalties or other remedial measures conferred upon it for prudential purposes, the following paragraphs will focus on the sanctions under the AML/CFT Law and any reference to the former is for the sake of information and completion.

1308. The analysis for EC 29.4 above also applies in the analysis for Recommendation 17 under this section.

Effective, proportionate and dissuasive sanctions – Essential Criterion 17.1

1309. EC 17.1 reflects the main scope of Recommendation 17 in ensuring that effective, proportionate and dissuasive criminal, civil or administrative sanctions are available and applicable to both natural and legal persons as appropriate.

1310. As described under Section 3.10 for the analysis of EC 29.4, various financial legislation provide for the imposition of an array of sanctions and penalties that are criminal, civil and administrative in nature and that are applied to banks and financial institutions that breach the respective financial laws or rules, regulations and orders issued by the CBK there-under. Hence, such sanctions and penalties, irrespective of whether they are effective, proportionate and dissuasive, are not applicable where a financial institution or its directors or senior management fail to comply with the provisions of the AML/CFT Law.

1311. This is only natural since the AML/CFT Law itself, to an extent, provides for criminal, civil and administrative sanctions or penalties for non-compliance with the Law.

1312. Article 31 of the AML/CFT Law empowers the FIU to impose administrative penalties which however are limited in scope being applicable to third parties as opposed to reporting subjects: *A determination made by the FIU notifying the obligor of a failure to comply with the requirements under sub-paragraph 1.3, paragraph 1 Article 14 of this law shall constitute a violation of the obligations set under the this Law which shall be subject to an administrative sanction in a form of a fine of € five hundred (500) for each day of non-compliance following the date of notification.*

1313. For specific persons and entities under the AML/CFT Law, the Law provides for administrative measures that may be taken in terms of the respective laws (Articles refer to AML/CFT Law):

- *Article 24(8)* The Competent body under the Law on Freedom of Association in Non-Governmental Organizations (No 03/L-134) may suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organizations (No 03/L-134). The imposition of such sanction shall be without prejudice to any criminal proceedings.

- *Article 25(7)* The Political Party Registration Office may investigate a political party's compliance with the present article and may suspend the registration of a political party for a violation of any provision of the present article in accordance with Article 5 of UNMIK Regulation No. 2004/11. A sanction under the present paragraph shall be without prejudice to any criminal proceedings.
- *Article 26(14)* A sanction imposed by the competent Bar Association, the Kosovo Board on Standards for Financial Reporting or any other relevant professional association of covered professionals for a breach of this Law shall be without prejudice to any criminal proceedings.
- *Article 27(4)* A decision by the Municipal Cadastral Office to reject registration on the grounds of failure to comply with the present article, shall be made, and may be reviewed, in accordance with Law No. 2002/5 on the Establishment of an Immovable Property Rights Register, as promulgated by UNMIK Regulation No. 2002/22 of 20 December 2002.

1314. It should be noted that the AML/CFT Law does not provide for such administrative or other measures in the case of casinos and other gaming houses (Article 28 of the AML/CFT Law).

1315. Article 33 of the AML/CFT Law provides for the punishment of other criminal offences under the jurisdiction of the District Courts for breaches of the provisions of the Law when such offences are made intentionally and wilfully. Examples of such offences would include wilful false statements, destruction of documents, tipping off, obstructing an on-site inspection and others. Punishments under this Article can be imposed on the legal person, senior officials and other members of the staff of reporting entities, FIU personnel and any other person committing such offence.

1316. According to Article 5 of the Law on Liability of Legal Persons for Criminal Offences: *A legal person is liable for the criminal offence of the responsible person, who has committed a criminal offence, acting on behalf of the legal person within his or her authorizations, with purpose to gain benefit or has caused damages for that legal person. The liability of legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person.* Moreover, according to the same Article 5: *The liability of the legal person is based on the culpability of the responsible person.*

1317. In dealing with the criminal liability of legal persons for the purposes of the AML/CFT Law, Article 34 of the Law states that if a legal person commits an offence under the AML/CFT Law, every director and other person involved in the management of that legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that the offence was committed without his or her consent or knowledge; and that he/she took reasonable measures to prevent the commission of the offence as ought to have been exercised by that person having regard to the nature of his or her functions in that capacity.

1318. Administrative, civil or criminal sanctions contemplated by various financial legislation for breaches of such legislative provisions by banks and financial institutions, their directors or senior management and that are therefore imposed for prudential or criminal purposes accordingly, are not applicable to breaches of the AML/CFT Law.

1319. The provisions under Article 31 of the AML/CFT Law are limited in scope and applicable only to third parties *public or governmental bodies or any international or intergovernmental body or organization (in Kosovo)* who fail to provide information

requested by the FIU in connection with its analysis of suspected money laundering or financing of terrorism activities concerning a person, entity, property or transaction.¹³³

1320. The AML/CFT Law also provides for administrative measures that can be taken by other authorities, such as the removal of licences or suspension of registration. It is debatable to what extent these provisions under the principal laws can be applied for breaches of the AML/CFT Law when such authorities may not have sufficient information on such breaches, themselves not all being provided with legal authority to monitor such persons for the purposes of the AML/CFT Law, thus also creating an uneven playing field in supervisory matters:

- *Article 24(8)* The competent body under the Law on Freedom of Association in Non-Governmental Organizations (No 03/L-134) is not empowered by the AML/CFT Law to monitor NGOs for the purposes of the AML/CFT Law. Hence it is debatable to what extent the provisions of Article 24(8) can be imposed;¹³⁴
- *Article 25(7)* On the other hand, in the case of political parties, the AML/CFT Law is empowering the Political Party Registration Office to investigate a political party's compliance with the provisions of Article 25 of the AML/CFT Law before empowering it to suspend a registration of a political party;¹³⁵
- *Article 26(14)* Covered professionals as defined in the AML/CFT Law fall within the supervisory remit of the FIU and it is therefore debatable to what extent the relevant prudential competent authorities would be in a position and legally empowered to impose sanctions for breaches of the AML/CFT Law – the more so since the only administrative sanctions can only be applied by the FIU under Article 31 of the AML/CFT Law and only in limited circumstances;
- *Article 27(4)* Since Article 27 establishes the requirement of a specific additional document for registration or transfer of immovable property the Municipal Cadastral Office may be in a position to take action as provided under this paragraph of Article 27.

1321. It is therefore recommended to review the above provisions, which are the result of previous UNMIK Regulations now repealed, within the context of the recommended redrafting of Article 31 of the AML/CFT Law as provided below.

1322. Other sanctions contemplated by Article 33 of the AML/CFT Law are of a criminal nature within the jurisdiction of the District Courts.¹³⁶

1323. It is however noted that Article 33 of the AML/CFT Law carries certain criminal offences which are derived from previous UNMIK Regulations and which may be appropriate under other laws beyond the AML/CFT Law and which are creating legal conflict.

1324. One such case is paragraph (8) of Article 33 of the AML/CFT Law which is derived from UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and Related

¹³³ The draft Amending Law to the AML/CFT Law is proposing an amendment to Article 31 to remove this limitation.

¹³⁴ Paragraph (8) of Article 24 may need to be reviewed in the light of the proposed Amending Law which puts NGOs as reporting subjects under Article 16 of the AML/CFT Law subject to FIU supervision.

¹³⁵ Paragraph (7) of Article 25 may need to be reviewed in the light of the proposed Amending Law which puts Political Parties as reporting subjects under Article 16 of the AML/CFT Law subject to FIU supervision.

¹³⁶ The draft Amending Law will remove references to the District Court in accordance with the changes in the judicial structure as from 1 January 2013.

Criminal Offences, now repealed, establishes that: *Whoever acts as a bank or financial institution as defined in the present Regulation without registering in accordance with section 3.1 of the Banking Regulation, commits a criminal offence punishable by imprisonment of up to one (1) year and a fine of up to € one hundred thousand (100.000).*

1325. Paragraph (5) of Article 58 of the present Law on Banks provides that: *Any person who engages in unauthorized deposit-taking in contravention of Article 5 of this Law, notwithstanding any other provision of law, shall be subject to criminal penalties. In addition, the CBK may impose fines of up to ten thousand (10,000) Euros for each day that the infraction continues and be empowered to seek the liquidation of the business of such person under the provisions of applicable law.*

1326. Moreover, Article 84 of the Law on Banks which provides for criminal offences under the Act provides that: *A person who conducts the business of banking without obtaining a banking license within this Law is guilty of an offence and upon conviction may be subject to imprisonment for up to three (3) years, a fine of up to ten thousand (10,000) Euros, or both.*

1327. It follows that the same offence, which is not related to money laundering but which should be covered by the specific law, the Law on Banks, is considered as a criminal offence under both legislation; it carries different penalties; creates legal ambiguity and legal complexity in the application of the criminal penalties.

1328. It is therefore highly important that in amending the AML/CFT Law present criminal and other offences are reviewed for legal certainty and avoidance of legal complexity in application.¹³⁷

1329. Moreover the AML/CFT Law does not provide for administrative penalties for the infringement of individual obligations under the Law which may be identified for example in the course of an onsite examination and which may not necessarily be considered as major offences.

1330. Indeed the FIU and the CBK have both informed that they have never imposed any sanctions. One of the main reasons being the concern on the application of sanctions under the financial laws for the purposes of the AML/CFT Law by the CBK in the absence of a legal supervisory remit and a legal remit to apply such sanction and the limited powers under Article 31 of the AML/CFT Law.

1331. It is therefore recommended that Article 31 of the AML/CFT Law be amended to reflect the requirements under FATF Recommendation 17.¹³⁸

Article 31 **Administrative Sanctions and Remedial Measures**

(1) The FIU in consultation and in co-operation with ,any other supervisory competent authority designated under this Law and as appropriate within their supervisory remit, and in consultation and co-operation with other competent authorities responsible for specific sectors that are subject to the provisions of this Law,¹³⁹ shall impose administrative

¹³⁷ The present version of the draft Amending Law does not provide for a revision of this particular provision.

¹³⁸ The proposed redrafting of Article 31 includes recommendations for other Essential Criteria for Recommendation 17. These will be indicated accordingly in the respective Sections.

¹³⁹ The words *and in consultation and co-operation with other competent authorities responsible for specific sectors that are subject to the provisions of this Law* are intended to create the missing link with the various

sanctions and take such remedial measures as determined by this Law and which shall be applied, proportionately to the severity of the offence, to individual and legal persons under this Law or their directors or senior management as the case may be:

- issue written warnings;
- issue written orders requiring the reporting subject or other person or entity to take remedial action to rectify specified identified weaknesses within specified period of time;
- order a reporting subject or any other person or entity to periodically report on the remedial measures being taken;
- requiring a reporting subject or any other person or entity not to engage in one or more of the licensed activities;
- dismiss, suspend or replace a person from his or her position in the entity concerned;
- prohibit such person from serving in or engaging in activities or being employed within the same sector of business for a stated period or for life;
- restrict the powers of managers, directors or other senior officials;
- impose administrative penalties in accordance with the provisions of this Article and Article 31A and Article 31B without prejudice to any criminal proceedings;¹⁴⁰
- suspend or withdraw the licence or registration.

(2) A determination made by the FIU notifying a reporting subject under this Law or any other person or entity required to take measures under this Law or any other person or entity upon whom the FIU issued an order to provide the FIU with documents or information required by the FIU for the purposes of this Law, of a failure to comply with this Law shall constitute a violation of the obligations set under the this Law which shall be subject to an administrative sanction in a form of a fine of five hundred (500) Euros for each day of non-compliance following the date of notification. The imposition of such a fine shall be without prejudice to administrative penalties under Article 31A and Article 31B and shall be without prejudice to any criminal proceedings.¹⁴¹

(3) For the purposes of paragraph (2), the FIU, in consultation with Minister of Finance, may issue a sub-legal act to define the administrative offence procedure.¹⁴²

(4) The imposition of the administrative sanction in accordance with paragraph (2) may be contested before a court of competent jurisdiction.¹⁴³

Articles in the AML/CFT Law as referred above whereby the FIU and the specific competent authorities may consult and cooperate before imposing sanctions.

¹⁴⁰ The proposed Article 31A and Article 31B in the draft Amending Law provide for the application of the contemplated administrative penalties only to legal persons while the recommendation in this Report includes persons or entities as reporting subjects and their directors and senior management as may be the case – see Section 3.11.3 with respect to EC 17.3.

¹⁴¹ The proposed paragraph (2) draws on the current paragraph (1) of Article 31 of the AML/CFT Law and the proposed amendment in the draft Amending Law.

¹⁴² The proposed paragraph (3) is inspired from the proposed paragraph (2) in the draft Amending Law.

**Article 31A –
Administrative Pecuniary Penalties**

(It is recommended to insert the provisions of the proposed Article 31A in the Amending Law but to specify an authority responsible to impose them as required by EC 17.2 below. This proposed drafting – Article 31(1) assumes that the FIU in consultation with any other supervisory authority nominated under the AML/CFT Law and other respective authorities will be given this power complementary to the supervisory remit. The Kosovo Authorities may also wish to consider the title to this Article)

**Article 31B –
Further Administrative Pecuniary Penalties**

(See comments for Article 31A but with reference to the proposed Article 31B in the draft Amending Law).

Designation of authority to impose sanctions – Essential Criterion 17.2

1332. EC 17.2 requires the designation of an authority (e.g supervisors or FIU) empowered to apply sanctions. The Standard does not expect that only one authority is designated and provides for the designation of different authorities that may be responsible for applying sanctions depending on the nature of the requirement that was not complied with.

1333. The AML/CFT Law currently does not provide for the imposition of administrative sanctions or administrative penalties except to a limited extent through Article 31.¹⁴⁴ Article 31 empowers the FIU to impose a daily administrative fine but only in circumstances where, for the purposes of fulfilling its analytical duties on suspicions of money laundering or the financing of terrorism, it requests *documents and information from public or governmental bodies or any international or intergovernmental body or organization (in Kosovo) concerning a person, entity, property or transaction* and does not receive such documents or information.¹⁴⁵

1334. Since the AML/CFT Law does not provide for administrative sanctions except to the limited extent under Article 31 and for which the FIU is designated as the authority to impose such limited administrative sanctions, there is a need to introduce such sanctions and to designate an authority/ies to impose them.

1335. As already determined under this Report, while the financial legislation does provide for administrative sanctions that may be imposed upon the financial sector by the CBK, such administrative sanctions are of a prudential nature and not applicable for breaches of the AML/CFT Law as already demonstrated under this Report.

1336. Indeed, no administrative sanctions have been imposed by the CBK or the FIU for the purposes of the AML/CFT Law.

¹⁴³ The proposed paragraph (4) reflects the current paragraph (3) to Article 31 but is slightly amended to refer to the financial administrative sanction under paragraph (2) only since the proposed administrative sanctions under the new paragraph (1) shall be within the discretion of the FIU and the relevant supervisory authorities – however Kosovo Authorities may wish to consider this within the legal structure of Kosovo.

¹⁴⁴ The draft Amending Law introduces such administrative sanctions and penalties under two new Articles 31A and 31B which are being reflected in the proposed amendments to EC 17.1 in this Report. The draft Amending Law does not specifically designate an authority to impose them. The proposed amendments in this Report for EC 17.1 aim to designate such authorities.

¹⁴⁵ The draft Amending Law proposes an amendment to this Article to broaden the powers of the FIU. This is reflected in the proposed amendments under EC 17.1 but in a more specific and clear way.

1337. Criminal penalties contemplated by the AML/CFT Law fall within the jurisdiction of the District Courts.¹⁴⁶

1338. There is therefore a clear need to provide for administrative sanctions and to designate an authority/ies to impose them.

1339. The proposed redrafting of the present Article 31 of the AML/CFT Law under the recommendation for EC 17.1 aims to cover this requirement.

Sanctions applicable to directors and senior management – Essential Criterion 17.3¹⁴⁷

1340. EC 17.3 requires that sanctions are available not only against the legal persons that are financial institutions and businesses but also to their directors and senior management.

1341. Administrative sanctions under Article 31 of the AML/CFT Law are only applicable to the legal persons being a third party.

1342. Article 33 of the AML/CFT Law provides for other criminal offences. In some instances it refers to ‘Whoever..... commits a criminal offence punishable by’. In other instances, for example in paragraph (4), reference is made to *an officer, director, agent or employee of a bank or financial institution*. While in other instances, for example paragraph (6), the Law specifically refers to *An official of the FIU who willfully:*

1343. However, under Article 34, in establishing the criminal liability of a legal person, the AML/CFT Law provides that: *If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence unless that person proves that:*

1344. With the absence of provisions for the imposition of administrative sanctions the imposition of sanctions on directors and senior management under the AML/CFT Law is also absent.

1345. Where the Law provides for some administrative sanctions, though to a limited extent and to specific sectors, the AML/CFT Law still does not provide for their application to directors and senior management.

1346. In the case of criminal offences, Article 33 of the AML/CFT Law appears to be ambiguous in interpretation. This ambiguity is partly mitigated through the provisions of Article 34 of the AML/CFT Law which holds directors and senior management responsible for an offence under the Law committed by the legal person unless they can prove otherwise.

1347. Indeed, in the replies to the Questionnaire with respect to the analysis of EC 17.3 the FIU states that: *Applicable legislation in Kosovo does not foresee sanctions or offences against directors and their senior managers. But, the Law No. 03-L/196 on the Prevention of money laundering and terrorist financing, which is being supplemented – amended, and a recommendation is made that such sanctions to be incorporated in the law concerned.*

1348. This statement is contrary to the interpretation being given to Article 34 of the AML/CFT Law and leaves concerns on the application of Article 34 in practice. Moreover,

¹⁴⁶ The draft Amending Law will remove references to the District Court in accordance with the changes in the judicial structure as from 1 January 2013.

¹⁴⁷ Refer also to the analysis and comments under Section 3.10.5 regarding EC 29.4 for FATF Recommendation 29.

contrary to what is stated, the draft Amending Law in introducing the new Article 31A and Article 31B states that *A pecuniary penalty ranging from shall be imposed on legal persons for the following infringements:*.

1349. Therefore, further to the recommendations for redrafting Article 31 of the AML/CFT Law under the analysis for EC 17.1 of this Report, it may be appropriate to clarify paragraph (1) of Article 34 of the AML/CFT Law as follows (recommendation in italics):

Article 34 para (1) If a legal person commits an offence under this Law, every director and other person concerning in the management of the legal person (and any person purporting to act in such capacity) commits the offence and shall be liable to the penalties contemplated thereto by this Law, unless that person proves that:

Range of sanctions – Essential Criterion 17.4

1350. EC 17.4 requires a range of sanctions that is broad and proportionate to the severity of the situation. A range of sanctions would include the power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend the financial institution's licence, as and where applicable.

1351. As already determined under this Report the AML/CFT Law does not provide for a range of sanctions. Indeed it does not provide for administrative sanctions at all except to a limited extent under Article 31 and in relation to some specific sectors under the respective laws but which are being questioned by this Report – see the analysis above for EC 17.1.

1352. Administrative sanctions are provided by specific financial legislation but applicable only for prudential purposes for breaches of the specific legislation.

1353. Please refer also to the Description and Analysis in the previous paragraphs for Recommendation 17.

1354. Whereas in its replies to the Questionnaire the CBK does not provide a reply, the reply provided by the FIU raises concerns that have been repeatedly debated in this Report.

1355. In its replies the FIU states that: *Applicable legislation on prevention of money laundering and terrorist financing in Kosovo, does not foresee disciplinary and financial sanctions and the competence to withdraw, limit or suspend the license of the financial institution. But, there are special laws in Kosovo on reporting subjects enabling to competent authorities suspension of license of those subjects, which are covered under the law on prevention of money laundering and terrorist financing.*

1356. This statement indicates that, despite the absence of a legal mandate to the CBK or to any other supervisory authority provided through the AML/CFT Law, the FIU is of the opinion that supervisory authorities, such as the CBK, can apply measures of a prudential nature under the specific legislation for the purposes of the AML/CFT Law.¹⁴⁸ Indeed the AML/CFT Law does not even empower the FIU to propose the application of such prudential measures to other supervisory authorities – the analysis for EC 17.1 above of this Report indeed questions the applicability of certain provisions with respect to NGOs, Political Parties and others as contemplated by the AML/CFT Law.

¹⁴⁸ It is probably because of this reason that the draft Amending Law does not provide for such administrative sanctions as required for the purposes of EC 17.4.

1357. For these purposes, this Report concludes that currently there are no legal provisions under the AML/CFT Law for the imposition of administrative sanctions, although the Law does provide for criminal offences.

1358. The recommendations made above under the analysis of EC 17.1 for the redrafting of Article 31 of the AML/CFT Law should therefore apply also for the purposes of EC 17.4.

Effectiveness – for Recommendation 17

1359. The sanctioning regime for AML/CFT purposes is rather weak and hence negatively impacts on the effectiveness of the AML/CFT regime. Indeed, the authorities have reported that no sanctions of any nature have ever been imposed.

1360. Although the AML/CFT Law provides for administrative sanctions imposed by the FIU this is very much limited in scope and there is a complete lack of any system of graduated sanctions that can be applied. This further raises concerns of effectiveness as the authorities hold that such administrative sanctions for the financial sector can be imposed by the CBK under its respective financial sector laws such as the Law on Banks. Moreover, there are duplication of offences in the AML/CFT Law and other financial legislation, such as the Law on Banks and which carry different penalties for the same offence thus creating legal ambiguity which negatively impacts on the effective implementation.

3.11.2 Recommendations and Comments

1361. The analysis of the legal provisions for sanctions under the AML/CFT Law identifies huge shortcomings and lack of legal clarity on the application of sanctions contemplated by other laws for the purposes of the AML/CFT Law. Moreover, there appears to be conflicts in the criminal offences contemplated by the AML/CFT Law with respect to other laws resulting from previous UNMIK Regulations which have now been repealed with the introduction of the specific laws.

1362. In brief, some of the main findings are as follows. It should however be mentioned that a reading of the following does not substitute a reading of the context within which such weaknesses have been identified;

- concern over the applicability of certain provisions of the Law for administrative sanctioning purposes in particular for Article 24(8) for NGOs and Article 26(14) for covered professionals (EC 17.1);
- concern over criminal offences under the AML/CFT Law which are also reflected in the specific financial legislation and which carry different penalties thus creating legal conflict (EC 17.1);
- absence of administrative penalties for the infringement of individual obligations under the AML/CFT Law (EC 17.1);
- absence of designation of competent authority to impose administrative sanctions except to the limited extent under Article 31 (EC 17.2);
- legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects (EC 17.3);
- absence of range of sanctions to be applied proportionately to the severity of the offence (EC 17.4); and
- concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law (EC 17.4).

1363. Moreover no sanctions have been applied by the FIU, the CBK or any other authority under the Law for any breaches of the AML/CFT Law.

1364. Having identified these shortcomings, the Report makes various recommendations to rectify them. It is extremely important that all recommendations made are read within the analysis of the situation and comments made in this Report for the specific EC.

- review of Article 24(8), Article 25(7), Article 26(14) and Article 27(4) within the context of the proposed amendments to Article 31 of the AML/CFT Law;
- review present criminal and other offences for legal certainty and avoidance of legal complexity in application due to dual offences and different penalties;
- redraft Article 31 and introduce new Articles 31A and 31B as contemplated in the draft Amending Law amending the AML/CFT Law;
- designate authority/authorities to impose sanctions through the revised Article 31;
- ensure sanctions are applicable to directors and senior management through the revision of Article 31 and for this purpose amend Article 34 of the AML/CFT Law; and
- introduce range of sanctions through the revision of Article 31 as proposed.

3.11.3 Rating for Recommendation 17

| | Rate | Summary of factors underlying rating |
|--------|------|--|
| Rec 17 | NC | <ul style="list-style-type: none"> • concern over the applicability of certain provisions of the Law for administrative sanctioning purposes; • concern over dual criminal offences in the AML/CFT Law and specific financial legislation carrying different penalties; • absence of administrative penalties for the infringement of individual obligations under the AML/CFT Law; • non designation of competent authority to impose administrative sanctions; • legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects; • absence of range of sanctions; • concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law; and • consequent effectiveness issues arising out of the inadequacy of the sanctioning regime and the lack of application of sanctions. |

3.12 Money or Value Transfer Services (SR.VI)

3.12.1 Description and Analysis

1365. SR VI on alternative remittance services requires that persons or legal entities, including agents, that provide a MVT service, including transfers through informal systems or networks, should be registered or licensed and subject to supervision on compliance with the prevention of money laundering and financing of terrorism obligations that apply to banks

and non-bank financial institutions. Persons and entities providing such services should further be subject to administrative, civil or criminal sanctions.

1366. This Report has analysed the issue of ‘non-bank financial institutions’ under Section 3 under subtitle *Scope of coverage of AML/CFT preventive measures* and, with more relevance to Section 3.12 under the analysis for *Licensing or registration of money value transfer and currency exchange services – EC 23.5*

1367. The analysis that follows for the essential criteria for SR VI will therefore refer to the above mentioned analysis as necessary where such analysis reflects specific essential criteria for the SR.

Licensing and/or registration of money or value transfer services – Essential Criterion SR VI.1

1368. EC SR VI.1 requires that MVT service providers are to be licensed or registered, maintained in a reference register and be subject to compliance monitoring with their licensing or registration conditions.

1369. The analysis of this Report for EC 23.5 dealing with the licensing or registration of MVT and currency exchange services applies to the analysis of EC SR VI.1 and should be read accordingly.

1370. In terms of the Law on Banks, MVT services is an activity that is attributed to banks under Article 44 and to non-bank financial institutions in terms of Article 94 on the permitted activities for non-bank financial institutions. The definition of non-bank financial institutions in the Law on Banks however does not attribute this activity to a non-bank financial institution.

1371. Article 8 of the Law on the CBK states in paragraph (1) that the tasks of the CBK in pursuit of the objectives set forth in Article 7 and in other provisions of the Law on the CBK shall include to regulate, license, register and supervise financial institutions as further specified in this Law or any other Law. Moreover Article 23 of the Law on the CBK further states that the CBK shall be exclusively responsible for the regulation, licensing, registration and supervision of banks and other financial institutions as further specified in the relevant Laws.

1372. Moreover, Article 4 of the Law on Banks attributes the sole responsibility for the issuance of licences to all banks and registration of all microfinance institutions and non-bank financial institutions to the CBK.

1373. Article 4 of the Law on Banks further requires the CBK to maintain a central register that shall record for all financial institutions the name, the head office and branch office addresses, and current copies of its charter or equivalent establishing documentation and by-laws for inspection by the public. The register shall further maintain a list of all financial institutions whose licence or registration has been revoked, without their charter documentation and by-laws shall be removed.

1374. Article 91 of the Law on Banks specifies that no person shall engage in the business of a non-bank financial institutions unless that person has first registered with the CBK under the provisions of the Law on Banks, and without being at all times in full compliance with the Law on Banks and with all applicable Regulations and Orders issued by the CBK under its regulatory powers under the Law. Moreover Article 92 of the Law on Banks provides that all non-bank financial institutions must be regulated by the CBK while Article 104 requires that

all non-bank financial institutions are subject to examinations by the examiners of the CBK on their prudential compliance with the licence and the Law on Banks or any Regulations or Orders issued there-under.

1375. The licensing and the prudential regulatory and supervisory legal powers of the CBK for non-bank financial institutions are further reflected and clarified in Rule XVI of the CBK on the Registration, Supervision and Operations of Non-Bank Financial Institutions.

1376. Therefore MVT services providers are not included in the definition of financial institution in the Law on the CBK and in the Law on Banks but the service is included as an activity under Article 94 of the Law on Banks for non-bank financial institutions.

1377. As established under the analysis of the licensing framework for financial institutions under the analysis for EC 23.5 in this Report it transpires therefore that the various definitions of financial institution which differ in substance create a legal uncertainty, although not reflected in practice, on the licensing or registration procedures for MVT services.

1378. Hence in the analysis of EC 23.5 this Report recommends harmonisation of the various definitions of a 'financial institution' and the permitted activities of financial institutions should be cross-defined accordingly in the different laws in order for legal clarity for the licensing powers of the CBK in this regard. This recommendation also applies to EC SR VI.1.

1379. Without prejudice to the above, from a prudential aspect the CBK has the necessary procedures under the Law on Banks and the Law on the CBK to regulate and supervise persons providing a MVT service, including the maintenance of a register accordingly.

Monitoring AML/CFT compliance – Essential Criterion VI.2 and Essential Criterion VI.3

1380. EC VI.3 requires that MVT service operators are subject to the requirements and obligations for the prevention of money laundering and the financing of terrorism, including those for the obligations under SR VII for information accompanying wire transfers.

1381. In its definition of a 'financial institution' for the purposes of the obligations for the prevention of money laundering and the financing of terrorism, the AML/CFT Law specifies the inclusion of the transfer of currency or monetary instruments, by any means, including by an informal money transfer system or by a network of persons or entities which facilitate the transfer of money outside of the conventional financial institutions system.

1382. Financial institutions are included as reporting subjects under Article 16 for the purposes of the AML/CFT Law. Hence all obligations of reporting subjects, and in particular those related to banks and financial institutions, under the AML/CFT Law are applicable to MVT service providers.

1383. Under Article 19 of the AML/CFT Law, and in accordance with SR VII, banks and financial institutions providing a MVT services are further obliged to:

- obtain and verify the full name, account number, the address, or in absence of address the national identity number or date and place of birth, including when necessary the name of the financial institution, of the originator of such transfers;
- use a unique reference number if there is no account number to accompany the transfer;
- include such information in the message or payment form accompanying the transfer;

- maintain all such information and transmit it when they act as intermediaries in chain of payments;
- maintain all such information and transmit it when they act as intermediaries in chain of payments;
- take measures to obtain and verify the missing information from the ordering institution or the beneficiary when they receive wire transfers with missing information;
- refuse acceptance of transfer where the missing information is not obtained; and
- report such situation to the Financial Intelligence Unit accordingly.

1384. Moreover, Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions provides further guidance to MVT service providers on their operations.

1385. In requiring MVT service providers to comply with the general principles for the prevention of money laundering and the financing of terrorism established therein, Rule X of the CBK also provides further procedures that have to be undertaken in the course of carrying out their activities, although most of the guidance provided refers to the procedures for reporting cash transactions exceeding the €10,000 benchmark.

1386. EC VI.3 further requires that MVT service providers be subject to monitoring systems on their compliance with their obligations under the Law for the prevention of money laundering and the financing of terrorism.

1387. The AML/CFT Law does not designate an authority responsible to monitor banks and financial institutions on their compliance with the AML/CFT Law and any Rules or Regulations issued there-under.

1388. In practice such monitoring is undertaken by the CBK under its overall prudential supervisory powers. This Report has expressed serious concerns on this situation due to the absence of the legal mandate both to supervise and to apply the Bank's prudential supervisory powers under the Law on the CBK, the Law on Banks and other relevant financial laws.

1389. With the harmonisation of the definition through the inclusion of MVT services in the definition of a 'financial institution' and consequently the application of all requirements and obligations under the AML/CFT Law, it follows that all weaknesses and shortcomings identified in the analysis of this Report on such obligations also apply to MVT service providers in the analysis of EC VI.2.

1390. These would include concerns raised in this Report on the application of the full CDD measures including beneficial ownership; timing of verification; risk based approach; PEPs; tipping off; and others as detailed in this Report.

1391. All relevant recommendations made in this Report for such weaknesses or shortcomings are therefore also applicable to MVT service providers under SR VI.

1392. On the other hand the Report positively notes the application of additional obligations to MVT services providers in accordance with SR VII on the inclusion of customer details on remittance transfers and actions to be taken where customer information is missing in an inward transfer.

1393. The Report also positively acknowledges the supervisory work conducted by the CBK in ensuring compliance with the AML/CFT Law by MVT service providers, albeit on-site visits are rather low, notwithstanding the absence of a legal mandate. The Report has expressed an overall major serious concern on the absence of a legal supervisory mandate for the financial sector for the purposes of the AML/CFT Law.

1394. It is therefore recommended that the AML/CFT Law designates a competent authority to be responsible for monitoring MVT service providers as financial institutions within the financial sector on their compliance with the Law and any relevant Rules and Regulations.

List of agents – Essential Criterion SR VI.4

1395. EC SR VI.4 requires licensed or registered MVT service providers to maintain a list of its agents which must be made available to the designated competent authority.

1396. It is not clear from the Law on Banks whether MVT service providers are allowed by the Law to appoint agents. Although there is no specific prohibition yet there is no specific allowance or authorisation to do so. An analysis of the Law on Banks in this regard shows that there is no definition of the term ‘agent’ although the term is used throughout the Law for different purposes, and the definition of the term ‘non-bank financial institution’ does not refer to ‘agents’.

1397. Article 2 of the Law on Banks specifies the application of the Law to all entities exercising banking and financial activities, their shareholders, Board of Directors and Senior Managers, employees, *agents* and affiliates as well as to the operations of microfinance institutions and other non bank financial institutions.

1398. Within the context of banks the Law on Banks makes various references to ‘agents’ of banks – for example under Article 57 in connection with the supervisory powers of the CBK; Article 77 in connection with receivership provisions; and Article 80 in connection with secrecy provisions. Within the context of the provisions in the Law on Banks for non-bank financial institutions, the Law also makes references to ‘agents’ of non-bank financial institutions – for example under Article 100 on secrecy provisions.

1399. Likewise the AML/CFT Law does not provide a definition of the term ‘agent’ and the definition of ‘financial institution’ does not refer to ‘agents’ although the term is used throughout the Law for various purposes.

1400. Item (d) of Rule XVI of the CBK on the Registering, Supervision and Operations of Non-Bank Financial Institutions requires the institution to inform the CBK on changing of address. Item (e) further requires that a financial institution must get prior approval of the CBK before establishing branches or new offices. This is reflected from paragraph (1.2) of Article 95 of the Law on Banks which requires non-bank financial institution to obtain the prior approval of the CBK before the opening of new locations or any change of location

1401. Under Article 22 in dealing with the reporting to the FIU and more specifically in addressing the ‘tipping off’ issue, the AML/CFT Law refers to directors, officers, employees and *agents* of any bank or financial institution (paragraph 4); and in paragraph (11) to Article 26 in relation to covered professionals.

1402. The term “new locations” under paragraph (1.2) of Article 95 of the Law on Banks is not necessarily referring to “agents” in the wire transfer context as “agents” could be, and very often are, other entities carrying out commercial business which may receive or transfer money on behalf of the authorised service provider in terms of law.

1403. However, in practice the CBK interprets its own Rule and consequently paragraph (1.2) of Article 95 as allowing non-bank financial institutions to establish agents – in which case there is a need for legal clarity of the definition of an ‘agent’ and its functions. Even if for the sake of argument one accepts this interpretation of the CBK as the regulatory competent authority for the financial sector, the issue of the power of the CBK to licence MVT services providers as established by this Report remains an overall concern.

1404. The legal uncertainty as to whether a financial institution, and more specifically a MVT service provider, can appoint agents is important for the assessment of compliance with EC VI.4.

1405. In the circumstances it is recommended that legal clarity be provided through appropriate provisions in the Law on Banks by referring to ‘agents’ under Article 95 of the Law on Banks with clear definitions of the term ‘agent’ for these purposes in the Law and to create a legal process for the appointment of agents by MVT service providers.

1406. Assuming that financial institutions in general or MVT service providers in particular are allowed to appoint agents, consideration should be given to include a provision either in the AML/CFT Law or directly in the Law on Banks as follows:

- Where a [financial institution] [MVT service provider] appoints agents to carry out activities on its behalf as established [by this Law] [by the Law on Banks], that [financial institution] [MVT service provider] shall maintain a register of such agents that shall include the name, address, business activity, date of appointment and other relevant information and conditions and shall make such register available to the [competent authority] [CBK].

Sanctions – Essential Criterion SR VI.5

1407. EC SR VI.5 requires that effective, proportionate and dissuasive criminal, civil or administrative sanctions as required under Recommendation 17 are available for obligations under FATF SR VI.

1408. The availability of sanctions and their application has already been discussed under the analysis of Recommendation 17 of this Report. The analysis under Recommendation 17 applies to EC SR VI.5 and the following paragraphs will put such analysis in perspective for SR VI.

1409. The administrative sanctions contemplated under the present Article 31 of the AML/CFT Law are limited in scope and apply to persons and entities that are not reporting subjects for the purposes of Article 16 of the AML/CFT Law.¹⁴⁹

1410. Other criminal offences contemplated by Article 33 of the AML/CFT Law would be applicable to MVT services providers as financial institutions recognised as reporting subjects under Article 16 of the Law and subject to all obligations under the AML/CFT Law.

1411. However, as already explained under the analysis of Recommendation 17 of this Report the AML/CFT Law does not provide for administrative sanctions or penalties for breaches of individual obligations under the Law.¹⁵⁰

¹⁴⁹ The draft Amending Law is revising Article 31 making it broader in scope of application.

¹⁵⁰ For this purpose, the draft Amending Law is introducing new Articles 31A and 31B which are being reflected in the proposed review of Article 31 of the AML/CFT Law under Section 3.11 of this Report for Recommendation 17.

1412. The analysis for EC 29.4 of Recommendation 29 has identified a number of shortcomings and weaknesses in the application of sanctions to the financial sector. These findings apply in this Section to MVT services providers as financial institutions under the AML/CFT Law.

1413. Consequently the recommendations and proposals for rectifying this situation through the AML/CFT Law provided in this Report under the analysis of EC 29.4 and Recommendation 17 for a review of Article 31 of the AML/CFT Law are likewise applicable for the purposes of SR VI.

Implementation of FATF Best Practice Paper for SR VI – Additional Criterion VI.6

1414. Additional Criterion SR VI.6 tries to identify whether and what measures have been taken by the country to implement the recommendations in the Best Practice Paper for SR VI.

1415. In general, the Best Practice Paper provides guidance for the licensing or registration requirements for MVT service providers; for strategies to identify the provision of such services in the informal market; for conducting an awareness campaign to inform informal service providers of their obligations; and for the application of obligations for the prevention of money laundering and the financing of terrorism including the reporting obligations. The Best Practice Paper further provides guidance on the monitoring and supervision of these institutions and for the application of sanctions.

1416. Although there are no specific legal provisions within this context specifically and hence no competent authority in Kosovo has taken responsibility in this regard, taking note also of the fact that the AML/CFT Law does not nominate a competent supervisory authority for the financial sector, it should be noted that in attributing the competences of the FIU, the AML/CFT Law charges the Unit to organize and/or conduct training regarding money laundering, the financing of terrorist activities and the obligations of reporting subjects. Moreover, as the prudential supervisory authority, the CBK has published Rule XVI on the Registering, Supervision and Operations of Non-Bank Financial Institutions, although not specifically within the context of MVT services.

1417. Notwithstanding, there is no strategy to identify the provision of informal MVT services or to raise awareness on their obligations under the AML/CFT Laws even though the Law on Banks requires that no person may undertake the activities of a financial institution unless that person is so authorised by the CBK.

1418. It may be appropriate from a prudential aspect, which would also have implications for the prevention of money laundering and the financing of terrorism, for the CBK to carry out an identification strategy for informal activities in MVT services as part of a broader programme to assess the risk and vulnerabilities of the financial sector for money laundering and the financing of terrorism.

Effectiveness

1419. This Report finds various legal uncertainties surrounding MVT institutions which could have a negative impact on the effectiveness of the AML/CFT regime in this regard.

1420. The overall concerns expressed for the rest of the financial sector apply to MVT including the lack of a supervisory mandate for AML/CFT purposes and, in particular, the licensing and registration procedures for MVTs. Moreover, this Report expresses concern on the legal uncertainty for MVTs to appoint agents and questions the interpretation of the Law on Banks in this regard as given in practice by the CBK.

1421. Concerns on effectiveness expressed in this Report are further supported by the low number of onsite visits.

3.12.2 Recommendations and Comments

1422. The analysis and assessment of the implementation of the requirements under the FATF SR VI is partly covered through the analysis of other FATF Recommendations, such as Recommendations 17, 23 and 29. It follows that most findings, shortcoming and weaknesses identified in the analysis of these Recommendations become applicable to MVT service providers as financial institutions under the AML/CFT Law.

1423. While a full reading of the description, analysis and comments for this Section and other relevant parts of the Report as indicated above is highly recommended to put into context such findings, the main weaknesses can be grouped as follows:

- application of findings for other Recommendations, such as CDD, also apply directly to MVT services providers;
- legal uncertainty on the licensing or registration requirements of MVT services providers (EC SR VI.1);
- legal uncertainty on the appointment, functions and powers of ‘agents’;
- absence of a legal mandate for a relevant supervisory authority for monitoring the financial sector for AML/CFT purposes (EC SR VI.3);
- no obligation to maintain a list of agents (EC SR VI.4); and
- lack of effective, proportionate and dissuasive criminal, civil or administrative sanctions (EC SR VI.5).

1424. In order to rectify this situation various recommendations are made in this Section and other relevant parts of the Report as indicated above. Such recommendations should be read within the context of the description and analysis and comments made for the relevant criteria. The following are only indicative of such recommendations:

- harmonise the definition of a ‘financial institution’ in the respective legislation, including the AML/CFT Law, including activities that may be undertaken by non-bank financial institutions;
- designate a competent authority with a regulatory and supervisory remit for the purposes of the AML/CFT Law for the entire financial sector;
- clarify in the Law on Banks the power for non-bank financial institutions, including MVT services providers, to appoint agents and under what conditions or prohibit them;
- insert a definition of ‘agent’ in the Law on Banks;
- insert a new paragraph or Article in the Law on Banks or the AML/CFT Law obliging MVT services providers to maintain a list of agents if the Law on Banks does not prohibit this;
- redraft Article 31 of the AML/CFT Law as recommended under Section 3.11 of this Report.¹⁵¹

¹⁵¹ The draft Amending Law is proposing changes to Article 31 of the AML/CFT Law which have been taken into consideration in the proposals under Section 3.11 in this Report.

3.12.3 Rating for Special Recommendation VI

| | Rate | Summary of factors underlying rating |
|-------|------|---|
| SR VI | NC | <ul style="list-style-type: none"> • legal uncertainty on the licensing or registration requirements; • absence of a legal mandate for a relevant supervisory authority; • legal uncertainty on the appointment, functions and powers of ‘agents’; • consequently no obligation to maintain a list of agents; • lack of effective, proportionate and dissuasive criminal, civil or administrative sanctions; and • low number of on-site examinations; and • effectiveness issues arising mainly out of legal uncertainties. |

3.13 Modern secure transaction techniques (R.20)

3.13.1 Description and Analysis

1425. Recommendation 20 is twofold. It requires the application of the obligations for the prevention of money laundering and the financing of terrorism to other business and professions that pose a risk of money laundering and the financing of terrorism (EC 20.1) and the development and use of money management to reduce money laundering and financing of terrorism vulnerabilities (EC 20.2).

1426. This Report is only assessing EC 20.2.

Development and use of money management techniques – Essential Criterion 20.2

1427. EC 20.2 requires countries to take measures to encourage the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to money laundering. The FATF Methodology provides examples of techniques or measures that could be applied such as: reducing reliance on cash, not issuing very large denomination banknotes and secured automated transfer systems.

1428. According to Article 16 of the Law on the CBK the currency of Kosovo shall be determined by Law in accordance with Article 11 of the Constitution. The legal tender currency in Kosovo is currently the euro. All denominations of the euro notes, including the €500 note, are issued in circulation. According to Article 16 only the CBK shall have the right to issue banknotes and coins. To this effect the CBK is responsible for maintaining an appropriate supply of banknotes and coins in Kosovo.

1429. The CBK has provided information on the issue and withdrawal of currency notes by denomination for the period 2003 to 2012 (end November). The tables that follow provide this information for the period 2009 to 2012 (end November) with averages for the period 2003 to 2012 (end November).

1430. The following table provided by the CBK indicates the supply of euro currency notes in circulation:

Table 18: *Currency issued by the CBK (supply of currency in circulation)*

| Denomination/Year | 2009 | 2010 | 2011 | 2012* | Average** |
|-------------------|--------|--------|-------|--------|-----------|
| 500 € | 30,200 | 18,000 | 9,000 | 13,600 | 45,978 |

| Denomination/Year | 2009 | 2010 | 2011 | 2012* | Average** |
|----------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| 200 € | 500 | 2,000 | 1,000 | 100 | 19,035 |
| 100 € | 299,100 | 319,000 | 302,000 | 379,000 | 529,223 |
| 50 € | 1,662,500 | 2,273,000 | 2,335,000 | 2,136,100 | 1,512,703 |
| 20 € | 1,901,400 | 2,207,000 | 2,303,000 | 3,346,700 | 1,575,593 |
| 10 € | 1,822,400 | 2,086,000 | 2,140,000 | 3,518,500 | 1,422,947 |
| 5 € | 1,059,000 | 1,140,000 | 1,125,000 | 1,062,100 | 759,181 |
| Total pieces | 6,775,100 | 8,045,000 | 8,215,000 | 10,456,100 | 5,864,661 |
| Total amount | 189,782,000 | 225,650,000 | 224,735,000 | 258,954,500 | 204,890,771 |
| <i>of which 500 EUR</i> | <i>15,100,000</i> | <i>9,000,000</i> | <i>4,500,000</i> | <i>6,800,000</i> | <i>22,989,050</i> |
| Ratio of 500 EUR to total | 7.96% | 3.99% | 2.00% | 2.63% | 11.42% |

* Up to 30 November 2012

** Average for period 2003 – 2012

1431. The following table provided by the CBK indicates the withdrawal of euro currency notes from circulation:

Table 19: Currency deposited at the CBK (withdrawal from circulation)

| Denomination/Year | 2009 | 2010 | 2011 | 2012* | Average** |
|----------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| 500 € | 317,200 | 342,000 | 425,000 | 345,400 | 287,385 |
| 200 € | 158,100 | 186,000 | 214,000 | 174,100 | 175,487 |
| 100 € | 1,334,400 | 1,415,000 | 1,650,000 | 1,651,700 | 1,315,664 |
| 50 € | 3,875,100 | 4,283,000 | 5,027,000 | 4,784,400 | 3,549,810 |
| 20 € | 2,553,700 | 2,633,000 | 2,774,000 | 3,301,200 | 2,001,450 |
| 10 € | 2,447,800 | 2,453,000 | 2,494,000 | 3,238,900 | 1,857,830 |
| 5 € | 1,246,000 | 1,329,000 | 1,293,000 | 1,248,800 | 1,043,161 |
| Total pieces | 11,932,300 | 12,641,000 | 13,877,000 | 14,744,500 | 10,230,785 |
| Total amount | 599,197,000 | 647,685,000 | 758,535,000 | 716,567,000 | 551,669,847 |
| <i>of which 500 EUR</i> | <i>158,600,000</i> | <i>171,000,000</i> | <i>212,500,000</i> | <i>172,700,000</i> | <i>143,692,600</i> |
| Ratio of 500 EUR to total | 26.47% | 26.40% | 28.01% | 24.10% | 25.98% |

* Up to 30 November 2012

** Average for period 2003 - 2012

1432. Paragraph (1) of Article 22 of the Law on the CBK stipulates that the CBK shall be exclusively responsible for the regulation, licensing, registration and oversight of payment, clearing and securities settlement systems as further specified in the relevant Laws. The CBK is further empowered to impose administrative penalties within the relevant provisions of the Law on the CBK. The CBK is also empowered to regulate and oversee the issuance and quality of payment instruments.

1433. The CBK informed that there is no documented specific strategy with plans to reduce the use of cash. However various measures have already been and are being taken to this effect. Indeed currently there is a planned project for the development of a payment system. To this effect products for direct payments will be introduced thus reducing the need to settle payments and bills through cash.

1434. Indeed, the use of debit and credit cards is also gathering momentum in Kosovo. The CBK has provided the following statistics on the use of these cards.

Table 20: Number of Debit and Credit card in use

| Type | 2009 | 2010 | 2011 | 2012 * |
|---------------------|---------|---------|---------|---------|
| Credit Cards | 31,508 | 37,922 | 74,873 | 91,388 |
| Debit Cards | 507,399 | 480,659 | 548,253 | 590,758 |

* Up to 30 October 2012

1435. One of the measures in the use of cash is the percentage of currency in circulation to the Gross Domestic Product. The CBK has informed that for the past three years the ratio has shown a rising trend, standing at 18.8% for 2009; 19.9% for 2010 and 18.6% for 2011.

1436. Paragraph (7) of Article 13 of Law No 03/L-122 on Tax Administration and Procedures stipulates that: *Any transaction in excess of five hundred (500) euro, made between persons involved in economic activity, after 1 January 2009 is required to be made through bank account.*

1437. According to paragraph (1.26) of Article 1 of the Law on Tax Administration, the term 'person' includes a natural person, a legal person, a partnership as well as a grouping or association of persons, including consortiums.

1438. The Law on Tax Administration further defines the term 'economic activity' as: *any activity of producers, traders or persons supplying goods or services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purposes of obtaining income there from on a continuing basis shall in particular be regarded as an economic activity.*

1439. In the course of the on-site visit the Kosovo Tax Administration (TAK) informed that it has an updated system through which it can monitor related data for payments in excess of €500. If any breaches of this requirement are noted officials of the TAK visit the business concerned to get more information. The TAK informed it has a risk analysis tool to this effect. Failure to respect these provisions is subject to fines. The TAK has the possibility of requesting and receiving data from all authorities and institutions that could assist it in this process. All entities are obliged to report to the tax authorities every sale or purchase above €500 effected during the previous year by the 31 March of the following year. The way they report is regulated in order to have a unified reporting system. Thus the TAK has the possibility to monitor either on the side of the buyer or of the seller.

1440. Moreover the TAK have the power to stop delivery trucks and check documents for payments which can later be matched on transactions between buyer and seller. Another main source of checking reporting is through the tax declaration forms and the financial statements of entities concerned.

1441. Although there is no documented strategy with plans to reduce the use of cash, various measures have been or are being taken with this objective. Notwithstanding, information provided and statistics at times are in conflict and do not indicate this objective. The CBK may therefore wish to document its plans for better cash management techniques establishing objectives and milestones.

1442. The statistics provided by the CBK on the withdrawal and supply of currency notes indicate that more currency notes (by number and by value) are being deposited thus reducing circulation than the amount of currency notes that are being issued by the CBK in circulation. Thus for example in 2012 an amount to the value of €259 million were issued thus increasing circulation, while an amount to the value of €716.6 million were deposited thus reducing circulation.

1443. Moreover, focussing on the €500 currency note the statistics indicate that there is heavy demand for this note. Likewise statistics indicate that more €500 notes are being deposited with the CBK than the amount issued. Thus whereas in 2012 the CBK issued €6.8 million in €500 currency notes, an amount of €172.7 million were deposited.

1444. Notwithstanding the positive element of a reduction in currency in circulation, these statistics raise certain concerns. First on the difference between the high deposited amounts

and the amounts issued. Second on the high use of the €500 note despite the prohibitions in the Law on Tax Administration on the settlement in cash for transactions exceeding €500.

1445. While it is accepted that with the use of the euro as the currency the currency in circulation may increase with currency coming into Kosovo by *bona fide* travellers, the amounts are too high and raise concern of money coming over the borders and placed in the Kosovo banking system. It is therefore recommended that the CBK co-ordinates and undertakes a study on these statistics to identify the source of these differences with the assistance of other authorities such as Customs and TAK.

1446. This discrepancy in the currency in circulation could corroborate information available that the extent of black economy in Kosovo is rather high - *In 2007, the extent of black economy during the period 2004-2006 has been estimated to run up annually more than €300 million in Kosovo. A cash-based economy makes Kosovo vulnerable to money laundering activities and terrorist financing.*¹⁵² *Kosovo's economy, especially the private sector is cash based, therefore the proceeds from criminal activities are more easily laundered through the black market, smuggled goods such as tobacco, jewellery, cafes, alcohol and mobile phones*¹⁵³. *Kosovo does have an active black market for smuggled consumer goods and pirated products.*

1447. It is also recommended that the TAK ensure the effectiveness of the monitoring on the prohibition for cash payments in excess of €500 as statistics indicate otherwise.

1448. The statistics on the percentage of currency in circulation against the Gross Domestic Product indicate high positions which need to be further addressed in the light of the high cash based economy in Kosovo.

1449. The efforts of the CBK to introduce a payments system and to introduce products for direct payments through the banking system are welcome and indicate a positive move towards the goal of reducing the use of cash. It is important that such products provide for both direct debits and direct credits. Likewise is the increasing trend in the use of debit and credit cards which may be an indication of more use of the banking system.

1450. Notwithstanding, in the course of the on-site visit information was provided that such facilities are not available and to transfer money from one bank to another one had to withdraw the money from one bank and physically deposit it at the other.

Effectiveness for Recommendation 20

1451. The statistics provided by the CBK on the issue of currency in circulation raise serious concerns on the effectiveness of the measures being taken by the CBK itself and other authorities such as the TAK and Customs on monitoring and reducing the use of cash in a system that is relatively highly cash based and in the movement of currency across borders.

3.13.2 Recommendations and comments

1452. In summary, with reference to Recommendation 20, this Report expresses concerns that:

- although there is work in progress, the CBK has not developed a documented strategy with goals and milestones to reduce the use of cash;

¹⁵² https://ritdml.rit.edu/bitstream/handle/1850/13011/BesartQerimi_CapstoneProject_Report_11-162010.pdf?sequence=6

¹⁵³ *Ibid.* p.44.

- there is extensive high use of high denomination currency notes which indicates a high cash based economy;
- statistics on currency issued and deposited conflict and could indicate possible import of currency across the border;
- lack of direct debit and credit procedures within the banking system;
- effectiveness of implementing Article 13 of Law by Tax Administration.

1453. With the aim of improving the system for better cash management techniques this Report recommends that:

- CBK documents its strategy for better cash management techniques with objectives and milestones including the introduction of direct debit and direct credit systems;
- CBK co-ordinates a study on the statistics on currency issued and currency deposited to identify the source of these differences in cooperation with other authorities such as Customs and Tax Administration;
- this study should also identify reasons for the high use of the €500 currency note;
- ensure effectiveness of the implementation of Article 13 of the Law on Tax Administration by Tax Administration.

3.13.3 Rating for Recommendation 20

| | Rating | Summary of factors underlying rating |
|-------------------|--------|---|
| Rec 20 EC 20.2 | NC | <ul style="list-style-type: none"> • no documented strategy with goals and milestones to reduce the use of cash; • extensive use of high denomination currency notes; • no facilities for direct debits and direct credits through banking system; • conflicts in statistics on currency notes issued and deposited; and • apparent lack of effectiveness in monitoring compliance with the provision of Article 13 of the Law on Tax Administration and currency movement across the borders. |

4 LEGAL PERSONS – ACCESS TO BENEFICIAL OWNERSHIP AND CONTROL INFORMATION (R.33)

Legal Framework

- Law on the Prevention of Money Laundering and Terrorist Financing (Law no. 03/L-196 of 30/09/2010), hereinafter AML/CFT Law.
- Law on Business Organisations (Law no 02/L-123 of 27/09/2007).
- Law on amending the Law on Business Organisations (Law no 04/L-006 of 23/06/2011).

4.1 Description and Analysis

1454. The Law on Business Organisations came into force on 27 September 2007. Upon the coming into force of the Law on Business Organisations, UNMIK Regulation 2001/6 of 8 February 2001 on Business Organisations and UNMIK Administrative Direction 2002/22 of 11 October 2002 on Implementing Regulation 2001/6 on Business Organisations have been repealed.

1455. The Law amending the Law on Business Organisations came into force on 23 June 2011. Upon coming into force of the amending law UNMIK Regulation N0.2008/26 of 27 May 2008 on the Promulgation of the Law on Business Organisations, UNMIK Regulation N0.2001/6, UNMIK Administrative Order N0.2002/22 and Administrative Directive N0.2003/1 have been abrogated.

1456. The following analysis, comments and recommendations will therefore be based on the Law on Business Organisations as amended, the information provided in the replies to the Questionnaire, and the information and other documents obtained during the onsite visit in the course of the discussions with the relevant authorities.

1457. For a detailed overview of the legal persons framework under the above mentioned laws, including type of legal persons, and registration process including documents required please refer to Section 1.5 of this Report.

Information on beneficial ownership and control – Essential Criterion 33.1

1458. EC 33.1 requires countries to take measures to prevent the unlawful use of legal persons in relation to money laundering and the financing of terrorism by ensuring that the country's commercial, corporate and other laws require adequate transparency concerning the beneficial ownership and control of legal persons.

1459. The FATF Methodology provides three types of mechanisms that are acceptable for the purposes of EC 33.1 either individually or in combination due to their high degree of complementarities:

- upfront disclosure system through a domestic system that records the required ownership and control details;
- through the retention of the required information by company service providers; or
- through reliance on the investigative powers of law enforcement, regulatory, supervisory or other competent authorities to obtain or have access to this information.

1460. Whatever system is used, EC 33.1 requires three essential elements:

- timely access by competent authorities to beneficial ownership and control information;
- availability of adequate, accurate and timely information; and
- ability of competent authorities to share such information with other relevant domestic or foreign competent authorities.

1461. Kosovo applies an upfront system through the business registration system governed by the Law on Business Organisations.

1462. The KBRA is the competent authority under the Law on Business Organisations that is responsible for the registration of all business entities under the Law.¹⁵⁴ The KBRA is within the Ministry of Trade and Industry and is headed by a senior civil servant referred to as the ‘Director’ who, according to Article 9 of the Law, shall exercise his functions in an independent manner without any political or illicit influence.

1463. According to Article 7 of the Law on Business Organisations the KBRA is mainly responsible to register business organisations and foreign business organisations in accordance with the provisions and requirements of the Law. The Agency however also has the authority and responsibility to perform any other functions that are specifically and explicitly assigned to it by the Law on Business Organisation.

1464. Moreover, Article 11 of the Law requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site all the relevant information or any changes thereto within one month after the registration of such company or any change to such information.

1465. In terms of Article 13 of the Law, every business organisation is under a continuing obligation to ensure that all information set forth in its registered documents is accurate and in compliance with the requirements of the Law on Business Organisations. On the other hand, the Agency is strictly required to formally and officially register a document submitted to it if such document complies with the requirements established by the Law.

1466. The KBRA is under a legal obligation to note the date and time of receipt on every document that is submitted for registration and to provide, on request, a receipt to the person submitting the documents. Article 14 of the Law further obliges the KBRA to formally and officially register such document within three (3) calendar days following the day of receipt if the document received by it satisfies the requirements of the Law.¹⁵⁵

1467. In terms of Article 15 of the Law, the fact that a document has been registered is a formal informational and administrative act only. The KBRA is not obliged to verify information contained in any registration document. The Law imposes the responsibility for the accuracy of the information in all documents for registration upon the person signing such document. Indeed, the registration of a document does not constitute any type of legal determination or presumption on the validity of the document or that any information contained therein is accurate or inaccurate.

1468. Original copies of records and documents received or registered are to be maintained in perpetuity both in physical and electronic format.

¹⁵⁴ Previously known as the Kosovo Registry of Business Organizations and Trade Names.

¹⁵⁵ As recently amended from the previous ten (10) calendar days.

1469. Article 23 of the Law requires that every business organisation specifies its physical registered address in Kosovo and the name of its agent, being the person having his principal place of work or residence at that address.

1470. In the case of joint stock companies and limited liability companies the Law requires that any changes in any of the information contained in a registered charter of a joint stock company or a limited liability company is reported to the KBRA.

1471. Moreover, Article 42 of the Law obliges every business organisation to submit an annual report to the Director of the Agency which, in the case of joint stock companies and limited liability companies includes details on the names and addresses of (i) its board of directors and (ii) all its shareholders and (iii) its authorized persons (and any restrictions on authorization). Non submission of the annual report could lead to deregistration.

1472. According to Article 78 an ownership interest in a limited liability company may, but need not, be evidenced by a certificate and may be referred to as a “share”. A company’s charter or company agreement may provide that ownership interests or shares in the company will be evidenced by certificates issued by the company. Transfer of ownership is strictly regulated by the Law on Business Organisations between the current owners.

1473. On the other hand, according to Article 126 of the Law, the shares in a joint stock company are the units into which the ownership interests in the company are divided and are the property of the shareholder and may be freely transferred in whole or in part, by the shareholder to any person or organization. A joint stock company may have one or more persons, business organizations and/or other organizations as its shareholder or shareholders. The joint stock company is further required to maintain an updated list of its shareholders.

1474. According to paragraph (5) of Article 141 *A joint stock company shall not have any authority to issue, and shall not issue, bearer shares or other bearer securities. Any shares or securities issued in violation of this Article, and any purported rights or claims arising from such shares or securities, shall be null, void and unenforceable.*

1475. In practice the KBRA aims to provide a ‘one stop shop’ for business registration. To this effect the Agency operates through 28 Municipal Centres. All Centres scan documents and look at their legal aspects. If all documents are correct they can approve it and give it a registration number. In the near future, in addition to the registration number the Centres will be able to provide the business entity with the tax number and the VAT and Customs numbers. All systems are interlinked and therefore the Agency can provide a ‘one stop shop’ for business registration. There is one main register for all businesses registered that is available to the public for information.¹⁵⁶

1476. KBRA has about 16 officers and other staff in the Centres. Each officer has a separate ID Code which is linked to all registrations that he/she does. Thus electronically the Agency can follow the process of registration to the official responsible for registering that business. Staff includes an IT persons who is responsible for the IT systems linking the Centres to Head Office. KBRA is of the opinion that the present IT system is adequate and caters well for its operations.

1477. There is no need for intermediaries (lawyers, accountants, etc) to register a business organisation. All forms for registration are available online and registration can be done online.

¹⁵⁶ The Register of Businesses maintained by the KBRA is separate from the Register of NGOs maintained by DRLNGO (Section 5) and the Register of Banks and Financial Institutions maintained by the CBK (Section 3).

1478. The registration system for business organisations appears adequate although some weaknesses can be identified mainly in relation to the maintenance and updating of information, and information relating to beneficial ownership.

1479. In the case of joint stock companies and limited liability companies, although the Law requires that any changes in any of the information contained in a registered charter of a joint stock company or a limited liability company is reported to the KBRA, and notwithstanding the obligation of joint stock companies to maintain a list of shareholders, there is no direct obligation to immediately inform KBRA upon changes in shareholders.

1480. Indeed the KBRA informed that in order to try to obtain such information earlier than the annual report, the Agency insists on business organisations to appoint a person with the responsibility to inform the Agency immediately any changes occur.

1481. The accuracy of the information available is also questioned due to the provisions under the Law that the registration of a document does not constitute any type of legal determination or presumption on the validity of the document or that any information contained therein is accurate or inaccurate. There is therefore lack of due diligence at least on the founders of a business organisation.

1482. The appointment of an ‘agent’ representing the company at its registered address does not necessarily mean that a ‘shell company’ cannot be registered with corporate or trust shareholding.

1483. Moreover, it appears that the system does not provide the possibility for the KBRA or any other person or authority to identify whether a number of business organisations belong to the same individual. The authorities have however informed that such facility is available to TAK only through the tax registration number.

1484. Furthermore, it also appears that the system does not identify inter-connections between business organisations where, through layers of ownership some companies might own each other.

1485. The above shortcomings can have a negative impact in identifying the beneficial owner through layers of corporate shareholdings.

1486. The Law amending the Law on Business Organisations has reduced the registration period to three (3) calendar days from the previous ten (10). It has also reduced the charter capital for the registration of a joint stock company from €25,000 to €10,000. Moreover the previous minimum charter capital for a limited liability company of €1,000 has been removed meaning that basically a limited liability company may be registered without capital.

1487. Although from an economic perspective the above changes may contribute positively, from an AML/CFT perspective these may raise concerns as they make the registration of business entities easier unless strictly monitored at the registration stage, considering the lack of due diligence.

1488. In the light of the above findings, although no specific recommendations may be made for legislative or other changes, it is highly advisable that the KBRA takes note accordingly and reviews its procedures and powers to take measures to rectify these findings:

- introduce an obligation for immediate reporting of changes to shareholding and directors further to the *ad hoc* appointment of a person responsible to do so;

- introduce procedures and systems for competent authorities and the industry to identify where one persons owns more than one business organisation;
- introduce administrative procedure to ascertain to the extent possible the accuracy of documents and integrity of contents – for example by checking founders against the United Nations and other lists of designated persons and entities;
- introduce procedures to identify interconnectivity between registered business organisations;
- introduce stronger measures for the accuracy and validity of applications for registration to cater for the short registration period and the reduced capital required.

Timely access to information - Essential Criterion 33.2

1489. EC 33.2 requires that competent authorities are able to obtain or have access in a timely fashion to adequate, accurate and current information on the beneficial owner and control of legal persons.

1490. Article 10 of the Law on Business Organisations provides that all records, documents, filings, forms, rules and other materials required under the Law to be submitted to the KBRA or prepared by the KBRA relating to its operations or procedures or to any business organization are, without exception, public documents and to have them readily and routinely available to any person, upon such person’s request or demand, for review and copying. In this regard the Agency shall mark any copies requested by any person as ‘true copies’.

1491. Moreover, Article 11 of the Law requires that for each company that is registered, the KBRA is to publish on a publicly accessible web site the following information or any change thereto within one month after the registration of such company or any change to such information:

- the name of the company;
- the type of company (limited liability or joint stock company);
- the address of the company’s registered office and the name of the company’s registered agent at that address;
- a brief description of the business purpose or purposes of the company, which purposes may be described simply as “to engage in any Lawful business activity”;
- the name and address of each founder;
- the names of the directors and authorized persons and, if specified in the company’s registration documents, any limitations on their authority;
- the duration of the company if it is not perpetual; and
- the charter capital of the company.

1492. Access to this information is available to the public in general through the web-site of the Agency. In order to access such data a person must have information on either of the business registration number, business name, personal ID of authorised person, owners’ personal ID, main activity or other activities.

1493. Upon registration of a business organisation the KBRA informs other authorities, such as the Tax Administration, Customs, Statistics Office, Municipalities Administration and others. Indeed some authorities such as Kosovo Police and Tax Administration have

confirmed receipt of information and access to information held by the Kosovo Business Registration Authority.

1494. It appears that changes in shareholding are only reported through the annual reporting obligation. Likewise, changes in directors are only communicated to the KBRA through the annual report. Thus there is a time lag when the information available may not be timely and accurate.

1495. Moreover the requirements under Article 11 of the Law on Business Organisations for all registration information or changes thereto may be put on the website 'within one month' raises concerns on the 'timeliness' of the availability of information, although in practice the Agency claims to take less time.

1496. In the light of the above findings, although no specific recommendations may be made for legislative or other changes, it is highly advisable that the KBRA takes note accordingly and reviews its procedures and powers to take measures to rectify these findings, taking account of the recommendations under this Section above.

Effectiveness for Recommendation 33

1497. The robustness of the company registration regime is negatively affected through identified shortcomings which impact on its effectiveness and beneficial ownership information. In particular are weaknesses in the system related to due diligence on founders and major shareholders and hence accuracy of information and the lack of facilities to identify inter-connectivity of companies and separate ownerships through the same shareholder/s.

4.2 Recommendations and Comments

1498. Although the legislative framework is to an extent adequate for the registration of business organisations some findings, both of a legislative and procedural/operational nature, impact on the requirements of Recommendation 33 within the context of the analysis in this Report.

1499. With a full reading of the analysis and comments being highly recommended, the following are the main findings:

- no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur;
- concerns over the accuracy of information available;
- concerns over the timeliness of availability of information to competent authorities;
- no procedures for competent authorities except TAK for the identification whether a number of business organisations belong to the same individual;
- no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies might own each other; and
- concerns over the easiness of registration.

1500. In the light of these findings, the Report makes certain recommendations, although not specific to legislative changes. It is however important that recommendations made are read within the context of the analysis and comments for the respective Essential Criteria:

- introduce an obligation for immediate reporting of changes to shareholding and directors further to the *ad hoc* appointment of a person responsible to do so;
- introduce procedures and systems for competent authorities and the industry to identify where a person owns more than one business organisation;
- introduce administrative procedure to ascertain to the extent possible the accuracy of documents and contents by the KBRA in order to ensure that both natural and legal persons establishing companies be checked and monitored with respect to possible criminal records or professional disqualifications, as well as against the United Nations and other lists of designated persons and entities;
- introduce procedures to identify interconnectivity between registered business organisations;
- introduce measure for accuracy and validity of applications for registration to cater for the short registration period.

4.3 Rating for Recommendation 33

| | Rate | Summary of factors underlying rating |
|--------|------|--|
| Rec 33 | PC | <ul style="list-style-type: none"> • no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur; • concerns over the accuracy and timeliness of information available; • concerns on due diligence on founders and major shareholders; • concerns over the timeliness of availability of information to competent authorities; • no procedures for competent authorities except for TAK for identification whether a number of business organisations belong to the same individual; • no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies may own each other; • concerns over the easiness of registration; and • consequent effectiveness issues. |

5 NON-PROFIT ORGANISATIONS¹⁵⁷ (SR.VIII)

Legal Framework

- Law on the Prevention of Money Laundering and Terrorist Financing (Law no. 03/L-196 of 30/09/2010), hereinafter AML/CFT Law.
- Law on Freedom of Association in Non-Government Organisations (Law no. 04-L-057 of 29/08/2011), hereinafter Law on NGOs.

5.1 Description and Analysis

1501. SR VIII requires countries to review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. NPOs (sometimes referred to as NGOs) are particularly vulnerable and countries should take measures to ensure that they cannot be misused or abused for such criminal purposes. Such measures are detailed in the Essential Criteria under the FATF Methodology as analysed in the following paragraphs.

1502. To this effect the FATF has published an Interpretative Note to SR VIII complemented by International Best Practices for combating the abuse of NPOs.

1503. According to Article 1 of the Law on NGOs establishing the aims and scope of the Law, the Law on NGOs sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs in Kosovo. The Law however does not apply to political parties, trade unions and unions' organisations and religious centres or temples and other fields regulated by special laws.

1504. The Law on NGOs defines a domestic NGO as an association (an organisation that has membership) or foundation (an organisation without membership) established in Kosovo to accomplish the purpose based on the law, either for public benefit or mutual interest.

1505. On the other hand, the Law defines a foreign or international NGO as a legal person established outside of Kosovo under legislation that substantially meets the requirements of Article 4 of the Law on NGOs – which deals with the non-distribution of earnings.

1506. In terms of Article 17 of the Law on NGOs, an NGO registered under the Law may apply for public beneficiary status if it is organized and operated to undertake one or more of the following as its principal activities: humanitarian assistance and relief, support for disabled persons, charity activities, education, health, culture, youth, sport, environmental conservation or protection, economic reconstruction and development, the promotion of human rights, the promotion of democratic practices and civil society, or any other activity that serves the public beneficiary. According to the Law, NGOs with a public beneficiary status shall be entitled to tax and fiscal benefits, except those which are essentially charges for municipal public services.

1507. The Department for Registration and Liaison with NGOs (hereinafter DRLNGO) within the Ministry for Public Administrations is the authority competent to implement the Law on NGOs, including registration.

1508. The Department has 11 employees structured in two divisions. One division is responsible for registrations and the other for the review of the reports and financial analysis. DRLNGO believes that currently resources are satisfactory for its legal mandate.

¹⁵⁷ Since legislation and other documents for Kosovo refer to 'non-government organisations' (NGOs) this term will be used in this section and should be read and construed to be referring to 'non-profit organisations' (NPOs) under the FATF Standards and Methodology.

1509. The following analysis, comments and recommendations will therefore be based on the Law on NGOs, the information provided in the replies to the Questionnaire, and the information and other documents obtained during and after the onsite visit in the course of the discussions with the relevant authorities.

Review of adequacy of domestic laws and regulations for NGOs – Essential Criterion SR VIII.1

1510. EC SR VIII.1 requires countries to review the adequacy of laws and regulations that relate to NGOs and assess the vulnerabilities of NGOs that can be abused for the financing of terrorism

1511. DRLNGO informed that it undertakes its functions in accordance with the Law on NGOs and the issue of competences for registration and liaison has a limited mandate. Since after the war registration of NGOs were for the first time regulated under UNMIK Regulation 1999/22 and later under the law adopted as Law 03/L-134 in 2009. It was later noted that the Law had some shortfalls and needed to be amended. Consequently on 29 August 2011 a new Law 04/L-057 was adopted. Since then a Regulation on compliance has been adopted by Government while a Regulation on registration is to be adopted soon.¹⁵⁸ DRLNGO informed that civil society parties were involved in the drafting of the new law. DRLNGO operates only within the provisions of the Law on NGOs and the Regulations. The Law sets forth the procedures for registration including internal structure and the giving of the public beneficiary status and therefore DRLNGO does not assume any further responsibilities not attributed to it by Law. All NGOs registered are expected to respect the Law and other laws applicable to them.

1512. According to DRLNGO amendments of the law were mainly initiated for lack of dispositions taken against NGOs that failed to report according to the Law. This was mainly because of inadequate cross-referencing in the previous law to paragraphs or articles in the law that did not exist or were wrongly referenced.¹⁵⁹

1513. Since 1999 to date 6,926 NGOs have been registered of which 6,428 are domestic and the other international. Up to the time of drafting this Report 88 NGOs ceased to exist.

1514. DRLNGO is not in a position to indicate the financing of terrorism risk and vulnerabilities to which NGOs may be exposed to as, according to it, this issue does not fall within its mandate under the Law on NGOs, which mandate is limited to registration. DRLNGO ensures that NGOs report on their financial activities between January and March each year as required by the Law and if they do not report DRLNGO will take measures against them on a graduated sanctioning basis which may include suspension but in accordance with the Law. At the same time the assessment team did not get confirmation from other authorities that NGOs did indeed pose a certain risk as far as terrorism financing was concerned.

1515. The provisions on additional obligations for NGOs for the prevention of money laundering and the financing of terrorism previously under Section 4 of the UNMIK Regulation 2004/2 of February 2004 on the Deterrence of Money Laundering and related Criminal Offences and which has been repealed by the AML/CFT Law have however been retained and reflected in Article 24 of the AML/CFT Law – see also analysis of Recommendation 17 on Sanctions.

¹⁵⁸ These documents were not made available to the assessment team.

¹⁵⁹ For example Article 19 of the first law referred to paragraph (4) and (5) of Article 20 and which paragraphs did not exist.

1516. Although the first law on NGOs, Law 03/L-134 of 2009, has been reviewed and replaced by the new law, Law 04/L-057 of 2011, it does not appear that the review of the law was the result of any study on the adequacy of the laws and regulations related to NGOs.

1517. Moreover, no studies have been carried out on the characteristics of the NGOs in Kosovo to identify those types that could be at risk of being misused for money laundering or the financing of terrorism.

1518. Indeed, DRLNGO is of the view that it only has the remit given to it by the Law on NGOs and that is principally to register and de-register NGOs. This could be consequent to the definition of ‘Competent Body’ under the Law which is defined as “the NGO registration and removal from register”. This raises concerns on the overall framework for NGOs.

1519. The Tax Administration has informed that since NGOs do not have high tax liabilities they are of a low risk for tax purposes. Hence, while acknowledging the importance to monitor the status of NGOs, TAK considers previous concerns on the sector removed through the coming into force of the respective laws. Hence TAK does not undertake any risk assessments of the sector and, even if it were to do so, this would be related to tax purposes only.

1520. The assessment of the adequacy of laws and regulations relating to NGOs as well as assessments on the vulnerabilities of NGOs for being misused for money laundering or the financing of terrorism could be addressed through a national risk assessment¹⁶⁰ or directly by DRLNGO or other competent authorities.

1521. Within this context, and in the light of the views of DRLNGO that the Law dictates its overall mandate with regard to NGOs, and this in a narrow and limited manner, it is recommended that a new Article 2A is introduced in the Law on NGOs providing for the designation of the Competent Body and its competences under the Law:

Article 2A
Designation and Competences of the Competent Body¹⁶¹

(1) The Department for the Registration and Liaison with NGOs within the Ministry of Public Administration shall be the Competent Body responsible for the implementation of this Law.

(2) The Competent Body shall be responsible to undertake all functions attributed to it by this Law with respect to the registration, de-registration and regulation of NGOs and to conduct oversight of registered NGOs for compliance with their obligations under this Law and any regulations issued there-under.

(3) In conducting oversight of registered NGOs the Competent Body may apply a risk sensitivity approach with higher oversight conducted for NGOs with significant financial resources under control and NGOs with substantial international activities and which could pose a higher risk. Higher oversight shall include examinations of books, documents and other information conducted at the premises of the NGO and for this purpose and upon proper identification officials of the Competent Body shall have a right of

¹⁶⁰ A national risk assessment is now mandatory under Recommendation 1 of the new FATF Standards 2012.

¹⁶¹ The proposed Article 2A provides for other shortcomings identified in the following sections of the Report. These are all included under one recommendation for the sake of clarity and continuity. References to the proposed Article will be made as appropriate in the relevant Sections.

access to the premises of the NGO during official working hours and to demand all documents and information required, including to copy or reproduce documents as may be required and to ask questions and seek clarifications in fulfilling these responsibilities. The Competent Body may apply the foregoing for examinations of NGOs on an off-site premises basis.

(4) The Competent Body shall periodically and as it deems appropriate gather sufficient information to assess the activities, size and other relevant features of the NGO sector to identify risks and vulnerabilities to which the sector may be exposed and shall raise awareness within the sector and make recommendations accordingly for amendments to this Law or any regulations issued there-under. To this effect the Competent Body shall co-operate with any other authorities that possesses information on the sector and shall share information accordingly and at its discretion.

1522. Consequent to the proposed new Article 2A it is further proposed that the definition of ‘Competent Body’ in Section 2 be amended to read *the body designated under Article 2A of the Law*.

1523. The oversight responsibility in the proposed Article 2A can be achieved by extending and strengthening the role of the Division within DRLNGO that is responsible for the review of the reports and financial analysis through a remit to examine NGOs on-site and/or off-site. In order to focus on the larger NGOs or those that present a higher risk of being used for criminal activities it is proposed to apply a risk sensitivity approach to the oversight functions which could be developed through the analysis of the financial and activity reporting under the Law on NGOs.

1524. Paragraph (9) of Article 18 of the Law on NGOs already recognises the notion of distinction for larger NGOs within the context of the financial statements submitted with the required annual report.

1525. It is further recommended that Kosovo undertakes without delay an assessment of any of the risks and vulnerabilities of any of the features and types of NGOs in Kosovo that are at risk of being exploited or misused for terrorist financing or money laundering.

1526. Moreover Kosovo should implement the relevant components of the AML/CFT Strategy as soon as possible.

Outreach to NPO sector – Essential Criterion SR VIII.2

1527. EC SR VIII.2 requires countries to undertake outreach to NGOs for awareness to protect the sector from criminal abuses for money laundering or the financing of terrorism.

1528. The Law on NGOs does not place any obligations to this effect on the DRLNGO. Likewise Article 24 of the AML/CFT Law on the additional obligations of NGOs.

1529. The AML/CFT Law does not specifically refer to NGOs in establishing the duties and competences of the FIU but in general it requires the FIU to organise and/or conduct training regarding money laundering, the financing of terrorist activities and the obligations of reporting subjects.

1530. Replies to the Questionnaire indicate that several roundtables and seminars have been organised by the FIU to this effect. The FIU has informed that in October 2007 it had conducted several training sessions for the NGOs regarding their obligations under the AML/CFT Law and regarding compliance inspections.

1531. DRLNGO informed that in debates held with civil society it discusses the obligations of the sector to uphold the laws of Kosovo. In this way DRLNGO ensures that NGOs are protected from criminal activities.

1532. Although not specific for the NGOs sector, it should be noted that in November 2007 the Government of Kosovo signed a Memorandum of Cooperation with the CiviKos Platform. This memorandum represents the first formal document that provides for a mutual commitment and institutional cooperation in genuine partnership between the Government and civil society. CiviKos Platform is an initiative of civil society organizations in Kosovo started in early 2007 and officially registered on 2 September 2007, aiming at creating an enabling environment for cooperation of formal civil society sector and the Government. A joint meeting was held in April 2012 to address topics concerning development of a cooperation strategy between the Government and the civil society.

1533. There is therefore no specific obligation on any authority to undertake outreach to the NGOs sector within the context of the prevention of money laundering and the financing of terrorism.

1534. Notwithstanding the provisions of Article 24 of the AML/CFT Law there is no obligation to undertake outreach to the NGOs sector to make them at least aware of their obligations, although morally this responsibility should be further assumed by the FIU or DRLNGO or jointly.

1535. It is however positively noted that according to information provided some generic awareness is being conducted and the CiviKos Platform should better serve for this purpose.

1536. There is however a definite need to identify responsibilities and to better formalise and structure outreach to the sector to strengthen awareness on vulnerabilities and risks to NGOs posed through the misuse of such organisations.

1537. To this effect there is a need for more cooperation, coordination and information sharing between the relevant authorities, such as the DRLNGO, the FIU, Tax Administration and other authorities who can contribute to the raising of awareness.

1538. Paragraph (4) of the proposed new Article 2A as recommended under the analysis of EC SR VIII.1 above is meant to partly provide accordingly under the responsibility of DRLNGO in cooperation with other authorities in particular the FIU.

1539. Consequently it is important that DRLNGO in cooperation with the FIU undertakes an urgent outreach programme to the NGO sector with a view to protecting the sector from terrorist financing or money laundering. This should include the production of freely available publications on legal compliance and good practice and policies on NGOs and terrorism and NGOs operating internationally. To this effect DRLNGO and FIU should further implement terrorism financing and prevention of money laundering awareness training starting with promulgating the FATF typologies of TF/ML abuse of the NPO sector.

Effective supervision or monitoring – Essential Criterion SR VIII.3

1540. EC SR VIII.3 requires the promotion of an effective supervision or monitoring regime of those NGOs that account for a significant portion of the financial resources under control of the sector and those that account to a substantial share of the international activities of the sector.

1541. In accordance with the Law on Banks an NGO may also seek to be registered as a microfinance institution with the CBK and still retain its status of NGO. In such instances the institution, referred to in the Law as an ‘NGO Microfinance Institution’ would be required to respect certain provisions of the Law on Banks that apply to microfinance institutions. Moreover according to Article 111 of the Law on Banks, and subject to the therein established procedures, an NGO Microfinance Institution can convert to a joint stock company microfinance institution. Article 116 of the Law on Banks provides that *After the application is submitted and registration is completed under this Law with CBK, NGO Microfinance Institutions will no longer be regulated by the Ministry of Public Administration.* It is worth noting that during the on-site visit DRLNGO expressed certain reservations on this procedure in the Law on Banks.¹⁶²

1542. Article 18 of the Law on NGOs imposes various financial and activity reporting obligations on NGOs with a public beneficiary status. To this effect such organisations must file each year an annual report to the Competent Body with respect to its operations and activities within Kosovo. This reporting includes the financial statements prepared in accordance with the requirements of the Competent Body and other information as established by the Law. Non submission of the annual report is subject to sanctions by the Competent Body in accordance with the Law.

1543. Moreover the Law on NGOs provides for regulatory measures that the DRLNGO can undertake where an NGO fails to meet any of its reporting obligations under the Law, including the suspension or removal of the public beneficiary status of the NGO or its removal from the Register.

1544. In its replies to the Questionnaire, DRLNGO claims that according to the provisions of the Law on NGOs, monitoring or supervision is not a competence of the DRLNGO and that this should be done by other bodies that are more competent for these purposes.

1545. With regards to the provisions of Article 24 of the AML/CFT Law on additional obligations for NGOs DRLNGO is further of the opinion that it does not have the capacity or the remit to monitor accordingly within its mandate under the Law on NGOs to register such organisations.

1546. Notwithstanding the Memorandum of Understanding for the Exchange of Information signed between the FIU and DRLNGO on 16 December 2011 in accordance with the then applicable UNMIK Regulations, includes provisions for participation in inspections of NGOs by both parties.¹⁶³

5.1 The FIC may in its discretion and if it considers advantageous, invite the MPS/DRNGO to designate a Department official to accompany FIC officials during the conduct of an onsite inspection of any NGO.

¹⁶² On 24 December 2012 the Constitutional Court took a decision on interim measures (Case KO 97/12 - Ombudsperson) for a period up to 31 January 2013 to immediately suspend the implementation of the Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, for the same duration. Article 90 deals with the definition of NGO Microfinance Institution; Article 95(1.6) prohibiting an NGO Microfinance Institution from selling or transferring business, merging, divesting or otherwise change structure; Article 110 on treatment of donated and surplus capital; Article 111 on procedures to convert to joint stock company and Article 116 on transitional provision and regulation of NGO Microfinance Institutions. On 30 January 2013 the Court extended the interim measures by a further 3 months to 30 April 2013. On 12 April 2013 the Constitutional Court has finally decided (No.AGJ403/13) to declare Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012 as incompatible with Articles 10, 44 and 46 of the Constitution and therefore to hold them as null and void.

¹⁶³ References to the FIC should be read as referring to the FIU.

5.2 The MPS/DRNGO may in its discretion and if it considers advantageous invite the FIC to designate an official to accompany MPS/DRNGO officials during the conduct of an onsite inspection of any NGO.

1547. Within the context of concerns expressed during the onsite visit on the lack of oversight of the NGOs sector being used for criminal purposes, the Tax Administration informed that the oversight it undertakes is related to tax matters (such as tax at source and social security contributions of their employees) although for this purpose it may examine the activities of an NGO. Tax Administration informed that there were cases where it examined NGOs. Through these examinations the Tax Administration identified irregularities as through these examinations the inspectors of the Tax Administration can access all accounts, records and information available at the NGO under examination. Other examinations involve the annual reports filed according to the Law on NGOs on their financial position, operations and activities. The scope of the examinations remains however for tax purposes. Tax Administration informed that most of the irregularities identified in the course of the examinations related to documentation not being in accordance with tax requirements.

1548. In practice adequate supervision or monitoring of any category of NGOs is absent. The Tax Administration undertakes examinations of the sector only for the purposes of tax liabilities which, according to the Tax Administration, are low. DRLNGO claims it has no monitoring mandate under the Law on NGOs and hence it does not undertake oversight of the sector which, it further claims, should be within the remit of other competent authorities – notwithstanding that the Law provides the DRLNGO with adequate powers to take corrective measures and impose administrative sanctions such as the suspension or withdrawal of the public beneficiary status. The FIU does not have a mandate under the AML/CFT Law to monitor NGOs for the purposes of Article 24 of the AML/CFT Law – notwithstanding that paragraph (4) of Article 24 of the AML/CFT Law requires NGOs to make available to the FIU and DRLNGO for inspection any documents retained in terms of the said paragraph of the Law. Moreover the AML/CFT Law gives the authority to DRLNGO to suspend or revoke the registration of an NGO for violation of any provision of Article 24 of the AML/CFT Law pursuant to Article 21 of the Law on NGOs, yet it does not provide mechanisms how this can be done in the absence of a supervisory mandate to the FIU or the DRLNGO – the latter claiming it has no such monitoring powers under the Law on NGOs.

1549. The lack of monitoring or supervision of NGOs manifests itself in situations where a non-government institution has a status of an “NGO Microfinance Institution” which remains under the governance of the DRLNGO until it loses its “NGO” status when it would fall within the remit of the CBK in terms of the Law on Banks.¹⁶⁴

1550. DRLNGO claims it has no monitoring mandate under the Law on NGOs. This Report begs to differ. DRLNGO has an obligation under the Law on NGOs to monitor NGOs on an off-site basis through the submission of the statements required under Article 12 of the Law and the Annual Reports in accordance with Article 18 of the Law on NGOs – but not for AML/CFT purposes. Indeed, as explained, DRLNGO is composed of two divisions – one for registration and the other for the review of the reports and financial analysis. According to the web-site of the Ministry for Public Administration, and more precisely that for DRLNGO, the Division within DRLNGO responsible for ‘Reporting and Monitoring’ performs the following activities:

- accepts and analysis annual reports with financial presentation of NGO;
- monitors the activities of NGO in order to find out how much do they respect their status and other obliged laws and it recommends needed advancements;

¹⁶⁴ This without prejudice to the recent decision of the Constitutional Court with respect to the suspension of certain relevant articles of the Law on Banks.

- it cooperates with other institutions;
- it takes decisions in compliance with the law; and
- registers NGOs, it provides public beneficiary status, takes decision for suspension of PBS, revoking and deregistration of NGO.

It therefore follows either that DRLNGO does in fact assume prudential monitoring responsibilities under the Law on NGOs or else that the activities it performs according to the Ministry web-site are not correct.

1551. Moreover, one questions the current validity of the provisions under Article 5 of the MoU for participation in inspections if both Parties to the agreement do not currently have a legal supervisory mandate. In the circumstances the anomaly in Article 5 of the Agreement can only become legally valid with a proper clear supervisory mandate. Otherwise the Article needs to be reviewed.¹⁶⁵

1552. Indeed, a supervisory mandate for the FIU with respect to NGOs under Article 30 of the AML/CFT Law is questionable. Article 30 provides for supervisory powers of the FIU for reporting subjects *as determined in sub-paragraphs 1.4 to 1.8, paragraph 1 of Article 16 of this law*. This excludes NGOs (and Political Parties) as Article 16 does not consider NGOs (and Political Parties) as reporting subjects. Hence, references to *records which are maintained pursuant to Articles 16 to 28 of this law or documents relevant to determining whether obligations under Articles 16 to 28 of this law have been complied with* become irrelevant for Article 24 on additional obligations of NGO as NGOs do not fall within *sub-paragraphs 1.4 to 1.8, paragraph 1 of Article 16 of the AML/CFT Law* as reporting subjects - notwithstanding that paragraph (4) of Article 24 of the AML/CFT Law requires NGOs to make available to the FIU and DRLNGO for inspection any documents retained in terms of the said paragraph of the Law.¹⁶⁶

1553. Within this context, the recommendations made under Section 5.1, and in particular paragraph (2) and (3) of this Report should provide to rectify these identified weaknesses.

1554. Moreover, the amended AML/CFT Law should remove the ambiguity in Article 30 of the AML/CFT Law and designate an authority to monitor the NGOs sector for the purposes of Article 24 of the AML/CFT Law. This responsibility could either be vested within the FIU or DRLNGO.¹⁶⁷ Wherever this responsibility is placed the Law must ensure co-operation between the FIU and DRLNGO – see analysis of EC VIII.4.1 for co-operation measures.

1555. Finally, as part of its supervisory regime, DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector's international activities. This assessment should be shared with the FIU.

Maintenance of governance information – Essential Criterion SR VIII 3.1

1556. EC SR VIII.3.1 requires NGOs to maintain information on the purpose and objectives of their stated activities and on the identity of the person or persons who own, control or direct the activities. The latter would include senior officers, board members and trustees.

¹⁶⁵ The amendments to the AML/CFT Law now designate the FIU as the supervisory authority for NGOs for the purposes of compliance thereto.

¹⁶⁶ Under the new amended AML/CFT Law NGOs are now recognised as reporting subjects under Article 16 and hence subject to monitoring and oversight by the FIU for the purposes of the AML/CFT Law. The proposed new Article 2A to the Law on NGOs will provide for the prudential supervisory powers of the DRLNGO.

¹⁶⁷ The draft Amending Law amending the AML/CFT Law envisage supervisory responsibility for NGOs under the Law to be vested within the FIU as NGOs are being added to reporting subjects under Article 16 of the Law.

1557. Article 12 of the Law on NGOs obliges the Competent Body to maintain a register of NGOs that *shall contain the name, address, organizational form and purposes, establishers of each NGO, name and other contact information of its authorized representative and shall also indicate if an NGO has public benefit status.*

1558. While the Competent Body is obliged to keep the public register updated, Article 12 further obliges domestic, foreign and international NGOs to submit an annual statement to the Competent Body either confirming that the information required to be retained in the register is still valid, or that changes have occurred. Failure to submit the annual statement can lead to the removal of the NGO from the Register.

1559. Article 18 of the Law on NGOs further requires NGOs with a public beneficiary status to file an annual report with the Competent Body with respect to their operations and activities within Kosovo. Reports must be filed by the end of March for the reporting year ending 31 December of the previous year. The Report includes three sections on management and administration, activities and achievements, and financial statements. Within the context of EC SR VIII.3.1 it is worth noting that the management and administration section includes details on the name, acronym, address, telephone number, fax number and e-mail address of the organisation; the name of the chief executive officer (e.g. the manager or Executive Director), and the names of the members of the governing body, including the names and titles of all officers in senior positions. Also within this context, the section on activities and achievements further includes a statement of the mission and public benefit purpose of the reporting NGO.

1560. There are no reporting requirements on NGOs that do not enjoy the public beneficiary status.

1561. The obligation on NGOs to provide DRLNGO with an annual statement for updating the Register and the information submitted with the Annual Report under the Law provides most of the information that is required under EC SR VIII.3.1.

1562. Moreover, since NGOs are required to report it follows that they have to maintain this information. Paragraph (11) of Article 9 of the Law on NGOs requires NGOs to report changes to their Statute within 30 days that these occur. However it does not appear that this obligation covers the names of officials indicated under paragraphs (4.2) and (4.3) of Article 18 of the Law on NGOs

1563. Furthermore, there is no obligation to maintain or report information on the owner(s) of an NGO if these are different from the founders since, notwithstanding the references to “owners” in the FATF EC SR VIII.3.1 the Kosovo authorities have informed that NGOs have no “owners” separate from the founders.

1564. Notwithstanding the obligation for continuous reporting under paragraph (11) of Article 9 of the Law on NGOs, it is recommended to amend this paragraph by adding the words *and the information required under paragraph (4.2) and paragraph (4.3) of Article 18 of this Law* after the current words “and paragraph 5 of this Article”,

Appropriate measures to sanction violations – Essential Criterion SR VIII.3.2

1565. EC SR VIII.3.2 requires the availability of appropriate measures to sanction violations of oversight measures or rules either by the NPO or by persons acting on their behalf. Such sanction should not preclude parallel civil, administrative or criminal proceedings against the NPO or persons acting on their behalf where appropriate.

1566. The Law on NGOs does not envisage any sanctions for violations of oversight measures except the removal of the NGO from the Register (Article 21) and the suspension or revocation of the ‘public beneficiary status’ (Article 19).

1567. The Competent Body can remove an NGO from the Register as a sanction for violation of the Law only if for three (3) years the NGO fails to file the annual statement foreseen under paragraph (5) of Article 12 of the Law on NGOs dealing with the information retained by the Competent Body in the public Register. The Law on NGOs does not specify that the removal of an NGO from the Register is without prejudice to any civil, criminal or administrative procedures with respect to the organisation itself or persons acting on its behalf

1568. Article 19 of the Law on NGOs empowers the Competent Body to suspend or revoke the ‘public beneficiary status’ and all benefits thereof under procedures established by the Law when:

- an NGO fails to submit a complete annual report in accordance with Article 18 of the Law on NGOs within the stipulated time;
- after review of an annual report submitted by a NGO the Competent Body determines that the NGO no longer meets the requirements for public beneficiary status foreseen under Article 17 of the Law.

1569. The Law on NGOs does not specify that the suspension or revocation of the ‘public beneficiary status’ is without prejudice to any civil, criminal or administrative procedures with respect to the organisation itself or persons acting on its behalf

1570. Article 24 of the AML/CFT Law establishes additional obligations for NGOs. Paragraph (8) of the Article requires the Competent Body to *suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organizations (No 03/L-134). The imposition of such sanction shall be without prejudice to any criminal proceedings.*

1571. As already argued in this Report the administrative sanctions contemplated under Article 31 of the AML/CFT Law are limited in scope and it is debatable to what extent these can be applied to NGOs within the context of their additional obligations under Article 24 of the AML/CFT Law.

1572. On the other hand, other criminal offences and penalties contemplated under Article 33 of the AML/CFT Law appear to be applicable to NGOs or persons acting on their behalf for breaches of the additional obligations for NGOs stipulated under Article 24 of the AML/CFT Law.

1573. An NGO that is also authorised by the CBK to operate as an NGO Microfinance Institution is subject to the penalties and remedial measures contemplated by Article 105 and Article 106 of the Law on Banks.¹⁶⁸

1574. In general, the above provisions to a large extent cover the requirement of EC SR VIII.3.2. Sanction for oversight measures for the prevention of money laundering and financing of terrorism are partly covered through the AML/CFT Law.

1575. However, the Law on NGOs does not provide for prudential sanctions in two instances:

¹⁶⁸ Without prejudice to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012 and subsequent.

- breaches of obligations under Article 4 prohibiting the distribution of earnings;
- breaches of paragraph (11) of Article 9 for non reporting of changes to the registration documents within the stipulated period.

1576. The Kosovo authorities may wish to consider introducing administrative measures and/or sanctions in this regard.

1577. Moreover, it is noted that while paragraph (5) of Article 24 of the AML/CFT Law refers to the powers of the Competent Body under the Law on NGOs to *suspend or revoke the registration of an NGO for violation of any provision of the present article pursuant to Article 21 of the Law on Freedom of Association in Non-Governmental Organizations*, Article 21 of the Law on NGOs only empowers the Competent Body to remove the NGO from the Register.

1578. Therefore, while the provisions in Article 24 of the AML/CFT Law and those in Article 21 of the Law on NGOs need to be harmonised, it is recommended to create a link in the Law on NGOs with the provisions of Article 24 of the AML/CFT Law. To this effect it is recommended that a new paragraph (1.3) is added to Article 21 of the Law on NGOs:¹⁶⁹

Article 21 para (1.3) if the NGO manifestly does not comply with the added obligations under Article 24 of the Law on the Prevention of Money Laundering and the Terrorism Financing (Law no. 03/L-196 of 30/09/2010).

Licensing or registration of non-government organisations – Essential Criterion SR VIII.3.3

1579. EC SR VIII.3.3 requires that NGOs are either licensed or registered by competent authorities.

1580. DRLNGO within the Ministry for Public Administration is the authority competent to implement the Law on NGOs, including registration.

1581. The Law on NGOs provides for the registration and de-registration process. According to information provided by DRLNGO an NGO is first registered as an NGO under the Law on NGOs and then considered as a legal person. There is no further registration under the Law on Business Organisations as there are two separate registers under the two laws. Notwithstanding, there could be instances where the KBRA could require information on an NGO that is registered with DRLNGO under the Law on NGOs.

1582. Since a domestic NGO can be in the form of an association or a foundation, Article 6 of the Law on NGOs clearly articulates the requirements to establish either type.

1583. The Law on NGOs provides that every person is eligible to register an NGO under the terms and conditions of the Law. On the other hand, no person needs to register the NGO to exercise the right on freedom of association. However, once registered an NGO must comply with the provisions of the Law on NGOs. In this respect, Article 9 of the Law on NGOs articulates the procedures for registration. The Law on NGOs further provides for deregistration of NGOs under circumstances prescribed by the Law itself under Article 21.

1584. It should however be noted that, from information provided by DRLNGO, in the registration process, the DRLNGO does not undertake or apply any due diligence measures to

¹⁶⁹ Unless Article 24 of the AML/CFT Law should actually refer to Article 19 of the Law on NGOs in which case the proposed paragraph (1.3) should be considered for inclusion accordingly.

ensure that the NGO is not being set up for illegal purposes. Indeed it has informed that it does not even check the names of the founders against lists of designated persons issued by the United Nations, the United States or the European Union – in fact DRLNGO informed it does not even have or receive copies of such lists.

1585. As detailed under the above analysis of EC SR VIII.3 of this Report, in accordance with the Law on Banks an NGO may also seek to be registered as a microfinance institution with the CBK and still retain its status of an NGO.¹⁷⁰

1586. Once registered with DRLNGO under the Law on NGOs, an NGO is further required to register with the TAK for tax purposes.

1587. The designation of DRLNGO as the competent body to register NGOs, together with the registration requirements and procedures under the Law on NGOs cover the requirement of EC SR VIII.3.3 to a large extent.

1588. It is however of concern that in the registration process, which clearly falls within the competences of DRLNGO, there is no due diligence procedures on the founders and hence it becomes basically impossible for DRLNGO to identify at the registration stage whether an NGO is being set up as a front organisation for illegal purposes.

1589. It is therefore recommended that in its internal registration procedures the DRLNGO includes a requirement to conduct due diligence on founders at least by checking names provided against those on the lists of designated persons under the United Nations Security Council Regulations, the United States and the European Union.

1590. To this effect, the FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR designated individuals and organisations should be extended to DRLNGO immediately.

Record keeping – Essential Criterion SR VIII.3.4

1591. EC SR VIII.3.4 requires that NGOs maintain for five years minimum and make available to relevant authorities, records of domestic and international transaction that are sufficiently detailed to verify the use of funds consistent with the purpose and objective of the organisation.

1592. Although in its replies to the Questionnaire DRLNGO claims that NGOs *are obliged to keep the above cited records in their archives*, the Law on NGOs does not appear to impose any obligations on the maintenance of any type of records by an NGO, even for prudential purposes.

1593. Moreover, in their replies to the Questionnaire the State Prosecutor and the Tax Administration both claim that NGOs are required to maintain records in accordance with the AML/CFT Law and the Law on Tax Administration.

1594. Paragraph (4) of Article 24 of the AML/CFT Law dealing with additional obligations of NGOs imposes an obligation on NGOs to maintain accounts that document all income and disbursements. The accounts shall identify income by source, amount, and manner of payment, such as currency or payment order, and identify disbursements by recipient, intended use of funds, and manner of payment. The Law requires that account documents be

¹⁷⁰ Please refer to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012.

maintained for five (5) years and shall be available for inspection upon demand by the FIU and the Competent Body under the Law on NGOs.¹⁷¹

1595. Paragraph (2.1) of Article 13 of the Law on Tax Administration, referred to by the State Prosecutor and the Tax Administration, stipulates that a person who is required to create records under the Law on Tax Administration is further required to retain those records for a period of at least six years after the end of the tax period in which the tax liability to which they relate arose.

1596. There are no legal obligations under the Law on NGOs to maintain records of domestic and international transactions.

1597. The record keeping obligations, both in type and retention period, under paragraph (4) of Article 24 of the AML/CFT Law to a large extent cover the requirements of EC SR VIII.3.4. Article 24 however does not establish the initiation timing for the retention period.

1598. It is therefore recommended to amend paragraph (4) of Article 24 of the AML/CFT Law as follows for better harmonisation with EC SR VIII.3.4:¹⁷²

*Article 24 para (4) NGOs shall maintain accounts that document all income and disbursements. The accounts shall identify income by source, amount, and manner of payment, such as currency or payment order, and identify disbursements by recipient, intended use of funds, and manner of payment. **For the purposes of this Law, account documents shall be maintained for five (5) years following the execution of the transaction and shall be maintained in a manner such that the relevant competent authorities would be able to verify that transactions undertaken are consistent with the purpose and objectives of the NGO. To this effect, account documents shall be made** available for inspection upon demand by the FIU, ~~and~~ the competent body under Law on Freedom of Association in Non-Governmental Organizations (~~No 03/L-134~~) (~~No 04/L 057~~) and any other relevant competent authority for the purposes of fulfilling its legal obligations.*

1599. The proposed amendment to paragraph (4) of Article 24 of the AML/CFT Law sets the initiation time for the retention period; ensures the manner in which documents are retained; and ensures availability upon demand to all relevant competent authorities who have to fulfil legal obligations in relation to NGOs.

Investigations and gathering of information – Essential Criterion SR VIII.4

1600. EC SR VIII.4 requires a country to implement measures to ensure the effective investigation and gathering of information on NGOs.

1601. Article 12 of the Law on NGOs requires the Competent Body to maintain a Register of NGOs with details on the name, address, organizational form and purposes, founders of the NGO, name and other contact information of its authorized representative and an indication if a NGO has a public beneficiary status. Article 12 requires that all NGOs submit an annual

¹⁷¹ The Draft Amending Law to the AML/CFT Law proposes an amendment to Article 16 to include NGOs as ‘reporting subjects’ for the purposes of the Law. Under these circumstances all the record keeping obligations under the AML/CFT Law for reporting subjects should apply to NGOs. There is no proposal to review paragraph (4) of Article 24.

¹⁷² It should be ensured that the proposed amendment to Article 24 would not eventually conflict with any changes in the status of NGOs under the AML/CFT Law as proposed to be amended by the draft Amending Law.

statement to the Competent Body indicating changes. Moreover the register is available to the public subject to data protection.¹⁷³

1602. Article 18 of the Law on NGOs also requires all NGOs that have been granted a public beneficiary status to file an annual report with the Competent Body. The annual report shall necessarily consist of three sections dealing with Management and Administration; Activities and Achievements, and Financial Statements. These reports are eventually made available to the public.

1603. Notwithstanding that the Reports filed by NGOs with the Competent Body (DRLNGO) are available to the public, paragraph (9) of Article 24 of the AML/CFT Law requires that such Reports are to be made available to the FIU upon request.

1604. Paragraph (4) of Article 24 of the AML/CFT Law also requires that information and documents relating to the maintenance of accounts that document all income and disbursements are made available upon request to the FIU and the Competent Body.¹⁷⁴

1605. The Law on NGOs and the AML/CFT Law place obligations on NGOs to report and provide information on their administration, operations and financial situation to the Competent Body and to the FIU. Such information is made public.

1606. There are however no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require – probably, although not specified, with the exception of clarifications on reports submitted in accordance with Article 18 – with the exception of documents retained by NGOs for the purposes of paragraph (4) of Article 24 of the AML/CFT Law.

1607. To this effect, the proposed paragraph (3) and (4) of the recommended new Article 2A to the Law on NGOs – see the analysis for EC SR VIII.1 in this Report – shall provide the necessary legal mandate and empowerment to DRLNGO.

1608. Likewise, and notwithstanding that NGOs are obliged to report any suspicious acts or transactions to the FIU, Article 24 of the AML/CFT Law does not empower the FIU to demand any information from NGOs except for the Annual Reports drawn up under Article 18 of the Law on NGOs and the records maintained under paragraph (4) of Article 24 of the AML/CFT Law.

1609. It is therefore recommended to insert a new paragraph (5A) to Article 24 of the AML/CFT Law which, consistent with the proposed new paragraph (1.2A) to Article 14 of the AML/CFT Law,¹⁷⁵ empowers the FIU to demand information, data or documents from NGOs for the purposes of fulfilling its obligations under the Law, in addition to paragraph (4) of Article 24:

Art 24 para (5A) In addition to the powers under paragraph (4) and paragraph (9) of this Article, for the purposes of fulfilling any of its obligations under this Law, the FIU may demand from any NGO any information, data, or documents that the Unit may require.

¹⁷³ Refer to the analysis for EC SR VIII.3.1 of this Report for further information and analysis.

¹⁷⁴ See proposed amendments to paragraph (4) of Article 24 of the AML/CFT Law under the analysis of EC SR VIII.3.4 of this Report.

¹⁷⁵ Refer to the analysis of EC 13.1 in Section 3 of this Report.

Co-operation, co-ordination and information sharing – Essential Criterion SR VIII.4.1

1610. EC SR VIII.4.1 requires the establishment of effective systems of domestic co-operation, co-ordination and information sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NGOs of potential money laundering or financing of terrorism concern.

1611. There are no provisions for the sharing of information by DRLNGO in the Law on NGOs as all reports filed with DRLNGO under Article 12 and Article 18 of the Law are made public. DRLNGO however may be in possession of other information on NGOs that is not made public and hence is not shared.

1612. Paragraph (1.5) of Article 14 of the AML/CFT Law requires the FIU and other bodies and institutions in Kosovo to mutually cooperate and assist one another in performing their duties and to coordinate activities within their competence, consistent with the applicable laws. This statement is generic and could therefore be applied within the context of the provisions of Article 24 of the AML/CFT Law on the additional obligations of NGOs.

1613. The FIU informed that on 16 December 2011 it entered into a co-operation agreement with DRLNGO for the exchange of information. The Memorandum of Understanding establishes the procedures, conditions and criteria for the exchange of information and the obligations of each party on the treatment of information exchanged. Through the Agreement the FIU can request information from DRLNGO and the latter shall comply *for the purposes of financial analysis and other activities within the authority of the FIC*. However, while the Agreement binds both parties with conditions on information exchange, the Agreement does not empower DRLNGO to request information from the FIU, thus creating an ambiguity.

1614. The FIU further informed, and DRLNGO confirmed, that consequent to the co-operation agreement, the Unit has established direct connection/access to the database of DRLNGO. Another connection is to exchange information with the officials of the DRLNGO through the goAML message board which is a secure internal way of exchanging information.

1615. In its replies to the Questionnaire, Tax Administration informed that, depending on requests from competent bodies, it will provide all information available to it about NGOs.

1616. Paragraph (1.5) of Article 14 of the AML/CFT Law imposes an obligation on all relevant competent authorities to mutually cooperate and assist each other. It does not however set any mechanisms to bring this obligation into effect.

1617. In the case of authorities holding information on NGOs this is done through co-operation agreements and on the basis of direct requests – with the FIU having direct access to the DRLNGO database.

1618. It is however recommended to revise Article 4 of the Memorandum of Agreement to better clarify the obligations of both parties.

1619. Therefore, whereas some basis for co-operating and sharing of information may exist, its effectiveness in practice could not be measured.

1620. It is consequently recommended that the appropriate authorities with information on NGOs either form part of a wider co-ordination group for the prevention of money laundering and the financing of terrorism in terms of the obligation under paragraph (1.5) of Article 14 of the AML/CFT Law or else ensure that they periodically meet to discuss relevant issues and document the outcome of such meetings.

Access to information for investigation purposes – Essential Criterion SR VIII.4.2

1621. Essential Criterion SR VIII.4.2 requires that authorities have full access to information on the administration and management of an NGO in the course of an investigation.

1622. As detailed under the analysis for EC SR VIII.4 above, the Law on NGOs and the AML/CFT Law place obligations on NGOs to report and provide information on their administration, operations and financial situation to the Competent Body and to the FIU. Such information is made public.

1623. In accordance with Article 18 of the Law on NGOs all NGOs that have been granted a public beneficiary status are required to file an annual report with the Competent Body. The annual report shall necessarily consist of three sections dealing with Management and Administration; Activities and Achievements, and Financial Statements.

1624. Moreover, the provisions of the MoU between the FIU and DRLNGO enable the FIU to demand and obtain any information it requires to fulfil its responsibilities under the Law from DRLNGO. Through this agreement, the FIU further has direct access to the databases of DRLNGO.

1625. Furthermore, Article 119 of the CPC gives the Prosecutor the right to obtain all documentary evidence including financial records. Moreover, Articles 70 - 73¹⁷⁶ of the new CPC gives the law enforcement agencies the powers to collect information to investigate crime at the initial investigative phase.

1626. Notwithstanding the submission of the Annual Reports the powers of the FIU and DRLNGO to demand information appears to be limited. To this effect the analysis and recommendations made above in relation to EC SR VIII.4 apply.

1627. The provisions of the CPC with regards to the Prosecutor and the law enforcement agencies however positively contribute to compliance with EC SR VIII.4.2.

Investigative expertise and capability – Essential Criterion SR VIII.4.3

1628. EC SR VIII.4.3 requires countries to develop and implement mechanisms for the prompt sharing of information among all relevant competent authorities in order to take preventive or investigative action when there is suspicion or reasonable grounds to suspect that a particular NPO is being exploited for terrorist financing purposes or is a front organisation for terrorist fund raising.

1629. If an NPO were to be investigated (and there are no statistics to suggest they ever have been) then the normal investigative processes and criminal sanctions described elsewhere would apply. (Article 200 of the ‘old’ CPC, Chapter IX of the new CPC).¹⁷⁷

1630. The range of terrorism offences are defined in Article 135 of the new CC 04/L-082. Subsection 4 defines a Terrorist Group but not a Terrorist Organisation. The definition of Terrorist Financing in the AML/CFT Law Article 2.1.36 means;

the provision or collection of funds, by any means, directly or indirectly, with the intention that they should 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

¹⁷⁶ Article 201 of the ‘old’ CPC – General powers of the police to investigate.

¹⁷⁷ FATF SR VIII.4.

Articles 112 and 113 of the Criminal Code of Kosovo and within the specific definitions provided by FATF in the Special Recommendation II.

1631. There is a proposed amendment to the AML/CFT Law¹⁷⁸ that specifically criminalises financing of terrorist organisations:

36.B.1. Whoever, when committed intentionally, participates as an accomplice, provides or collects funds or organizes or direct others to provide or collect funds, or attempts to do so, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used in full or in part:

1.1 to carry out a terrorist act;

1.2 by a terrorist; or

1.3 by a terrorist organization;

will be deemed to have committed the act of terrorist financing.

2. The offence is committed irrespective of any occurrence of a terrorist act referred to in paragraph 1, or whether the funds have actually been used to commit such act.

1632. The amendments contain no definition of a terrorist organisation.

1633. As indicated earlier in this Section in registering NGOs DRLNGO does not undertake any due diligence procedures on the founders nor does it follow any changes through a due diligence process. Moreover, DRLNGO holds that it is not in its legal remit to examine whether an NGO is being established for criminal activities except to the extent of the prohibitions in the Law on NGOs for establishing NGOs i.e prohibition under paragraph (1.4) of Article 10.

1634. Moreover, the position taken by DRLNGO that it has no supervisory mandate under the Law on NGOs, and hence no supervisory mandate for the purposes of Article 24 of the AML/CFT Law on the additional obligations of NGOs under the Law, it is difficult for DRLNGO or any other authority to identify whether a particular NGO is being exploited for terrorist financing purposes and hence to investigate.

1635. Hence, notwithstanding that as indicated above if an NPO were to be investigated then the normal investigative processes and criminal sanctions described elsewhere in this Report would apply, there is a serious problem if NGOs that should be investigated cannot be identified.

1636. Consequently the recommendations made in this Section of the Report for the supervisory powers of the DRLNGO and for the application of due diligence measures on founders assume even higher importance.

Points of contact and procedures for international requests – Essential Criterion SR VIII.5

1637. EC SR VIII.5 requires countries to have appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs that are suspected of terrorist financing and other forms of terrorist support.

1638. The Law on NGOs is silent on the sharing of information with other authorities but, as already indicated earlier, all reports filed by NGOs in accordance with the Law on NGOs are made public.

¹⁷⁸ Article 36B.

1639. Paragraph (1.7) of Article 14 of the AML/CFT Law empowers the FIU to, spontaneously or upon request, share information with any foreign counterpart agency that performs similar functions and is subject to similar confidentiality obligations, regardless of the nature of the agency, subject to reciprocity

1640. On the basis of these provisions the FIU enters into MoUs with its foreign counterparts through which points of contact and procedures are established for the sharing of information and other assistance.

1641. Notwithstanding, in its replies to the Questionnaire regarding Recommendation 26 the FIU has informed that given that it has not yet managed to even apply for Egmont membership, it does not take into account the Egmont Group '*Principles for Information Exchange between Financial Intelligence Units for Money Laundering cases*'.

1642. Moreover, any international co-operation or requests for information sought or given and that is not directly between FIU to FIU will be routed through the ILECU within the Ministry of the Interior and the Department for International Legal Co-operation within the Ministry of Justice. There is no evidence this has yet happened in relation to NGOs.

1643. To an extent it appears that Kosovo has in place appropriate points of contact and procedures to respond to international requests. Although such procedures have not been established specifically to cater for NGOs, yet the procedures in place can be applied in such eventualities.

1644. Notwithstanding, it is advisable that, irrespective of not having yet applied for Egmont membership, the FIU should take account of the Egmont Principles for Information Sharing in establishing procedures under MoUs with other foreign FIUs.

1645. However, concerns expressed under the analysis for EC SR VIII.4.3 of this Section with respect to the identification of NGOs that may be exploited or founded for illegal purposes, such as the financing of terrorism, would negatively impact on the effective sharing of information in responding to foreign requests.

1646. Hence recommendations made thereto become even more important within this context.

Effectiveness

1647. This Report expresses serious concerns on the effectiveness of the NGO regime. Although there is a registration process, there is no due diligence procedure. Moreover, it appears that the process stops at the registration stage as DRLNGO maintains that registration and deregistration is the only mandate it has under the Law on NGOs.

1648. There is no outreach to the sector, monitoring of the sector is completely absent except by the Tax Authorities for tax purposes and this is very limited because of the low tax liabilities of NGOs, and there are conflicts between the AML/CFT Law and the Law on NGOs.

1649. Concerns on effectiveness of the regime are further accentuated by the fact that an NGO can seek a financial institution status under the Law on Banks.¹⁷⁹

¹⁷⁹ Without prejudice to the Decision on Interim Measures taken by the Constitutional Court on 24 December 2012 and subsequent.

5.2 Recommendations and Comments

1650. Some provisions under the Essential Criteria for the preventive measures for SR VIII may be found in the applicable legislation or in practice. However a number of shortcomings have also been identified dealing with various aspects for the NGOs regime.

1651. While it is strongly recommended that the full analysis and comments to the respective EC are read, the following indicate the major weaknesses identifies:

- no assessment of laws and regulations and on risks and vulnerabilities has been carried out as no authority assumes this responsibility (EC SR VIII.1);
- no outreach and no legal obligation for authorities to outreach to the NGOs sector and hence no authority assumes this responsibility (EC SR VIII.2);
- prudential supervisory oversight or monitoring of any category of NGOs is absent (EC SR VIII.3);
- legal ambiguity on the oversight of NGOs for the purposes of the AML/CFT Law in terms of Article 30 rendering supervisory powers inapplicable (EC SR VIII.3);
- anomaly of supervisory powers in Article 5 of the Memorandum of Understanding (EC SR VIII.3);
- no obligation on NGOs to maintain governance information on a continuous basis in all instances (EC SR VIII.3.1);
- Law on NGOs does not provide for prudential sanctions for breaches under Article 4 and paragraph (11) of Article 9 of the Law on NGOs (EC SR VIII.3.2);
- there is a conflict between paragraph (8) of Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body (EC SR VIII.3.2);
- there is no due diligence procedures on the founders at the registration stage (EC SR VIII.3.3);
- no empowerment provisions for DRLNGO under the Law on NGOs to demand any other information it may require (EC SR VIII.4);
- Article 24 of the AML/CFT Law does not empower the FIU to demand further information from NGOs (EC SR VIII.4);
- ambiguity in Article 4 of the Memorandum of Understanding for cooperation between the FIU and DRLNGO (EC SR VIII.4.1);
- effectiveness issues in sharing of information and coordination between authorities with relevant information on NGOs (EC SR VIII.4.1);
- concern on possibility to investigate NGOs that are either being exploited for financing of terrorism or have been established for terrorism fundraising (EC SR VIII.4.3); and
- effectiveness issues consequent to the narrow views of DRLNGO on its responsibilities under the Law on NGOs and the sharing of information.

1652. Having identified weaknesses or shortcomings, the Report makes concrete recommendations to rectify them. It is therefore highly recommended that the full analysis and recommendations made in this Section dealing with SR VIII are read to put the following recommendations within context:

- insert a new Article 2A on the ‘Designation and Competences of the Competent Body’ in the Law on NGOs establishing the competencies of the Competent Body with regards to designation; functions and responsibilities

under the Law; oversight of NGOs; and periodic risk assessment including sharing of information;

- amend definition of ‘Competent Body’ in Article 2 of the Law on NGOs;
- remove legal ambiguity on supervisory powers under Article 30 and designate an authority to monitor NGOs for the purposes of Article 24 of the AML/CFT Law;¹⁸⁰
- amend paragraph (11) of Article 9 of the Law on NGOs requiring NGOs also to report changes in relation to paragraph (4.2) and (4.3) of Article 18 of the Law on NGO;
- consider introducing prudential sanctions for breaches of Article 4 and paragraph (11) of Article 9 of the Law on NGOs;
- harmonise Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body;
- insert a new paragraph (1.3) to Article 21 of the Law on NGOs providing a link to Article 24 of the AML/CFT Law on removal of registration for non compliance with Article 24 of the AML/CFT Law;
- include measures in the internal licensing procedures of DRLNGO for due diligence on founders, at least by reference to United Nations and other lists of designated persons and entities;
- amend paragraph (4) to Article 24 of the AML/CFT Law to provide for the maintenance of transaction records and their availability to competent authorities;
- insert a new paragraph (5A) to Article 24 of the AML/CFT Law empowering the FIU to demand information, data or documents from NGOs for the purposes of fulfilling its obligations under the Law further to paragraph (4) and paragraph (9) of the same Article;
- review Article 4 of the Memorandum of Understanding between the FIU and DRLNGO;
- establish practical mechanisms for co-operation and sharing of information between authorities relevant to the NGOs sector;
- undertake an assessment of risks and vulnerabilities to which NGOs may be exposed or be exploited for financing of terrorism and implement an outreach programme for NGOs to create more awareness of such risks and vulnerabilities including training awareness sessions;
- DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector’s international activities. This assessment should be shared with the FIU;
- extend FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR on designated individuals and organisations to DRLNGO; and
- implement the relevant components of the AML/CFT Strategy with immediate effect.

5.3 Rating to Special Recommendation VIII

1653. Although Kosovo has developed an adequate system for the registration of NGOs and the AML/CFT Law has imposed obligations on them including the reporting of suspicious

¹⁸⁰ The draft Amending Law amending the AML/CFT Law is proposing to place this responsibility with the FIU.

acts or transactions, various weaknesses in relation to their registration, oversight and record keeping have been identified. Moreover the lack of oversight and effectiveness issues on co-operation and sharing of information impact negatively on the implementation of a large part of the requirements under SR VIII. Consequently, within this context, the rating for SR VIII is non-compliant.

| | Rating | Summary of factors underlying rating |
|----------------|---------------|--|
| SR VIII | NC | <ul style="list-style-type: none"> • no risk assessment of sector carried out; • no outreach and no legal obligation for authorities to outreach to the NGOs sector; • absence of prudential supervisory oversight; • legal ambiguity on supervisory powers for NGOs under Article 30 of AML/CFT Law; • hence absence of AML/CFT supervisory oversight; • no obligation to maintain governance information on a continuous basis in all instances; • prudential sanctions not available for all breaches under the Law on NGOs; • conflicts between AML/CFT Law and Law on NGOs; • no due diligence procedures on the founders at the registration stage; • no empowering provisions for DRLNGO to demand any other information it may require; • no empowering provisions under the AML/CFT Law for the FIU to demand further information it may require; • concerns over identification of NGOs that should be investigated and hence possibility of investigations; and • effectiveness issues consequent to narrow views on its responsibilities by DRLNGO and in sharing of information. |

6 NATIONAL AND INTERNATIONAL COOPERATION

6.1 National co-operation and coordination (R.31)

6.1.1 Description and Analysis

High-level cooperation

1654. While the roles of the different authorities that have an AML/CFT function have been clarified to some extent in different parts of legislation, there is a lot to be done in order to ensure the full functionality of the chain, starting from intelligence gathering and ending with judgment. In this regard the successful implementation of a unified AML/CFT strategy is essential for Kosovo.

1655. At the policy level the most important development is that of an AML/CFT strategy, that was adopted in September 2012. There is a cross-agency working Group on its implementation. When and if completed, this will have a major impact on Kosovo's ability to organise and inform itself to better tackle the threats from money laundering, economic crime and terrorist financing.

1656. This strategy lays out a roadmap to:

- *Create and staff the National Office for Economic Crimes Enforcement.*
- Rewrite or significantly amend the existing Law on the Prevention of Money Laundering and Terrorism Financing (LMPTF) to be fully compliant with the FATF 40 and the EU Acquis
- Finalize a risk assessment for AML/CFT in Kosovo.
- Obtain membership in the Egmont Group of FIUs.
- Sign intergovernmental agreements with the neighbouring FIU's and with the countries that Kosovo cooperates with.
- Build and maintain the enforcement community's capacity to fulfill their obligations.
- Create a National Economic Crimes Institute responsible for all types of AML/CFT training and awareness raising efforts.
- Continuously identify training needs and develop and deliver courses as required.
- Maintain communication within the enforcement community through print and electronic media.
- Establish communication with private stakeholders and civil society, especially NGOs.
- Incorporate management practices focused on preventing and prosecuting money laundering and terrorist financing offenses.
- Track investigations and prosecutions with a view towards significantly increasing arrests, convictions, seizures and confiscations.
- Expand the responsibility for money laundering investigations to all enforcement agencies where proceeds of crime are generated.
- Maintain communication and cooperation within the enforcement community through regular meetings of the Economic Crimes Working Group.
- Conduct at least one well-resourced, financial intelligence-led task force investigation of inexplicable wealth.
- Ensure that Kosovo has a meaningful financial intelligence-led analysis program for combating the financing of terrorism.

1657. The National Office is to serve as the key coordinating and monitoring mechanism for activities of all government actors in the area of combating economic crime, including ML and TF.

1658. The Kosovo Prosecutorial Council has recently developed a Strategic Plan for Inter-Institutional Cooperation in the Fight against Organized Crime and Corruption for 2013-2015. It was not clear whether this document has been adopted, or whether the implementing Action Plan, as envisaged has been developed.

1659. This document is aimed at improving interagency cooperation and information exchange on cases of corruption and organized crime.

1660. The purposes of the strategy include the improvement and standardization of interagency cooperation, as well of information on the detection, investigation, prosecution and court decisions about specific types of criminal cases, which *includes* money laundering as one of the objectives. The strategy also aims to *improve the identification of material benefits of criminal offences and increase confiscation of material benefits of criminal offences*. The objectives also list the increased *prevention* of money laundering, improvement of quality of information and statistical data available, *inter alia* with regard to ML offences. Among its main activities the strategy lists: signing of interagency MoUs, joint training, standardization of the criminal report form, harmonization of statistical information held by various government institutions. It also envisages the nomination (by Chief State Prosecutor and Head of SPRK) of Prosecutor Experts, who will de facto be responsible for providing full support in implementing all aspects of the strategy.

1661. If effectively implemented, the measures it sets out would come a significant way to mitigating the deficiencies identified in this assessment report, as they pertain to inter-institutional cooperation and harmonization and systematization of statistical data. In view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action plan of the Strategy.

1662. It is clear that the KPC and AML/Economic Crime strategies cover a number of the same issues. This leads to a concern as to how the KPC and AML strategies will correlate in terms of practical implementation. The AML Strategy will be coordinated by the Ministry of Finance, whereas the KPC document – naturally by the State Prosecutors Office. It is important that there is high-level strategic cooperation ensured at the level of these institutions and whatever bodies responsible for the implementation and monitoring of the two strategies and Action Plans. At the moment it seems that such cooperation is lacking, particularly as the list of institutions consulted in the course of preparing the KPC Strategy did not include the FIU, or the Ministry of Finance.

1663. At the Governmental level there is a “Joint Rule of Law Co-ordination Board” which co-ordinates national policies and initiatives on the between Government Departments. This Board is co-chaired by the Deputy Prime Minister Mr Kuci and the EUSR in Kosovo. The Board discusses issues across the whole range encompassed within the rule of law from the Corrections Service, the law on asset confiscation, witness protection, money laundering etc. The Board meets quarterly. This Board should also be kept informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan in order to ensure coordination and complementarity with other issues being discussed on its agenda.

Operational cooperation and coordination

1664. Operational cooperation between various authorities has been described in detail in various sections of this report (see sections 2.6-2.8). In general it is clear that law-

enforcement agencies are still at the initial stage of creating proper and systemic mechanisms for interagency information exchange and cooperation. The Police, Customs, FIU, Prosecutors have signed a number of MoUs to this effect, however several key arrangements, such as an Police-FIU¹⁸¹, FIU-Prosecutors MoU are still in the pipeline or have not yet been considered. Some MoUs (FIU-Central Bank) are outdated, as they have been inherited from the time of UNMIK and do not reflect the current regulatory framework. Neither are they properly followed by the participating agencies, as for example feedback between the Central Bank and FIU seemed to be an issue (both ways), even with an MoU in place and effect.

1665. Some MOU's that exist between the various agencies only cover exchange of information on demand or for specific data such as CTR from Customs to the FIU. There are otherwise no systematic mechanisms in place for operational coordination between the competent authorities, and the National Office could provide the proper forum to undertake an organized effort to coordinate various government actors.

Effectiveness

1666. Overall the anti-money laundering regime, as a multi-level interagency system has been capable of producing an extremely low number of sporadic, inconsequential outputs. Even though it may be incorrect to consider these minor results accidental, overall they confirm rather than deny the general inability of the institutional AML value chain to function in a proper integrated way with the involvement of all of its components: reporting - intelligence/analysis – investigation – prosecution - conviction/confiscation. This is caused by a number of cross-cutting factors, including the lack of systemic cooperation/coordination mechanisms and feedback across *all* segments, as well as a lack of necessary resources in *most*.

1667. The analysis of various components, undertaken in this Report also produced an extensive list of specific factors at the level of individual institutions which also negatively impact the system as a whole, the most important of them being:

- The low effectiveness on the preventative side which is significantly hampered by a deficient regulatory regime (significant shortcomings in the AML/CFT Law and related documents) and lack of proper supervision and enforcement/sanctioning regime. This means the preventative system is significantly failing in its main two functions: barring criminal proceeds from entering the financial system and ensuring that competent authorities are informed when such facts do take place.
- Insufficient institutional standing of the FIU, which reflects on its capacities to extend cooperation with other domestic authorities, access information and improve the quality of analysis;
- Reluctance, lack of understanding and capacity of law enforcement/prosecutors to pursue ML investigations/prosecutions and the seizure/confiscation of criminal proceeds;
- Lack of capacities in the judiciary and its reluctance in taking a proactive approach in issues of seizure/confiscation of criminal proceeds.

6.1.2 Recommendations and Comments

1668. With the KPC and AML strategies, the government has demonstrated that there is an understanding of the significant interagency problems that exist; otherwise an adoption of a strategy solely targeted at inter-institutional cooperation (by the KPC) would not have been

¹⁸¹ The assessment team was subsequently informed that the FIU and Police signed an MoU on 19 February 2013, however this falls outside the scope of this assessment, as signature took place more than two months after the on-site visit.

required. However, this policy step will demand significant efforts and resources in order to be effectively implemented, given the severe shortcomings in the system.

1669. In order to rectify the deficiencies in the area of interagency cooperation authorities in Kosovo should make it a priority to implement the AML/Economic Crime and KPC Strategies. This however should be done in a coordinated fashion, given the number of cross-cutting issues among the two documents.

1670. In view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action plan of the Strategy.

1671. This Joint Rule of Law Coordination Board should be kept informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan on Inter-Institutional Cooperation in order to ensure coordination and complementarity with other issues being discussed on its agenda.

6.1.3 Rating for Recommendation 31

| | Rating | Summary of factors underlying rating |
|-------------|--------|--|
| R.31 | NC | <ul style="list-style-type: none"> • Lack of feedback, information-sharing and coordination among authorities lead to overall ineffectiveness of the AML regime; • Lack of coordination at the strategic planning and policy making level between key institutions (KPC and Ministry of Finance); • Delays in the implementation of National Strategy, particularly in the creation of the National Office for Economic Crimes Enforcement. |

6.2 Mutual legal assistance (R. 36)

6.2.1 Description and Analysis

Treaty based MLA obligations

1672. Although Kosovo has appropriate domestic legislation by which it could accede to international treaties (Law No. 04/L-052 (2011) on International Agreements) its special position as a subject of international law (with regard to its partial recognition as a sovereign state) has so far prevented it from concluding multilateral (European or regional) conventions on international legal cooperation. While Kosovo does not have multilateral obligations deriving from treaties related to legal assistance on criminal matters, it has nevertheless signed numerous bilateral agreements in this field.

1673. Out of these, however, there are only a few agreements that actually refer to the provision of mutual legal assistance in criminal cases and that are actually in force, namely, one agreement concluded with “the former Yugoslav Republic of Macedonia” and another one with Croatia (the applicable agreements thus cover only two countries in the region). There is another bilateral MLA agreement with Turkey that has already been ratified by Kosovo but not yet by the other party and two others (with Albania and Germany) which are currently being finalized.

Widest possible range of mutual assistance / Provision of assistance in timely, constructive and effective manner - (Essential Criterion R.36.1)

1674. Provision of mutual legal assistance by Kosovo is regulated by Law No. 04/L-031 (2011) on International Cooperation in Criminal Matters (hereinafter: MLA Law) being in force since October 2011 (before that, the respective rules were to be found in the Prov.CPC). In absence of an international agreement between Kosovo and a foreign country, international legal assistance is to be administered on the basis of the principles of reciprocity (Art. 1.2 of MLA Law).

1675. The possible forms of international cooperation cover a wide range including procedural legal assistance in criminal matters in general (Chapter XII) extradition (Chapters II to IV) or transfer of proceedings (Chapters V to VII).

1676. Turning to the procedural legal assistance in criminal matters, the requests for international legal assistance shall be filed via the Ministry of Justice (Department for International Cooperation) which will then forward them to the local judicial authority (Art. 3.1 MLA Law). The local judicial authority might theoretically be either courts or prosecutions (Art. 2.1.7) but for the purposes of MLA the local authority must always be a prosecutor's office which executes the letter rogatory in direct manner. If a court order is required by Criminal Procedure Code to carry out the respective measure, the competent prosecutor would submit the necessary request to the court (Art.75).

1677. According to Art. 73.1 MLA Law the local judicial authority to execute a foreign letter rogatory must always be a district prosecutor's office. Nonetheless, the Ministry of Justice specified that, in practice, this provision is interpreted so as to be in line with Law on the SPRK that grants exclusive jurisdiction to the Special Prosecutor's Office in specific subject matters such as ML or TF. As a consequence, the Ministry interprets Art. 73.1 MLA Law in a way that all requests related to ML or TF would have to be transmitted to the SPRK for execution.

1678. The MLA Law does not allow for Kosovo judicial authorities to enter into a direct cooperation with their foreign counterparts as regards mutual assistance in criminal matters. In cases when a foreign request has been received by a local judicial authority directly or through INTERPOL¹⁸² or any other communication form, the local judicial authority can only offer the required assistance on condition that the requesting state guarantees to send the request and original documents through regular channels (i.e. to the Ministry of Justice) within 18 days. It is not stipulated precisely by the Law but it appears implied that in such cases, the Ministry would subsequently exercise its authority to confirm the permissibility of the letter rogatory (Art. 73.1).

1679. Direct communication between local and foreign local judicial authorities is only foreseen in case of spontaneous exchange of information pursuant to Art.88 MLA Law where Kosovo authorities may, without a previous request, forward to the competent authority of a foreign country information collected during their investigations, if they consider that the disclosure of such information may assist receiving country to initiate or to take over investigations or criminal proceedings, or it may lead to a petition for mutual international legal assistance filed by receiving country. This communication is, however, beyond the scope of FATF R.36.

1680. The range of procedural activities that can be executed upon a request by a foreign country is not specified by the MLA Law. Considering however that Art. 1.3 provides that

¹⁸² Legal text quoted as subsequently corrected by Kosovo authorities.

international legal assistance procedures shall be provided for with provisions of the CPC (unless otherwise provided for by the MLA Law) it is apparent that all investigative measures available in the CPC being in force are equally available for the purposes of execution of letters rogatory.

1681. No statistics had been provided to the evaluation team related to MLA provided or requested through the Ministry of Justice in ML or FT cases. As for the general turnover of international cooperation, the Ministry provided cumulated statistics for the period from 01.01.2010 to 29.06.2012 in which it can be seen that while the vast majority of the 19.241 cases mentioned by the Ministry of Justice consisted of servicing of documents, there were hundreds of letters rogatory (in which respect the categories of “legal assistance of various natures” and “rogatory-letter (act-petition)” may overlap to some extent) about which, however, the examiners did not receive appreciable information. That is, the breakdown of the figures does not allow for drawing conclusions as to the trends in international cooperation, the countries involved, the respective criminal offences, the time the execution of the requests consumed etc.

Provision of assistance not prohibited or made subject to unreasonable conditions (Essential Criterion 36.2)

1682. The legal grounds for refusal are provided in Art. 74 of the MLA Law according to which assistance may be refused if the request is related to a political offence or if its execution would prejudice sovereignty, security, public order or other vital interests of Kosovo.

1683. “Political offences” are addressed by Art. 12 of the MLA Law which can be found in Chapter II dealing with extradition requests while the provisions related to the execution of letters rogatory can be found in a different part of the Law. Nonetheless, the provision in Art.12.2 appears to be applicable to the entire MLA Law as it is formulated to provide a general definition “for the purposes of this Law” (and not only for extradition cases).

1684. According to Art. 12.2 the notion of political offence does not include a list of violent criminal offences (deprivation of life of the president or his/her family members, murder, severe body injury, abduction, rape, hostage-taking, blackmail or compulsion, causing of general danger, the attempt to commit these offences and the related ancillary offences) and neither can be applied for crimes falling in the categories of genocide, crimes against humanity, war crimes and terrorism.

1685. The list in Art. 74 is considerably short as compared to the respective regulations of other jurisdictions. It is silent on whether and to what extent double jeopardy (ne bis in idem) can be an obstacle to providing MLA as this issue is only regulated by Art. 11 for extradition cases. There is no specific basis to refuse the execution of requests where there are grounds for discrimination of the suspect on the basis of race, religion, citizenship etc. or if the suspect would not be punishable, for any reasons, according to the domestic law of Kosovo.

1686. Certainly, these features of the legislation are generally not to be criticized as the apparent lack of more detailed regulation would obviously support the provision of legal assistance to a greater extent and eventually the more effective implementation of FATF R.36. On the other hand, the example of other jurisdictions shows that lack of more specific provisions (for cases such as a foreign letter rogatory related to a criminal offence that has already been subject to a court verdict in Kosovo) may easily lead to the discretionary and extensive application of the generic grounds of refusal as provided in Art.74.2 (sovereignty, security, public order etc.)

1687. As for the applicability of the principle of dual criminality, it is only provided by Art. 79 regarding foreign requests for search and confiscation of property (where the offence which has caused the submission of the request should be punishable by the law of the requesting country as well as by Kosovo law). Beyond the scope of these specific coercive measures, no dual criminality standard applies.

1688. To date, Kosovo has not refused any case to offer mutual legal assistance because procedures in the requesting country have not yet started, or due to extremely strict interpretation of the principle of reciprocity or double incrimination or due to any other unreasonable cause.

Clear and efficient processes - (EC. 36.3)

1689. As regards clear and efficient processes for the execution of MLA requests in a timely way and without undue delays, neither the MLA Law nor the CPC nor any other piece of legislation provides procedural deadlines. At the time of the onsite visit, however, the Ministry of Justice was drafting legislation, that is, either a sub-legal act (an administrative instruction) for the implementation of the MLA Law or an amending law to the MLA Law itself in order to clarify procedures and to define time limits in provision of international legal assistance. However the evaluators were not made aware of any details in this respect.

1690. In any case, the Ministry of Justice indicated that special attention is paid by all competent authorities to foreign requests for MLA to which priority should be given over other procedures. Time limits for executing a letter rogatory are dependent on the content of the respective requests. In this context, the average time the execution requires was said to be 2 to 3 months. The examiners were not informed by any other states on any negative experiences, including undue delays in executing MLA requests, in the cooperation with Kosovo.

Provision of assistance regardless of possible involvement of fiscal matters or of existence of secrecy and confidentiality laws - (FATF R.36.4 and R.36.5)

1691. No ground for refusal for offences involving fiscal matters is regulated in the law of Kosovo. Similarly, neither piece of applicable legislation allows for the refusal of MLA requests on the grounds of secrecy or confidentiality requirements. In the law of Kosovo, no financial institution secrecy law appears to inhibit the implementation of the FATF Recommendations and this general approach must also be followed when executing foreign letters rogatory. The examiners have no information on any restrictive practice in this field.

1692. Art. 37 of the AML/CFT Law provides that professional secrecy, including financial secrecy may not be invoked as a ground for refusal to provide information that is sought by either the FIU or the police in connection with an investigation that relates to money laundering. The only exemption made in this respect is for information that is subject to lawyer-client privilege pursuant to Art. 30 paragraph 3.2 of the Law.

Availability of powers of competent authorities (applying FATF R.28 in R.36.6 and 36.8)

1693. Pursuant to the direct applicability of the rules of the CPC being in force, the powers of competent authorities are available for use in response to requests for MLA. Within the limits of the letter rogatory to be executed, the prosecuting authorities possess the same procedural powers compared to a national criminal investigation.

1694. As discussed above, all foreign MLA requests must be either submitted or received through the central authority (Ministry of Justice) for which reason there is no legal

possibility for domestic local judicial authorities to receive and execute direct requests from their foreign counterparts.

Avoiding conflicts of jurisdiction (Essential Criterion 36.7)

1695. There is no specific legislation in Kosovo to provide for mechanism for communication and coordination with other states to determine the best venue for prosecution of defendants in cases that are subject to prosecution in more than one country in order to avoid conflicts of jurisdiction, apart from the application of transfer of criminal proceedings to or from another state which can also be considered, to a certain extent, as a measure serving this purpose.

Effectiveness and statistics

1696. Between January 2010 and June 2012 the Department for International Legal Co-operation processed 4866 new requests for assistance and 6758 requests for further assistance on existing cases. They break down as follows:

- 3509** requests for servicing of documents
- 397** requests for legal assistance of various natures
- 272** requests for rogatory- letter (act-petition)
- 321** requests for verification of documents
- 35** requests for extraditions
- 66** requests for transfer of judicial procedures
- 136** requests for execution of decisions;
 - 4** requests on international child abduction;
 - 32** requests for transfer of convicted persons
 - 11** requests on international child abduction;
 - 3** requests on war crimes
- 80** requests for issuance of international wanted notices

1697. The assessment team was informed that at least one of these requests was with regard to the seizure of the proceeds of crime, where approx. 400 000 EUR was detained (based on a request from Germany). At the same time comprehensive statistics with a breakdown of these MLA and particularly those indicating ML, predicate offences and TF were not provided to the assessment team.

1698. Kosovo states that co-operation is conducted in a reasonable time and is constructive and effective in its implementation. There are no statistics available to show ‘turnaround’ times for international request. Apparently there are lengthy delays and long backlogs of proceedings that go through the Courts. If a request requires some form of Judicial Order there is no indication of how long this would take. At the same time Kosovo states it prioritizes requests for mutual legal assistance over other procedures. The MoJ is in the process of drafting legislation in the form of an Administrative Instruction to implement the MLA Law for the purpose of clarification of procedures and time limits in the provisions international legal assistance.

6.2.2 Recommendations and Comments

1699. Kosovo authorities should introduce clear service standards on turnaround times for foreign MLA requests.

1700. The MoJ should expedite the Administrative Instruction to implement the AML Law or, as another option, the drafting of a respective amending law for the purpose of clarification of procedures and time limits in the provisions international legal assistance.

1701. Kosovo authorities should keep detailed statistics on MLA with reference to offences involved, as well as requests on seizure and confiscation of proceeds.

6.2.3 Rating for Recommendation 36

| | Rating | Summary of factors relevant to s.6.3. underlying overall rating |
|------|--------|--|
| R.36 | PC | <ul style="list-style-type: none"> • There are no service standards on turnaround times of foreign requests which could impede effectiveness of the system; • Effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; • Lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced. |

6.3 Other forms of International Co-operation (R.40).

6.3.1 Description and analysis

1702. In accordance with the AML/CFT Law (Article 36) Kosovo authorities must afford the widest possible measure of cooperation to the authorities of foreign jurisdictions for purposes of information exchange, investigations and court proceedings, in relation to temporary measures for securing property and orders for confiscation relating to instrumentalities of money laundering and proceeds of crime, and for purposes of prosecution of the perpetrators of money laundering and terrorist activity.

1703. Non-MLA international cooperation in the AML/CFT area is carried out by the FIU and police. See analysis of international cooperation carried out by customs in Section 2.8 of this report.

1704. Article 14.1.7 of the AML Law No. 03/L-196 allows the FIU to spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and which are subject to similar obligations in terms of preservation of confidentiality, regardless of the nature of agency which is subject to reciprocity. The information provided shall only be used upon approval by the agency and solely for purposes of combating money laundering, and related criminal offences and terrorist financing.

1705. The FIU is able to make enquiries on behalf of foreign counterparts of publically available information and its own databases (STR related information). The FIU is entitled to request and receive from public or governmental bodies, or international bodies or organizations or intergovernmental organizations (in Kosovo), data, information, documents related to a person, entity, property or transaction, and may spontaneously or upon a request, share information with any foreign counterpart agency performing similar functions and that is subject to similar obligations for protection of confidentiality, regardless of the nature of the agency which is subject to reciprocity.¹⁸³ At the same time, the AML/CFT Law does not

¹⁸³ Rec. 40.4.1

allow the FIU to make enquiries to financial institutions for information, based on a request from a foreign FIU (see also analysis in section 2.6).

1706. As the FIU is not a member of the Egmont Group it does not have access to the Egmont Secure Web. The FIU is able to use the secure messaging facilities within the goAML system. It has made such a direct link for information exchange with FIU Albania and where possible will seek to do the same with other FIU's. The FIU has also applied to join the EU's FIU.NET system but is waiting for an answer.

1707. Requests for assistance will not be refused on the sole ground that the request is also considered to involve fiscal matters. If the request is directed at the FIU then under the AML law the reply will only cover matters in the mandate of the FIU, i.e. on ML/TF matters. Requests received through ILECU/Interpol that concern fiscal matters will be referred to the competent authority, in this case most likely to be TAK.¹⁸⁴

1708. Since 2011 the Kosovo police has created an International Law Enforcement Co-operation Unit (ILECU) within the framework of a regional project aimed at facilitating international information exchange between law enforcement authorities. There are ILECU's in Albania, Macedonia, Serbia, BiH, Croatia and Slovenia. With the exception of BiH and Serbia information with these countries is exchanged directly. For Serbia/BiH and other countries, information exchange is channelled through Interpol within UNMIK/EULEX. Kosovo Customs are also represented within ILECU.

1709. In the case of requests referred to the FIU, Article 37 of the AML law states that professional secrecy cannot be used as a ground for rejecting a request for information that should be provided by law or has been collected in compliance with this law. There are exceptions which relate to the giving and provision of legal advice.

1710. Kosovo police and Customs must comply with the requirements of the Kosovo Data Protection Agency. Requests for information to be released must comply with the minimum standards. The requesting party must show the reasons for the request, the suspected criminality and an outline of the circumstances, the use to which the information requested may be put and how it will be held if released to the requesting party.¹⁸⁵

1711. Information received from other jurisdictions in response to a request, or that has been furnished in support of a request of the Kosovo authorities, is subject to the provisions of the Kosovo Data Protection law 03/L-172 and it must be held securely in compliance with Articles 3 & 14.¹⁸⁶

1712. Exchange with of information with non-counterparts will go via indirect channels. Either ILECU or Interpol will channel the request but in the case of Interpol there must also be a request through diplomatic channels within 18 days – thus an indirect routing. In either case the positioning of ILECU or Interpol means there is an intermediary in the process.¹⁸⁷

1713. On exchange, it is a requirement that the requesting authority disclose the purpose of the request, what the information will be used for and other information to enable the party processing the request sufficient information to verify the request is in compliance with the law.¹⁸⁸

¹⁸⁴ Rec 40.7

¹⁸⁵ Rec 40.8

¹⁸⁶ Rec 40.9

¹⁸⁷ Rec 40.1

¹⁸⁸ Rec 40.10.1

Can FIU co-operate with all types of FIU? (CETS 198 Art. 46.3)

1714. Article 14 of the AML law allows FIU-K to co-operate with counterpart agencies performing a similar function in another country regardless of the nature of the agency (FIU).

Grounds for a request by FIU (CETS 198 Art. 46.4)

1715. The FIU prepares its requests for information addressed to foreign FIUs describing facts and grounds in a short statement for the making of such a request. This will include a statement on how the information will be used (Art 46.4). Any extension of use will be referred back to the originator for permission.

Provision of information by FIU without a Letter of Request (CETS 198 Art. 46.5)

1716. The FIU is able to –share information in connection with its mandate. Article 14 & 15 of the AML law 03/L-196 enables the FIU to request specific information from law enforcement agencies and Government Departments and share this information with counterparts performing the same functions. This information is only released for information purposes and cannot be used as evidence without the specific written approval of the Director of the FIU. The FIU cannot request obliged entities for information based on a request of a foreign FIU (see Section 2.6).

Does FIU refuse to divulge information (CETS 198 Art. 46.6)

1717. There have been cases when the FIU has rejected a request but only for technical reasons i.e. that the request did not contain sufficient information to substantiate a suspicion of organised crime, money laundering or terrorism finance. There are no statistics for these instances.

Restriction on use of information by third parties (CETS 198 Art. 46.7)

1718. Article 15 of AML law 03/L-196 restricts the use of information supplied by the FIU to foreign counterparts to that of ‘information only’. No extension of use is allowed without the written permission of the FIU Director.

Does FIU impose restrictions and conditions on information use? (CETS 198 Art. 46.8)

1719. FIU-K includes a restrictive clause when supplying information to foreign counterparts. It is foreseen that the party which is requesting the information should maintain the confidentiality of a document and use it for the purposes of intelligence only.

Circumstances when FIU would refuse to allow information to be used in investigations as evidence (CETS 198 Art. 46.9)

1720. Although Article 15 of the AML law allows the Director FIU to authorise the use of information transmitted for information purposes to be used as evidence, this should only be in exceptional circumstances when all other possibilities to obtain the material in an evidential format have been exhausted. Mutual Legal Assistance requests should be used as the prime route to secure evidence required for investigation and prosecution.

Security measures used to ensure transmitted information is not accessible by other agencies (CETS 198 Art.46.11)

1721. Kosovo is not a member of the Egmont Group so does not have access to the Egmont Secure Web. FIU-K has applied for membership of the EU intra-FIU communication system FIU.net but has not received an answer. FIU-K uses the UN supplied goAML system which has inbuilt secure messaging service and FIU-K would like to use this with as many FIU-s as possible.

Feedback (CETS 198 Art. 46.12)

1722. FIU-K may, depending on the case, make comments and recommendations to receiving counterparties for the purposes of increasing the effectiveness of analysis related to prevention and combating of money laundering. Where FIU-K has an MOU in place with foreign counterparts there is a clause that requests feedback over the use of information exchanged.

Possibilities of urgent freezing at the request of a foreign FIU (CETS 198 Art. 47)

1723. There is no provision for FIU-K to take this action. This situation has been brought to the attention of the legislators and a remedy should be included in the amendments to the AML law but there is, as yet, no reference to this in the draft.

Statistics and effectiveness

1724. The Kosovo FIU provided the following statistics for international information exchange

Table 21: *Requests received from foreign FIUs*

| Year Referrals | 2011 | 2012 |
|-----------------------|-------------|-------------|
| FIU Croatia | 0 | 1 |
| FIU Holland | 0 | 1 |
| FIU Macedonia | 3 | 4 |
| FIU Montenegro | 4 | 4 |
| FIU Albania | 2 | 0 |
| FIU Germany | 1 | 0 |
| Total | 10 | 10 |

Table 22: *Processed of request from foreign FIUs*

| Year Referrals | 2011 | 2012 |
|-----------------------|-------------|-------------|
| FIU Croatia | 0 | 1 |
| FIU Holland | 0 | 1 |
| FIU Macedonia | 3 | 4 |
| FIU Montenegro | 4 | 4 |
| FIU Albania | 2 | 0 |
| FIU Germany | 1 | 0 |
| Total | 10 | 10 |

Table 23: *Answers request to foreign FIUs*

| Year Referrals | 2011 | 2012 |
|----------------|-----------|-----------|
| FIU Croatia | 0 | 1 |
| FIU Holland | 0 | 1 |
| FIU Macedonia | 3 | 4 |
| FIU Montenegro | 4 | 4 |
| FIU Albania | 2 | 0 |
| FIU Germany | 1 | 0 |
| Total | 10 | 10 |

1725. The assessment team was informed that the Kosovo FIU initiated 2 spontaneous disseminations to foreign FIUs (Albania and Macedonia).

1726. Kosovo authorities have not provided statistics with regard to international information exchange by the police, neither through ILECU or otherwise, thus making it impossible to judge about the effectiveness.

6.3.2 Recommendations and Comments

1727. ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where money laundering/TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness.

1728. (CETS 198 19.1) The AML law should include an ability for the FIU or the prosecutor to seek a bank account monitoring order.

1729. (CETS 198 Art 28.1.e) Kosovo should clarify whether or not it refuses international co-operation on the grounds that it relates to a political offence.

1730. (CETS 198 47) FIU should have powers to freeze or postpone transactions on the request of a foreign FIU.

6.3.3 Rating for Recommendation 40

| | Rating | Summary of factors underlying rating |
|-------------|-----------|---|
| R.40 | LC | <ul style="list-style-type: none"> Effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF; There are no service standards on turnaround times of foreign requests which could impede effectiveness of the system. |

7 OTHER ISSUES

7.1 Resources and statistics

1731. The text of the description, analysis and recommendations for improvement that relate to Recommendations 30 and 32 is contained in all the relevant sections of the report i.e. all of section 2, parts of sections 3, 4, 5 and in section 6. There is a single rating for each of these Recommendations, even though the Recommendations are addressed in several sections. Section 7.1 of the report primarily contains the boxes showing the rating and the factors underlying the rating.

| | Rating | Summary of factors underlying overall rating |
|------|--------|--|
| R.30 | NC | <ul style="list-style-type: none"> • Increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness; • Inadequate staffing at specialized ML Unit in the Police impacts effectiveness; • There is insufficient awareness/capacity in the police regarding the need to proactively pursue criminal proceeds when dealing with acquisitive crime; • Understaffing impacts the effectiveness of Customs. • Human resources for supervisory authorities are insufficient thus impacting effectiveness; • Lack of relevant training programmes for supervisory staff impacts effectiveness. |
| R.32 | NC | <ul style="list-style-type: none"> • Need to strengthen obligation for all competent authorities, reporting subjects and other persons and entities to maintain statistical data through a legal provision; • Meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime; • The lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis; • The lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy; • Need for supervisory authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. • Effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; • Effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF. |

Table 1: Ratings of compliance with FATF Recommendations

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC)), or could, in exceptional cases, be marked as not applicable (NA). These ratings are based only on the essential criteria, and defined as follows:

| | | |
|--------------------------|---|--|
| Compliant (C) | ➤ | The Recommendation is fully observed with respect to all essential criteria. |
| Largely Compliant (LC) | ➤ | There are only minor shortcomings, with a large majority of the essential criteria being fully met. |
| Partially Compliant (PC) | ➤ | The jurisdiction has taken some substantive action and complies with some of the essential criteria. |
| Non-compliant (NC) | ➤ | There are major shortcomings, with a large majority of the essential criteria not being met. |

| Recommendation | Rating | Summary of factors underlying rating |
|--------------------------|-----------|---|
| <i>Legal Systems</i> | | |
| R.1 ML Offence | PC | <ul style="list-style-type: none"> • The offence of market manipulation is not covered among predicate offences to ML • Confusion and redundancy in definitions related to proceeds of crime as well as in terms of whether proceeds of criminal activity in general can be subject of ML • Inadequate regulation of the required level of proof for the predicate crime in Art. 32 paragraph 4.1 causing uncertainty to and unfamiliarity with the respective provisions among practitioners • Unclear and inadequate formulation of the provision that defines the coverage of self-laundering (Art. 32 para 4.2) • Harmonization required between AML/CFT Law and CC in terms of concept and terminology as regards ancillary offences • Effectiveness of the application of the ML offence could not be assessed due to conflicting statistics provided to the assessment team. |
| R.2 | PC | <ul style="list-style-type: none"> • serious uncertainty in legislation as regards the basics of corporate criminal liability (whether or not it |

| Recommendation | Rating | Summary of factors underlying rating |
|---|------------------|--|
| Liability for ML offence | | <p>depends on the culpability of the natural person)</p> <ul style="list-style-type: none"> • ineffectively mild sanctioning provisions of legal entities for criminal offences (low range of punishment) • harmonization required between AML/CFT Law and CC or CLLP Law in terms of concept and terminology as regards • the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC) • the basics of corporate criminal responsibility and that of the related natural persons (Art.34 AML/CFT Law vs Art.40 CC / Art.5 CLLP Law) |
| <p>R.3</p> <p>Seizure and confiscation</p> | <p>NC</p> | <ul style="list-style-type: none"> • No procedure or standard of proof indicated in CPC to allow for the confiscation of instrumentalities intended for the use in a criminal offence. • While the provisions of third party confiscation included in the CC meet international standards, the supporting Articles of the CPC conflict with these provisions. • The standard of proof for a bona fide third party is unjustifiably high, oftentimes making it impossible for him/her to prove their legitimate rights and intentions with regard to property. • There is no authority to take steps to prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation. • The effectiveness of the existing measures must be considered low due to an insufficiency of prosecutions resulting in low levels of confiscation of the proceeds of crime. • Meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime. • Law enforcement authorities and prosecutorial authorities do not proactively undertake asset tracing and recovery when pursuing any acquisitive crime. |
| <p><i>Preventive Measures for financial institutions</i></p> | | |
| <p>R.4</p> <p>Secrecy laws consistent with the Recommendations</p> | <p>LC</p> | <ul style="list-style-type: none"> • There is a need for legal clarity for lifting confidentiality for the CBK with regards to and for the purposes of the provisions of the AML/CFT Law beyond prudential matters. |

| Recommendation | Rating | Summary of factors underlying rating |
|--|------------------|---|
| <p>R.5 Customer due diligence</p> | <p>PC</p> | <ul style="list-style-type: none"> • This Report expresses concerns regarding the validity of Advisory Letter 2007/1 and Rule X of the CBK within the context that the UNMIK Regulation 2004/2 has been entirely repealed. • This Report also expresses concern on the definitions of ‘financial institution’ in the respective laws which differ in some instances. <p><i>Deficiencies specific to Recommendation 5:</i></p> <ul style="list-style-type: none"> • no legal obligation to apply full CDD measures; • no explicit prohibition for keeping accounts in fictitious names; • threshold for wire transfers not clear; • where doubts arise on the veracity or adequacy of previous obtained customer identification data applies only for occasional transactions; • insufficient legal obligation to identify beneficial owner; • strengthening of the obligation to understand the ownership and control structure of the customer; • strengthening of the obligation to understand the purpose and intended nature of the business relationship; • strengthening of the obligation to exercise ongoing monitoring of business relationship and transaction in all circumstances beyond high risk customers; • strengthening of the obligation for financial institutions to apply a risk based approach; • lack of guidance on implementing a risk based approach; • inconsistencies in the timing of the verification process against the timing of the identification process; • failure to complete CDD process applies only to the verification process; • failure to complete CDD where business relationship already exists is not adequately covered; • obligation to apply CDD to existing customers is dated and only provided under Rule X in relation to repealed UNMIK Regulations; • better distribution and application of lists of designated persons; and • effectiveness issues with regard to the scope and extent of application of CDD, identification of the beneficial owner and application of the risk-based approach |
| <p>R.6</p> | <p>PC</p> | <ul style="list-style-type: none"> • shortcomings in the definition of a PEP; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|-----------|---|
| Politically exposed persons | | <ul style="list-style-type: none"> • non application of enhanced measures to foreign PEPs residing in Kosovo • no obligation to identify if a beneficial owner is a PEP; • no obligation for senior management approval for continuation of business with a PEP; • legal obligation to identify source of wealth not clear; • industry concerns on the application of the PEP notion; and • effectiveness issues related to extended definition of PEP, guidance on continued monitoring and beneficial owner status. |
| R.10 Record Keeping | NC | <ul style="list-style-type: none"> • lack of provisions for the commencement retention period for linked occasional transactions; • lack of guidance on methodology of record retention; • lack of legal power for the extension of the five (5) year retention period for both transaction and identification records when necessary; • legal inconsistency on the timing for the commencement of the retention period for identification records; • ambiguity on the availability of records to competent authorities; and • effectiveness issues related to conflicting or lack of legal provisions and uneven playing field among the entire reporting subjects |
| R.13 Suspicious Transaction Reporting | PC | <ul style="list-style-type: none"> • no reporting obligation in situations where information available indicates possible money laundering or financing of terrorism activities; • no reporting obligation for financing of terrorism; • no reporting obligation of attempted suspicious acts or transactions; • low number of STRs; • concern over non-filing of suspicious CTRs as STRs; and • effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs. |
| R.14 Protection and no tipping off | NC | <ul style="list-style-type: none"> • not clear that safe harbour protection for disclosures applies to directors, officers and employees, temporary or permanent; • prohibition of disclosure (tipping off) does not apply to banks and financial institution as entities; • prohibition of disclosure (tipping off) does not specify whether it applies to both permanent and temporary employees; • prohibition of disclosure (tipping off) covers situations |

| Recommendation | Rating | Summary of factors underlying rating |
|--|------------------|--|
| | | <p>where the report itself is provided to the third party;</p> <ul style="list-style-type: none"> • prohibition of disclosure (tipping off) does not cover situations where an investigation is being or may be carried out; • legal uncertainty on the protection of personal data of employees making the report or providing information; • limitations on lifting of prohibition of disclosure in specific circumstances; and • effectiveness issues due to divergences from the international standard. |
| <p>R.17 Sanctions</p> | <p>NC</p> | <ul style="list-style-type: none"> • concern over the applicability of certain provisions of the Law for administrative sanctioning purposes; • concern over dual criminal offences in the AML/CFT Law and specific financial legislation carrying different penalties; • absence of administrative penalties for the infringement of individual obligations under the AML/CFT Law; • non designation of competent authority to impose administrative sanctions; • legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects; • absence of range of sanctions; • concern on the applicability of prudential administrative and other sanctions under the specific financial legislation for the purposes of the AML/CFT Law; and • consequent effectiveness issues arising out of the inadequacy of the sanctioning regime and the lack of application of sanctions. |
| <p>R.18 Shell banks</p> | <p>PC</p> | <ul style="list-style-type: none"> • Note: In assessing compliance with Recommendation 18 the Report has analysed licensing provisions for banks and financial institutions in the relevant banking laws and regulations. • lack of legal clarity in distinguishing between correspondent and respondent banks in dealing with shell banks; • no definition of correspondent banking relationship; • no obligation for banks to ensure that respondent institutions do not allow their accounts to be used by shell banks; and • effectiveness concerns due to lack of legal clarity, |
| <p>R.20 EC 20.2 Cash Management</p> | <p>NC</p> | <ul style="list-style-type: none"> • no documented strategy with goals and milestones to reduce the use of cash; • extensive use of high denomination currency notes; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|-----------|--|
| Techniques | | <ul style="list-style-type: none"> • no facilities for direct debits and direct credits through banking system; • conflicts in statistics on currency notes issued and deposited; and • apparent lack of effectiveness in monitoring compliance with the provision of Article 13 of the Law on Tax Administration and currency movement across the borders. |
| R.23 Regulation, supervision and monitoring | PC | <ul style="list-style-type: none"> • absence of legal mandate for a supervisory competent authority for the financial sector; • absence of mandate for a supervisory competent authority to issue AML/CFT rules and regulations; • no obligation to inform CBK on divestment of shareholding; • need to strengthen criteria for approval of changes in shareholding in relation to AML/CFT issues; • divergences in definition of ‘financial institution’; • legal uncertainty in licensing requirement for some financial institutions; • low number of on-site visits; and • effectiveness issues arising out of lack of supervisory legal mandate; lack of legal mandate to issue rules and regulations, and legal uncertainty of licensing for MVTs. • human resources for supervisory authorities are insufficient thus impacting effectiveness; • lack of relevant training programmes for supervisory staff impacts effectiveness; • need for authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. |
| <i>Institutional and other measures</i> | | |
| R.26 FIU and its functions | PC | <ul style="list-style-type: none"> • The scope and mode of FIU access to various databases is insufficient and negatively impacts the analytical function of the Unit; • Ambiguity in the powers of the FIU to request additional information from reporting entities open it up to legal challenges; • Kosovo should consider adopting the Egmont group principles for international information exchange; • The lack of feedback from law enforcement on FIU disseminations negatively impacts the effectiveness of the FIU; • The lack of statistics on the outcome of FIU disseminations does not allow to properly judge about |

| Recommendation | Rating | Summary of factors underlying rating |
|--|------------------|--|
| | | <p>the effectiveness and relevance of FIU analysis;</p> <ul style="list-style-type: none"> • Rigid reporting forms and absence of specific and strategic feedback and guidance to reporting entities leads to low quality STRs and numerous additional information requests bringing an excessive burden on both - the FIU and industry and decreasing effectiveness; • The need to excessively request additional information (stemming from low quality and non-informative STRs) puts a resource burden on the FIU, negatively impacting its' effectiveness. • FIU annual report does not contain ML typologies and has not been made available to the wider public; |
| <p>R.27 Law enforcement authorities</p> | <p>PC</p> | <ul style="list-style-type: none"> • The lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy; • Increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness; • Inadequate staffing at specialized ML Unit in the Police impacts effectiveness; • Police do not provide feedback to FIU on cases, thus decreasing the overall effectiveness of the system; • No systemic feedback provided by prosecutors to police and other law enforcement bodies on the outcome of prosecutions; • Sharp drop in numbers of ML cases reported by the police to SPRK in 2012 indicates decreasing effectiveness of police in pursuing ML; • There is insufficient awareness in the police about the need to proactively pursue criminal proceeds when dealing with acquisitive crime; • No clear power to postpone or waive arrest for purposes of evidence-gathering or identification of other persons involved. |
| <p>R.28 Powers of competent authorities</p> | <p>C</p> | <p>This Recommendation has been fully met.</p> |
| <p>R.29 Supervisors</p> | <p>NC</p> | <ul style="list-style-type: none"> • absence of legal mandate for a supervisory competent authority for the financial sector for the purposes of the AML/CFT Law; • absence of supervisory powers that may be applied for the supervision of the financial sector for AML/CFT purposes; • absence of a legal mandate to apply prudential supervisory powers for the purposes of the AML/CFT |

| Recommendation | Rating | Summary of factors underlying rating |
|--|------------------|--|
| | | <p>Law;</p> <ul style="list-style-type: none"> • absence of a mandate for the FIU to undertake offsite examinations; • no adequate powers of enforcement and sanctions; and • effectiveness issues arising out lack of legal supervisory mandates and powers of enforcement; • human resources for supervisory authorities are insufficient thus impacting effectiveness; • lack of relevant training programmes for supervisory staff impacts effectiveness; • need for authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. |
| <p>R.30 Resources, integrity and training</p> | <p>NC</p> | <ul style="list-style-type: none"> • Increasing case-load of SPRK with regard to ML cases indicates lack of resources and low levels of effectiveness; • Inadequate staffing at specialized ML Unit in the Police impacts effectiveness; • There is insufficient awareness/capacity in the police regarding the need to proactively pursue criminal proceeds when dealing with acquisitive crime; • Understaffing impacts the effectiveness of Customs. • Human resources for supervisory authorities are insufficient thus impacting effectiveness; • Lack of relevant training programmes for supervisory staff impacts effectiveness. |
| <p>R.31 National cooperation</p> | <p>NC</p> | <ul style="list-style-type: none"> • Lack of feedback, information-sharing and coordination among authorities lead to overall ineffectiveness of the AML regime; • Lack of coordination at the strategic planning and policy making level between key institutions (KPC and Ministry of Finance); • Delays in the implementation of National Strategy, particularly in the creation of the National Office for Economic Crimes Enforcement. |
| <p>R.32 Maintenance of Statistics</p> | <p>NC</p> | <ul style="list-style-type: none"> • Need to strengthen obligation for all competent authorities, reporting subjects and other persons and entities to maintain statistical data through a legal provision; • Meaningful statistics on seized and confiscated property are not kept, making it difficult to exactly measure the level of effectiveness of the regime; • The lack of statistics on the outcome of FIU disseminations does not allow to properly judge about the effectiveness and relevance of FIU analysis; |

| Recommendation | Rating | Summary of factors underlying rating |
|---|------------------|---|
| | | <ul style="list-style-type: none"> • The lack of unified statistics makes it impossible to judge about the effectiveness of ML investigations and prosecutions with full accuracy; • Need for supervisory authorities to maintain more meaningful statistics, otherwise effectiveness cannot be adequately judged. • Effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; • Effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF. |
| <p>R.33 Legal persons – beneficial owners</p> | <p>PC</p> | <ul style="list-style-type: none"> • no direct obligation to inform the KBRA on shareholding and directorship changes immediately they occur; • concerns over the accuracy and timeliness of information available; • concerns on due diligence on founders and major shareholders; • concerns over the timeliness of availability of information to competent authorities; • no procedures for competent authorities except for TAK for identification whether a number of business organisations belong to the same individual; • no procedures for competent authorities for the identification of inter-connections between business organisations where, through layers of ownership, some companies may own each other; • concerns over the easiness of registration; and • consequent effectiveness issues |
| <p>R.36 Mutual legal assistance</p> | <p>PC</p> | <ul style="list-style-type: none"> • There are no service standards on turnaround times of foreign requests which could impede effectiveness of the system; • Effectiveness could not be demonstrated due to the absence of comprehensive statistics on MLA requests relating to ML, predicate offences and TF; • Lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced. |
| <p>R.40 Other forms of international cooperation</p> | <p>LC</p> | <ul style="list-style-type: none"> • Effectiveness with regard to international police cooperation could not be demonstrated due to the absence of comprehensive statistics on ILECU requests relating to ML, predicate offences and TF; • There are no service standards on turnaround times of foreign requests which could impede effectiveness of the system. |

| Recommendation | Rating | Summary of factors underlying rating |
|---|-----------|---|
| Nine Special Recommendations | | |
| SR.II TF Offence | PC | <ul style="list-style-type: none"> • financing of an individual terrorist (for any purpose) is clearly not covered by the FT offence • inconsistent and/or redundant terminology used in FT-related provisions in the CC • deficient coverage of “act of terrorism” as required by Art. 2(1) of the FT Convention: • no complete and general coverage of the “generic” offence of terrorism as subject of FT • deficient coverage of the “treaty offences” as subject of FT by requiring an extra purposive element • unclear whether the definition of “terrorist act” in Art. 135.1 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence |
| SR.III Freezing of terrorist assets | NC | <ul style="list-style-type: none"> • No effective laws and procedures in place for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and to ensure that freezing actions extend to funds or assets controlled by designated persons; • No designation authority in place for UNSCR 1373; • No effective systems for communicating actions under the freezing mechanisms to the financial sector and no practical guidance in this field; • No procedures for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism • No procedure for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452 • No specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs; • No measures for monitoring the compliance with implementation of obligations under SR.III and to impose sanctions. |
| SR.IV Reporting of Suspicions of Financing of Terrorism | NC | <ul style="list-style-type: none"> • no reporting obligation in situations where information available indicates possible money laundering or financing of terrorism activities; • no reporting obligation for financing of terrorism; • no reporting obligation of attempted suspicious acts or transactions; • low number of STRs; |

| Recommendation | Rating | Summary of factors underlying rating |
|--|------------------|--|
| | | <ul style="list-style-type: none"> • concern over non-filing of suspicious CTRs as STRs; and • effectiveness issues with regard to quality and quantity of STR reporting and reporting of suspicious CTRs. |
| <p>SR.VI AML requirements for money/value transfer services</p> | <p>NC</p> | <ul style="list-style-type: none"> • legal uncertainty on the licensing or registration requirements; • absence of a legal mandate for a relevant supervisory authority; • legal uncertainty on the appointment, functions and powers of ‘agents’; • consequently no obligation to maintain a list of agents; • lack of effective, proportionate and dissuasive criminal, civil or administrative sanctions; and • low number of on-site examinations; and • effectiveness issues arising mainly out of legal uncertainties |
| <p>SR.VIII Non Profit Organisations</p> | <p>NC</p> | <ul style="list-style-type: none"> • no risk assessment of sector carried out; • no outreach and no legal obligation for authorities to outreach to the NGOs sector; • absence of prudential supervisory oversight; • legal ambiguity on supervisory powers for NGOs under Article 30 of AML/CFT Law; • hence absence of AML/CFT supervisory oversight; • no obligation to maintain governance information on a continuous basis in all instances; • prudential sanctions not available for all breaches under the Law on NGOs; • conflicts between AML/CFT Law and Law on NGOs; • no due diligence procedures on the founders at the registration stage; • no empowering provisions for DRLNGO to demand any other information it may require; • no empowering provisions under the AML/CFT Law for the FIU to demand further information it may require; and • concerns over identification of NGOs that should be investigated and hence possibility of investigations; and • effectiveness issues consequent to narrow views on its responsibilities by DRLNGO and in sharing of information. |
| <p>SR.IX Cross-border declaration and</p> | <p>LC</p> | <ul style="list-style-type: none"> • No record-keeping rules in Customs with regard to information on declarations/false declarations and suspicions of ML/TF; • Prosecutor does not provide structured feedback on |

| Recommendation | Rating | Summary of factors underlying rating |
|----------------|--------|---|
| disclosure | | cases referred by Customs; <ul style="list-style-type: none"> • Understaffing impacts the effectiveness of Customs. |

Table 2: Recommended Action Plan to improve AML/CFT system

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|--|
| 1. General | No text required |
| 2. Legal System and Related Institutional Measures | |
| 2.1 Criminalisation of Money Laundering (R.1) | <ul style="list-style-type: none"> • Revise the legal definitions related to proceeds of crime so as to eliminate confusion and redundancy in this field. • Redefine the required level of proof for the predicate crime (Art. 32 para 4.1) and/or provide for adequate guidance to practitioners in this respect. • Reformulate the provision that defines the coverage of self-laundering (Art. 32 para 4.2) so as to remedy its current inadequacy. • Harmonize the respective provisions of the AML/CFT Law and the CC, both in terms of concept and terminology, as regards ancillary offences. • Provide for the adequate criminalization of the offence of market manipulation and include it among predicate offences to ML. |
| 2.2 Liability for ML offence (R.2) | <ul style="list-style-type: none"> • Revise the basics of corporate criminal liability as it is currently stipulated by legislation (whether or not it depends on the culpability of the natural person). • Harmonize the respective provisions of the AML/CFT Law and the CC, both in terms of concept and terminology, as regards <ul style="list-style-type: none"> ○ the knowledge standard applicable in case of ML offences (AML/CFT Law vs CC) ○ the basics of corporate criminal responsibility and that of the related natural persons (Art.34 AML/CFT Law vs Art.40 CC / Art.5 CLLP Law) • Prescribe more severe sanctions (increase the range of fines) applicable to legal entities for criminal offences. |
| 2.3 Criminalisation of Terrorist Financing (SR.II) | <ul style="list-style-type: none"> • The duplicate criminalization of FT (in the CC on the one hand and in the recently amended AML/CFT Law on the other) should urgently be addressed by Kosovo legislation (involving both the Ministry of Justice and the Ministry of Finance) so as to provide for a single, autonomous and comprehensive FT offence that meets all aspects of SR.II. • Revise the current coverage of “terrorist act” (“act of terrorism” etc.) and redefine it in full compliance with Art. 2(1) of the FT Convention, including <ul style="list-style-type: none"> ○ providing for the complete and general coverage of the “generic” offence of terrorism ○ abandon requiring the extra purposive element to the “treaty offences” as subject of FT |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|--|
| | <ul style="list-style-type: none"> ○ make it clear that the definition of “terrorist act” in Art. 135.1 extends to the terrorism-related offences (e.g. recruitment for terrorism) so that financing of these offences can also be considered a FT offence • The actions listed below all refer to the FT criminalization as it is currently provided by the CC : <ul style="list-style-type: none"> ○ criminalize the financing of an individual terrorist (for any purpose) in the FT offence ○ revise and reformulate the inconsistent and/or redundant terminology used in FT-related provisions |
| 2.4 Confiscation, freezing and seizing of proceeds of crime (R.3) | <ul style="list-style-type: none"> • The Criminal Procedure Code should be amended to include provisions that indicate the standard of proof required to allow for the confiscation of instrumentalities intended for the use in a criminal offence. • Kosovo should harmonize the norms of the CC and CPC with regard to third party confiscation. In this case priority should be given to the framework set out in the CC, which is generally in line with international standards, and would not pose effectiveness problems in terms of implementation, contrary to the norms of the CPC. • Kosovo should revise the provisions of the CPC regulating the protection of the rights of bona fide third parties. The standard of proof required from the bona fide to prove their legitimate rights and intentions with regard to property should be lowered. • Kosovo should institute mechanisms prevent or void actions, contractual or otherwise, where the persons involved knew or should have known that as a result of those actions the authorities would be prejudiced in their ability to recover property subject to confiscation. • The judiciary should be allowed and encouraged to take a proactive approach in taking the necessary measures, where the prosecutor has clearly failed in an obvious setting of a specific case to follow through with seizure and confiscation of known instrumentalities/proceeds of crime. • Kosovo should implement the relevant components of the AML/CFT strategy as soon as possible, particularly to enhance the role of financial investigations, asset recovery mechanisms and interagency coordination and cooperation in these fields. • The National Office for Economic Crimes Enforcement, foreseen under the strategy should become staffed and operational as soon as possible in |

| AML/CFT System | Recommended Action (listed in order of priority) |
|---|--|
| | <p>order to monitor and enhance the effectiveness of interagency cooperation and coordination in the area of financial crime.</p> <ul style="list-style-type: none"> • The Asset Management Agency, police, KPC and KJC should be required to keep coordinated statistics with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences. • There should be consistency of terminology throughout the legislation to dispel ambiguities, including the discrepancies between the AML/CFT Law, CC and CPC. • The substitution of non-criminally acquired assets in lieu of confiscating the actual proceeds/material benefit is implied in Article 97.1 of the Criminal Code. This should be redrafted to remove any doubt. • Temporary Freezing Orders are initiated by the Prosecutor. There are provisions for appeal by those affected by the Order but it is not explicitly stated in the CPC that application for these Orders are ex parte. The language of the relevant provision (Art 274 CPC) should be explicit to remove doubt. • Kosovo should consider implementing a system of in rem confiscation of the proceeds of crime. The amendments to the extended law on confiscation do not provide this. |
| 2.5 Freezing of funds used for terrorist financing (SR.III) | <ul style="list-style-type: none"> • Draft and adopt effective laws and procedures for freezing of terrorist funds or other assets of designated persons and entities in accordance with UNSCRs 1267/1988 and 1373 or under procedures initiated by third countries and ensure that freezing actions extend to funds or assets controlled by designated persons. • Establish a competent designating authority for the purposes UNSCR 1373. • Set up effective systems for communicating actions under the freezing mechanisms to the financial sector and provide adequate practical guidance in this field. • Introduce appropriate procedures <ul style="list-style-type: none"> ○ for considering de-listing requests and for unfreezing funds or other assets of delisted persons or entities and persons or entities inadvertently affected by a freezing mechanism; ○ for authorising access to funds or other assets frozen pursuant to UNSCR 1267/1988 in accordance with UNSCR 1452; ○ and for specific procedures to challenge freezing actions taken pursuant to the respective UNSCRs. |

| AML/CFT System | Recommended Action (listed in order of priority) |
|--|--|
| | <ul style="list-style-type: none"> • Provide for measures for monitoring the compliance with implementation of obligations under SR.III and to impose sanctions. |
| 2.6 The Financial Intelligence Unit and its functions (R.26) | <ul style="list-style-type: none"> • The Ministry of Finance and the Governing Board of the FIU should take measures to facilitate and promote the institutional standing of the FIU with regard to other authorities. • The number of databases that FIU has access to should be expanded. Most importantly, the FIU should be provided access to the database of the Police. Those databases where FIU is allowed direct access should be integrated into the analytical mainframe of goAML to enhance the quality, scope and speed of analysis. • Reporting forms should not pose obligations on reporting entities that go beyond the AML/CFT Law (additional resource burden on the private sector). • The FIU should take additional measures to increase the quality of STRs and ultimately alleviate the burden of additional requests by working with the reporting sector by providing general (typologies) and targeted feedback on the outcome of STR disseminations. • A formal and regular system of feedback on progression of FIU referrals should be implemented jointly with Police, Customs and Prosecutors. This issue should be considered as one of the priorities by the National Office for Economic Crime Enforcement, when this Office is set up. • The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort. • The publication of the annual report by the FIU should be considered a priority in order to raise awareness about the activities of the FIU among the wider interagency community, as well as the reporting sector. This report should be used, inter alia as an effective tool by the FIU to provide feedback to the reporting sector, and thus should always include information on current ML typologies. • It is recommended to modify the text of the AML/CFT Law so as to make the FIU power to request additional information unequivocal and not subject to any interpretation. • That the FIU should implement the Egmont Principles of Information Exchange in its dealings with foreign FIU's • The FIU should conduct a financial and technical |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | <p>needs assessment including a 3 year forward look. This should be complemented and informed by an assessment of the money laundering threats and risks to Kosovo (as foreseen by the AML/CFT strategy), where the FIU should take a leading role. The two assessments should produce an integrated action/resource allocation plan with joint priorities set for the FIU, law enforcement, supervisory and policy-making authorities.</p> |
| <p>2.7 Law enforcement, prosecution and other competent authorities (R.27)</p> | <ul style="list-style-type: none"> • The National Office for Economic Crimes Enforcement should urgently design measures for closer FIU-police collaboration and monitor their implementation in order to increase the efficiency in the use of FIU resources by police. • The National Office for Economic Crimes Enforcement should institute a system of maintaining unified statistics among police and prosecution on ML cases, in order to ensure that accurate analysis of effectiveness of the system can be made. • Increase the staffing of the Kosovo Police financial crime and money laundering unit. • The police liaison officer placed in the FIU following the signing of the planned MoU should become the main channel of feedback between the two agencies, particularly with regard to the supply of information on the progress of FIU cases. This should be explicitly specified in the text of the MoU. Additionally the FIU should hold regular consultations and coordination meetings with the Police ML unit on issues pertaining to the content of supplied material. • To introduce objective and transparent criteria for appointment/dismissal of the General Director and top management of the Police in order to ensure operational independence of the Police (see description in the AC Report, Section 2.3). • It is recommended to adopt guidelines for Police concerning the approval of exceptional outside engagement for police officers and establish a limit for the remuneration on such engagements (see description in the AC Report, Section 2.3). • The Kosovo Police Inspectorate role should be expanded to include an evaluation on whether KP is effective and ‘fit for purpose’. These reports should be made public. • There should be a concerted effort to clear the backlog of ML cases in the prosecutorial system. • Kosovo competent authorities should undertake a review of ML/TF trends and techniques on a regular interagency basis with detailed input from the police |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | and prosecution. |
| 2.8 Cross border declaration or disclosure (SR.IX) | <ul style="list-style-type: none"> • Consideration should be given to further reinforcing the Customs through allocating additional resources to motivate and facilitate the filling of vacancies, as well as to reinforce the integrity of staff. • A periodic external fit-for-purpose evaluation should be carried out with regard to Kosovo Customs in order to assess function, structure, effectiveness and value for money. The results should be made public. |
| 3. Preventive Measures – Financial Institutions | |
| 3.1 Risk of money laundering or terrorist financing | <ul style="list-style-type: none"> • Kosovo authorities should undertake a national assessment of ML and TF risks |
| 3.2 Customer due diligence, including enhanced or reduced measures (R.5) | <ul style="list-style-type: none"> • a review of Rule X, incorporating Advisory Letter 2007/1, of the CBK within the context of the new legislation and the repeal of the UNMIK Regulations; • harmonisation of the definition of ‘financial institution’ in the respective laws and regulations; • legal obligation for the application of the full CDD measures as defined in the AML/CFT Law as opposed to the application of the identification and verification processes which only form a component of the CDD concept; • a review of the distribution and application of the United Nations and other lists of designated persons and entities; • a general review of the AML/CFT Law in specific areas related to enhanced and reduced CDD within the context of the application and guidance on the risk based approach and the harmonisation of provisions as indicated in the respective Essential Criteria. |
| 3.3 Politically Exposed Persons (PEPs) (R.6) | <ul style="list-style-type: none"> • harmonise the definition of a PEP with the FATF definition in the AML/CFT Law; • impose legal obligation to identify if a beneficial owner of a legal entity falls within the definition of PEP; • amend Article 21 of the AML/CFT Law to ensure that procedures are applied to identify if a customer or a beneficial owner is eventually identified as a PEP or becomes a PEP; • clarify in Article 21 of the AML/CFT Law that the identification of the source of funds is applicable on an ongoing basis to all transactions with PEPs; • provide guidance to the industry. |
| 3.4 Financial institution secrecy or confidentiality (R.4) | <ul style="list-style-type: none"> • a new bullet point be added to Article 74(2) of the Law on the CBK, in particular if the CBK is eventually given supervisory powers under and for the purposes of the AML/CFT Law, to clarify the lifting of confidentiality when the CBK provides information to the FIU. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| 3.5 Record keeping (R.10) | <ul style="list-style-type: none"> • amending paragraph (6.2) of Article 17 in connection with the timing of the retention period for a series of linked occasional transactions; • inserting a new paragraph (7) to Article 17 empowering the FIU to extend the retention period in specific cases; • amending paragraph (6.1) of Article 17 consistent with paragraph (6) of Article 18; and • harmonising Article 17 and Article 20 on the availability of retained records to competent authorities. |
| 3.6 Suspicious transaction reporting (R.13 & SR.IV) | <ul style="list-style-type: none"> • amending the definition of ‘suspicious acts and transactions’ to include situations where information available indicates that a person or entity may be involved in criminal activities; • amending Article 22 to introduce the reporting obligation for the financing of terrorism; • amending the definition of ‘suspicious acts or transactions’ to included attempted acts and transactions; and • FIU to undertake measures to ensure that CTRs that raise suspicions are also reported as STRs and to create awareness accordingly. |
| 3.7 Protection and no tipping off (R.14) | <ul style="list-style-type: none"> • amend Article 35 of the AML/CFT Law to extend protection to directors, officers and employees, temporary or permanent; • amend paragraph (4) of Article 22 imposing the prohibition of disclosure in accordance with the international standards; • consider extending the prohibition of disclosure to other reporting subjects and entities; • ensure that paragraph (1.3) of Article 15 does not cover the names and personal details of the staff at the bank or financial institution making the report or providing the information; • review paragraph (2) of Article 15 of the Law to limit the entities or authorities to whom the information could be provided to those to whom the FIU forwards its reports; • add a new paragraph (4) to Article 15 of the AML/CFT Law which obliges any authority that for any reason has possession of personal information on employees of reporting subjects who have filed a report or provided information, to protect such information and keep it confidential; • consider the provisions of Article 28 of the EU Third Directive on the lifting of the disclosure prohibitions in specific circumstances; and • consider inserting a new paragraph (4A) to Article 22 of the AML/CFT Law imposing a prohibition of disclosure |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | in circumstances as provided under the Council of Europe Convention (CETS 198) |
| 3.8 Shell banks (R.18) | <ul style="list-style-type: none"> • redraft paragraph (6) of Article 21 to remove legal uncertainties; • insert a definition of ‘correspondent banking relationship’ incorporating both ‘correspondent’ and ‘respondent’ institutions in accordance with the definition in the FATF Glossary to the Methodology; • insert a new paragraph (4.6) to Article 21 of the AML/CFT Law to ensure that banks confirm that their respondent institutions do not allow the use of their accounts by shell banks. |
| 3.9 Ongoing Supervision and Monitoring and Market Entry (R.23) | <ul style="list-style-type: none"> • introduce a legal basis appointing a competent authority to act as the supervisory authority for the financial sector for the purposes of the AML/CFT Law; • a supervisory legal mandate should be accompanied with a mandate for the appointed supervisory authority to issue binding and mandatory rules and regulations for AML/CFT purposes (for the CBK beyond the powers of the CBK in this regard under Article 85 of the Law on Banks for prudential purposes); • insert a new paragraph (6) to Article 37 of the Law on Banks requiring a person or entity, alone or in concert with another, divesting of a significant interest or to reduce current shareholding to inform the CBK accordingly; • insert a new paragraph (2) to Article 38 of the Law on Banks requiring application of AML/CFT criteria as established under the EU Directive on Mergers and Acquisitions for approval of changes in shareholding; • amend paragraph (3) of Article 39 of the Law on Banks on mergers, consolidations and acquisitions consequent to the proposed paragraph (2) to Article 38; and • harmonise the definitions of ‘financial institution’ in the various laws. |
| 3.10 Supervisors (R.29) | <ul style="list-style-type: none"> • insert a new Article 30B in the AML/CFT Law to the effect that a supervisory authority appointed under the AML/CFT Law that already has a supervisory remit under other legislation may apply its prudential supervisory powers under the respective laws for the purposes of supervising compliance under the AML/CFT Law with the exception of the application of administrative or other penalties and sanctions under these laws as these are contemplated under the AML/CFT Law; and • insert a new paragraph (6) to Article 30 of the AML/CFT Law providing for the off-site examination powers of the FIU. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| 3.11 Sanctions (R.17) | <ul style="list-style-type: none"> • review of Article 24(8), Article 25(7), Article 26(14) and Article 27(4) within the context of the proposed amendments to Article 31 of the AML/CFT Law; • review present criminal and other offences for legal certainty and avoidance of legal complexity in application due to dual offences and different penalties; • redraft Article 31 and introduce new Articles 31A and 31B as contemplated in the draft Amending Law amending the AML/CFT Law; • designate authority/authorities to impose sanctions through the revised Article 31; • ensure sanctions are applicable to directors and senior management through the revision of Article 31 and for this purpose amend Article 34 of the AML/CFT Law; and • introduce range of sanctions through the revision of Article 31 as proposed. |
| 3.12 Money or value transfer services (SR. VI) | <ul style="list-style-type: none"> • harmonise the definition of a ‘financial institution’ in the respective legislation, including the AML/CFT Law, including activities that may be undertaken by non-bank financial institutions; • designate a competent authority with a regulatory and supervisory remit for the purposes of the AML/CFT Law for the entire financial sector; • clarify in the Law on Banks the power for non-bank financial institutions, including MVT services providers, to appoint agents and under what conditions or prohibit them; • insert a definition of ‘agent’ in the Law on Banks; • insert a new paragraph or Article in the Law on Banks or the AML/CFT Law obliging MVT services providers to maintain a list of agents if the Law on Banks does not prohibit this; • redraft Article 31 of the AML/CFT Law as recommended under Section 3.11 of this Report. |
| 3.13 Modern secure transaction techniques (R.20) | <ul style="list-style-type: none"> • CBK should document its strategy for better cash management techniques with objectives and milestones including the introduction of direct debit and direct credit systems; • CBK should co-ordinate a study on the statistics on currency issued and currency deposited to identify the source of these differences in cooperation with other authorities such as Customs and Tax Administration; • this study should also identify reasons for the high use of the €500 currency note; • it is recommended to ensure effectiveness of the |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | implementation of Article 13 of the Law on Tax Administration by Tax Administration. |
| 4. Legal Persons and Arrangements | |
| 4.1 Legal persons – Access to beneficial ownership and control information (R.33) | <ul style="list-style-type: none"> • introduce an obligation for immediate reporting of changes to shareholding and directors further to the <i>ad hoc</i> appointment of a person responsible to do so; • introduce procedures and systems for competent authorities and the industry to identify where a person owns more than one business organisation; • introduce administrative procedure to ascertain to the extent possible the accuracy of documents and contents by the KBRA in order to ensure that both natural and legal persons establishing companies be checked and monitored with respect to possible criminal records or professional disqualifications, as well as against the United Nations and other lists of designated persons and entities; • introduce procedures to identify interconnectivity between registered business organisations; • introduce measure for accuracy and validity of applications for registration to cater for the short registration period. |
| 5. Non-Profit Organisations | |
| 5.1 Non-profit organisations (SR.VIII) | <ul style="list-style-type: none"> • insert a new Article 2A on the ‘Designation and Competences of the Competent Body’ in the Law on NGOs establishing the competencies of the Competent Body with regards to designation; functions and responsibilities under the Law; oversight of NGOs; and periodic risk assessment including sharing of information; • amend definition of ‘Competent Body’ in Article 2 of the Law on NGOs; • remove legal ambiguity on supervisory powers under Article 30 and designate an authority to monitor NGOs for the purposes of Article 24 of the AML/CFT Law;¹⁸⁹ • amend paragraph (11) of Article 9 of the Law on NGOs requiring NGOs also to report changes in relation to paragraph (4.2) and (4,3) of Article 18 of the Law on NGO; • consider introducing prudential sanctions for breaches of Article 4 and paragraph (11) of Article 9 of the Law on NGOs; • harmonise Article 24 of the AML/CFT Law and Article 21 of the Law on NGOs on the sanctioning powers of the Competent Body; • insert a new paragraph (1.3) to Article 21 of the Law on NGOs providing a link to Article 24 of the AML/CFT |

¹⁸⁹ The draft Amending Law amending the AML/CFT Law is proposing to place this responsibility with the FIU.

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | <p>Law on removal of registration for non compliance with Article 24 of the AML/CFT Law;</p> <ul style="list-style-type: none"> • include measures in the internal licensing procedures of DRLNGO for due diligence on founders, at least by reference to United Nations and other lists of designated persons and entities; • amend paragraph (4) to Article 24 of the AML/CFT Law to provide for the maintenance of transaction records and their availability to competent authorities; • insert a new paragraph (5A) to Article 24 of the AML/CFT Law empowering the FIU to demand information, data or documents from NGOs for the purposes of fulfilling its obligations under the Law further to paragraph (4) and paragraph (9) of the same Article; • review Article 4 of the Memorandum of Understanding between the FIU and DRLNGO; • establish practical mechanisms for co-operation and sharing of information between authorities relevant to the NGOs sector; • undertake an assessment of risks and vulnerabilities to which NGOs may be exposed or be exploited for financing of terrorism and implement an outreach programme for NGOs to create more awareness of such risks and vulnerabilities including training awareness sessions; • DRLNGO should undertake a strategic assessment to determine which NGOs occupy a significant portion of the financial resources under control of the sector or have a substantial share of the sector's international activities. This assessment should be shared with the FIU; • extend FIU Administrative Directive requiring reporting entities to pay special attention to UNSCR on designated individuals and organisations to DRLNGO; and • implement the relevant components of the AML/CFT Strategy with immediate effect. |
| 6. National and International Co-operation | |
| 6.1 National co-operation and coordination (R.31) | <ul style="list-style-type: none"> • In order to rectify the deficiencies in the area of interagency cooperation authorities in Kosovo should make it a priority to implement the AML/Economic Crime and KPC Strategies. This however should be done in a coordinated fashion, given the number of cross-cutting issues among the two documents. • In view of the assessment team, the KPC Strategy should be more explicit with regard to promoting feedback between relevant authorities, which could be accomplished through inserting mandatory obligations in the MoUs. This should also be mentioned in the Action plan of the Strategy. • This Joint Rule of Law Coordination Board should be kept |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | informed about the implementation of both – the AML/Economic Crime Strategy and the KPC Strategic Plan on Inter-Institutional Cooperation in order to ensure coordination and complementarity with other issues being discussed on its agenda. |
| 6.2 Mutual Legal Assistance (R.36) | <ul style="list-style-type: none"> • Provide for service standards on turnaround times of foreign requests which could impede effectiveness of the system. • Revise procedural legislation so as to overcome lengthy backlogs with regard to MLA requests that require Judicial Orders to be produced. |
| 6.3 Other Forms of Co-operation (R.40) | <ul style="list-style-type: none"> • ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where money laundering/TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness. • The AML law should include an ability for the FIU or the prosecutor to seek a bank account monitoring order. • Kosovo should clarify whether or not it refuses international co-operation on the grounds that it relates to a political offence. • FIU should have powers to freeze or postpone transactions on the request of a foreign FIU. |
| 7. Other Issues | |
| 7.1 Resources and statistics (R. 30 & 32) | <ul style="list-style-type: none"> • A legal mandate appointing a competent authority to supervise the entire financial sector for the purposes of the AML/CFT Law should be accompanied by a review of adequate human and other resources. • The Asset Management Agency, police, KPC and KJC should be required to keep coordinated statistics with a greater level of detail on the amounts of property frozen, seized, and confiscated relating to ML, FT, criminal proceeds and underlying predicate offences. • The lack of meaningful statistics demonstrating the outcomes of FIU disseminations to law enforcement is the most important gap and should be rectified by Kosovo authorities in the shortest time possible through a collective interagency effort. • The National Office for Economic Crimes Enforcement should institute a system of maintaining unified statistics among police and prosecution on ML cases, in order to ensure that accurate analysis of effectiveness of the system can be made. • Increase the staffing of the Kosovo Police financial crime and money laundering unit. • Consideration should be given to further reinforcing the Customs through allocating additional resources to motivate and facilitate the filling of vacancies, as well as to reinforce the integrity of staff. |

| AML/CFT System | Recommended Action (listed in order of priority) |
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| | <ul style="list-style-type: none"> <li data-bbox="699 255 1412 389">• A new Article 30A under the title “Statistical Data” as indicated should be introduced in the AML/CFT Law requiring the maintenance of statistics by reporting subjects and relevant competent authorities. <li data-bbox="699 398 1412 566">• ILECU should maintain statistics including sufficient detail to identify the predicate offence and especially where money laundering/TF is a part, as well as request turnaround times without which it is impossible to judge the effectiveness. |

ANNEXES

ANNEX 1: List of abbreviations

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| AC | Anti corruption |
| AML/CFT | Anti-Money Laundering / Countering or Combating the Financing of Terrorism. |
| AMSCA | Agency for Managing Seized and Confiscated Assets |
| CBK | Central Bank of Kosovo |
| CC | Criminal Code |
| CDD | Customer Due Diligence |
| CETS | Council of Europe Treaty Series |
| CFT | Countering or Combating the Financing of Terrorism |
| CLLP | Criminal Liability for Legal Persons for Criminal Offences Law |
| CPC | Criminal Procedures Code |
| CoE | Council of Europe |
| CTR | Cash Transaction Report |
| DNFBPs | Designated Non-Financial Businesses and Professions |
| DRLNGO | Department for Registration and Liaison with NGOs |
| EBRD | European Bank for Reconstruction and Development |
| EC | Essential Criteria/Criterion |
| EU | European Union |
| EULEX | European Union Rule of Law Mission |
| FATF | Financial Action Task Force |
| FIC | Financial Intelligence Centre (forerunner of the FIU) |
| FIU | Financial Intelligence Unit |
| FT or TF | Financing of Terrorism or Terrorism Financing |
| GDP | Gross Domestic Product |
| GP | General Partnership |
| IFC | International Finance Corporation |
| ILECU | Directorate for International Law Enforcement Co-operation |
| IMF | International Monetary Fund |
| IB | Individual Business |
| JSC | Joint Stock Company |
| KBRA | Kosovo Business Registration Agency |
| KCA | Kosovo Cadastral Agency |
| KFOR | Kosovo Force |

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| KIA | Kosovo Intelligence Agency |
| KJC | Kosovo Judicial Council |
| KJI | Kosovo Judicial Institute |
| KP | Kosovo Police |
| KPC | Kosovo Prosecutorial Council |
| LLC | Limited Liability Corporation |
| LP | Limited Partnership |
| MFE | Ministry of Finance and Economy (also referred to as MoF) |
| MFI | Micro Finance Institution |
| MIA | Ministry of Internal Affairs |
| ML | Money Laundering |
| MLA | Mutual Legal Assistance |
| MoJ | Ministry of Justice |
| MoU | Memorandum of Understanding |
| MTI | Ministry of Trade and Industry |
| MVT | Money or Value Transfer |
| NGO | Non-Government Organisation |
| NPO | Non-Profit Organisation |
| PEP | Politically Exposed Person |
| SPRK | Special Prosecutor's Office of Kosovo |
| SR | FATF Special Recommendation |
| STR | Suspicious Transaction Report |
| TAK | Tax Administration of Kosovo |
| UN | United Nations |
| UNMIK | United Nations Interim Administration Mission in Kosovo |
| UNSCR | United Nations Security Council Resolution |

ANNEX 2: Details of all bodies met during the on-site visit

- Financial Intelligence Unit (FIU)
- Central Bank of Kosovo (CBK)
- Ministry of Internal Affairs (MIA)
- Kosovo Police (KP)
- Kosovo Police Inspectorate (KPI)
- Kosovo Academy for Public Safety (KAPS)
- State Prosecutor's Office (SPO)
- Kosovo Special Prosecution Office (SPRK)
- Kosovo Prosecutorial Council (KPC)
- Kosovo Judicial Council (KJC)
- Constitutional Court (CC)
- Ministry of Justice (MoJ)
- Agency for Managing Seized and Confiscated Assets (AMSCA)
- Kosovo Business Registration Agency (KBRA/MTI)
- Department for Registration and Liaison with NGOs (DRLNGO/MPA)
- Judges from Basic and Municipal courts of Pristina
- Kosovo Tax Administration (KTA)
- Kosovo Customs (KC)
- Kosovo Intelligence Agency (KIA)
- European Union Office in Kosovo (EUO)
- European Union Rule of Law Mission in Kosovo (EULEX) – representatives covering police, prosecution, judiciary and customs
- Organisation for Security and Cooperation in Europe, Mission in Kosovo
- Kosovo Institute for Policy Research and Development (KIPRED)
- Society of Certified Accountants and Auditors of Kosovo (SCAAK)
- Kosovo Banker's Association
- Representatives of commercial banks (Raiffeisen, Procredit, Banka Kombëtare Tregtare) and
- Association of Micro Finance institutions in Kosovo (AMIK).

ANNEX 3: List of key laws, regulations and other material received

- Law on the Prevention of Money Laundering and Terrorist Financing (Law no. 03/L-196 of 30/09/2010), AML/CFT Law
- Law on Amending and supplementing the law no. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing (Law no. 04/L-178 of 11/02/2013)
- Law on Central Bank of Kosovo (Law no. 03/L-209 of 22 July 2010)
- Law on Banks, Microfinance Institutions and Non Bank Financial Institutions (Law no. 04/L-093 of 12 April 2012)
- Law on Pension Funds of Kosovo (Law no. 04/L-101 of 6 April 2012)
- UNMIK Regulation 2001/25 on the Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries
- New Criminal Code (Law no.04/L-082 of 20/04/2012)
- New Criminal Procedure Code (Law no.04/L-123 of 13/12/2012)
- Law on Execution of Penal Sanctions (Law no. 03/L-191 of 22/07/2010)
- Law on Executive Procedure (Law no. 03/L-008 of 02/06/2008)
- Law on Protection of Witness (Law no. 04/L-015 of 29/07/2011)
- Law on State Prosecutor (Law no. 03/L-225 of 30/09/2010)
- Law on Special Prosecution Office (Law no. 03/L-052 of 13/03/2008)
- Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03/L-053 of 13/03/2008)
- Law on the Bar (Law no. 03/L-117 of 20/11/2008)
- Law on Notary (Law no. 03/L-010 of 17/10/2008)
- Law on Amending and Supplementing the Law No. 03/L-010 on Notary (Law no. 04/L-002 of 21/07/2011)
- Law on Police (Law no. 04/L-076 of 23/01/2012)
- Law on Police Inspectorate (Law no. 03/L-231 of 14/10/2010)
- Law on Kosovo Academy for Public Safety (Law no. 04/L-053 of 21/10/2011)
- Law on State Border Control and Surveillance (Law no. 04/L-072 of 21/12/2011)
- Law on the Kosovo Intelligence Agency (Law no. 03/L-063 of 21/05/2008)
- Law on Management of the Seized or Confiscated Assets (Law no. 03/L-141 of 10/07/2009)
- Law on Accounting, Financial Reporting and Audit (Law no. 04/L-014 of 29/07/2011)
- Customs and Excise Code of Kosovo (Law no. 03/L-109 of 10/11/2008)
- Law on Amending and Supplementing Customs and Excise Code No. 03/L-109 (Law no. 04/L-099 of 03/05/2012)
- Law on Tax Administration and Procedures (Law no. 03/L-222 of 12/07/2010)
- Law on Amending and Supplementing the Law No. 03/L-222 on tax administration and procedure (Law no. 04/L-102 of 19/04/2012)
- Law on Business Organizations (Law no. 02/L-123 of 27/09/2007)
- Law on Amending and Supplementing of the Law No. 02/L-123 on Business Organizations (Law no. 04/L-006 of 23/06/2011)

- Law on Liability of Legal Persons for Criminal offences (Law no. 04/L-030 of 31/08/2011)
- Law on Freedom of Association in Non Governmental Organisations (Law no. 04/L-057 of 29/08/2011)
- Law on Classification of Information and Security Clearances (Law no. 03/L-178 of 01/07/2010)
- Law on Games of Chance (Law no. 04/L-080 of 06/04/2012)
- Law on International Agreements (Law no. 04/L-052 of 14/11/2011)
- Law on International Legal Cooperation in Criminal Matters (Law no. 04/L-031 of 31/08/2011)
- Law on Implementation of International Sanctions (Law no. 03/L-183 of 15/04/2010)
- Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence (Law no. 04/L-140 of 11/02/2013)

- Central Banking Authority of Kosovo (CBK) - Advisory Letter 2007-1 of May 2007 on The Prevention of Money Laundering and Terrorist Financing
- CBK – Rule X on The Prevention of Money Laundering and Terrorist Financing
- Financial Intelligence Centre/Unit (FIU) - Administrative Directives