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Model Law on money laundering and financing of terrorism, 1 December 2005: Explanatory Note

Introduction to the model law

The model law is a legal tool intended to facilitate the drafting of legislative provisions by countries that wish to have a law to combat money laundering and the financing of terrorism or to modernize their legislation in this area. The model law ensures that domestic legislation is consistent with existing international anti-money laundering/combating the financing of terrorism (AML/CFT) standards. These standards are mainly contained in the following international documents:[1]

- United Nations (Vienna) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of December 20, 1988 (88 Conv).
- United Nations International Convention for the Suppression of the Financing of Terrorism of December 9, 1999 (ICFT).
- United Nations (Palermo) Convention against Transnational Organized Crime of December 14, 2000 (UNCTOC).
- Resolution 1373 of the United Nations Security Council (S/RES/1373).
- Forty Recommendations of the Financial Action Task Force (FATF) of June 2003 as amended in October 2004 (FATF R).
- Nine Special Recommendations on the Financing of Terrorism of October 2001 and October 2004 of the FATF (FATF SR).
- United Nations Convention against Corruption of October 31, 2003 (UNCAC).
- Council of Europe (Warsaw) Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 (CoEC).
- 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 (EU Dir).
- EU Council Decision 2000/642/JAI of October 17, 2000 concerning Arrangements for Cooperation between Financial Intelligence Units of the Member States in Respect of Exchanging Information (EU CD(FIU)).

The model law also makes it possible to exceed the requirements of the international regulatory framework, drawing inspiration from the relevant provisions developed by domestic legislation. The model suggests innovative provisions to improve the

[1] Each standard is given an abbreviation that will be used as a reference in the explanatory comments on compliance with these standards.

effectiveness of measures to prevent and suppress the laundering of the proceeds of crime and the financing of terrorism and makes available to the Member States appropriate legal means in the area of international cooperation, with great strategic and practical importance.

It will be up to each country to adapt the suggested provisions so as to make them, when necessary, compatible with their constitutional principles and the basic concepts of their legal systems, and to supplement them with measures considered most likely to effectively combat money laundering and the financing of terrorism. However, this model constitutes a cohesive legal whole. When integrating these provisions in their domestic legislation, the States must be sure to preserve the logic of the document so as not to weaken its reach. Certain provisions that are supported by the document as a whole would not have the desired effectiveness if adopted in isolation or taken out of context. The document's overall philosophy would also be adversely affected if certain provisions were eliminated. Nonetheless, some of the provisions included in the model law might more usefully take the form of regulations or decrees provided such instruments were to prove more appropriate for attaining the operational objectives of the mechanism.

In order to facilitate its incorporation into domestic law, the model law presents certain provisions in the form of variants or options. A variant makes it possible to adapt a provision whose absence would be inconceivable in AML/CFT legislation. A State that adopts all components of the model law, leaving aside the options, assures itself of making its law consistent with the international regulatory framework. The options designate elective provisions that generally make it possible to go beyond the international requirements. It will be up to the States to take them into consideration or not.

Comments on articles

These comments are intended to assist States that use the model law, ensuring that its various provisions are properly understood. They provide guidance and criteria for interpreting the provisions so as to facilitate their incorporation in domestic legislation. Each comment first provides the international regulatory provisions whose implementation is assured by the provision in question. If necessary, the comment also gives examples intended to ensure the implementation of the various articles through regulations or circulars. The comments explain the differences between the model's different variants and options. Finally, the comments indicate whether States can incorporate a particular provision through regulation or decree rather than directly in the law.

To be noted from the outset is the fact that Titles II and III on the prevention and detection of money laundering and financing of terrorism follow a risk-based approach that is consistent with the philosophy developed by the FATF. This approach allows States to take into account the risk intrinsic to each sector or to certain types of financial operations and to limit accordingly the scope of certain regulatory obligations. However, any exemption from or easing of requirements must be strictly defined and justified. In such cases, the State must introduce mechanisms to ensure compliance with the obligations.

The comments take into account the criteria developed by the International Monetary Fund, the World Bank, and the FATF in the *Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations* as of February 2005.

Title I. Definitions

Article 1.1 Money laundering

Compliance with: Art. 3, §1 (b) 88Conv, Art. 9 CoEC, Art. 6, §1 UNCTOC, Art. 23, §1 UNCAC, FATF R1, Art. 1 (2) EU Dir

This provision defines money laundering with reference to the money laundering offence defined in Article 5.2.1 of the model law. States should be sure to cover the list of offences in the FATF 40 Recommendations. Further explanation is provided in the explanation to Article 5.2.1.

Article 1.2 Financing of terrorism

Compliance with: Art. 2 ICFT, FATF SR II, S/RES/1373

This provision defines the financing of terrorism with reference to the financing of terrorism offence as defined in Article 5.2.2. of the model law. Further explanation is provided in the explanation to Article 5.2.2.

Article 1.3 Definitions

(A) "Proceeds of crime"

Compliance with: Art. 1 (p) 88Conv, Art. 2 (e) UNCTOC , Art. 1 (a) CoEC

Defining the proceeds of crime amounts to defining the predicate offences that must be taken into consideration as constituting money laundering.

Variant 1: this variant suggests an "all crimes" approach like that of the 2005 Strasbourg Convention. This approach has many advantages: it avoids having to identify the offences considered serious by domestic legislation, lightens the burden of proof in money laundering, and facilitates international cooperation. The FATF urges States to choose this approach. The disadvantage is primarily at the preventive level as the private sector may feel that it does not have to cooperate in the detection of less serious offences.

Variant 2: this means establishing a maximum penalty threshold. All offences with a maximum penalty of more than one year imprisonment must be covered by the money laundering offence. This is the threshold established by the European Union's framework decision of June 26, 2001 on money laundering, which has been taken up in FATF Recommendation 1. With this system a State can avoid establishing a list that must then be adapted to keep pace with changes in legislation and the international standards. Any offence incurring a punishment above this threshold is automatically incorporated in the list of predicate offences.

Variant 3: the mechanism is the same as in variant 2 and rests on the same international standards. It targets States with a minimum penalty system (e.g., fraud is punishable by a penalty ranging from 8 months to 3 years). The point is to cover all offences that have a minimum penalty of more than 6 months.

Variant 4: this is the list system. The State lists in its legislation all offences that must be deemed to have the potential of generating proceeds that can be laundered. This list must cover at least the list of offences indicated in the FATF 40 Recommendations. The advantage of a list is its transparency; it specifically identifies those offences that must be covered. The disadvantage is that the list must be amended to keep pace with developments in legislation and the international standards. For example, if a State establishes that bribery is an offence, it will have to consider expanding its list of offences constituting money laundering.

(B) "Funds" or "Property"

Compliance with: Art. 1 (q) 88Conv, Art. 1 (1) ICFT, Art. 2 (d) UNCTOC, Art. 2 (d) UNCAC, Art. 1 (b) CoEC

The definition of these terms is important in that it determines the scope of several provisions (freezing, seizure, financing of terrorism). It is modeled on Article 1, §1, of the ICFT. It is also the definition adopted by the FATF. It is a very broad definition that seeks to encompass all types of assets regardless of their nature.

(C) "Predicate offence"

Compliance with: Art. 2 (h) UNCTOC, Art. 2 (h) UNCAC, Art. 1 (e) CoEC

This term aims at offences that produce assets that can be laundered. The list of predicate offences covered refers back to point (A) defining the proceeds of crime. The powers granted by the model law for combating money laundering and financing of terrorism also generally cover these offences. Thus, for example, the confiscation of property and funds also refers to these offences to the extent that they generate assets that can be laundered.

(D) "Terrorist act"

To define the idea of a terrorist act, a State may either reference the annex to the 1999 Convention for the Suppression of the Financing of Tterrorism (*variant 1*), or opt for an exhaustive list of the treaties indicated (*variant 2*). The 1999 Convention authorizes a State, upon becoming a party to the Convention, to declare that a treaty to which it is not a party shall not be considered a part of the annex. Such a State shall then choose *variant 2*. Besides referring to these treaties, compliance with Article 2, §1, (b) of the ICFT presupposes covering the behaviors indicated in this article as a generic offence. This definition has been adopted in FATF SR II.

(E) "Terrorist"

The definition of a terrorist is based on Article 2, §5 of the ICFT and is modeled on the definitions established in the context of FATF SR II. A characteristic of this definition is that a person commits, attempts to commit, participates in, or contributes to a terrorist act.

(F) "Terrorist organization"

This definition is the same as that for a terrorist except that it focuses on a group of terrorists rather than on an individual person.

(G) "Financial institutions"

This involves establishing the list of financial institutions that will be covered by the obligations the law establishes for combating money laundering and the financing of terrorism.

There are two possible approaches. The State may either decide to cover financial institutions by indicating a list of financial activities (*variant 1*) or to list by name the financial institutions covered by the provision (*variant 2*).

The FATF preferred the first variant because it would make it possible to specify the actual conduct of financial activities rather than the legal form of the institution, and thus obtain more complete coverage. The risk in *variant 2* is that certain financial activities may be carried out by entities not included in the list. However, a disadvantage of *variant 1* is that it could result in coverage that is too broad because it applies to institutions that occasionally carry out one of the activities listed in the law. In order to offset this disadvantage, *variant 1* provides an option whereby the State

can empower a competent authority to exclude totally or partially from the scope of the provision natural or legal persons that carry out one of these financial activities on an occasional or very limited basis, with the result that the risk of money laundering or financing of terrorism is minimal. Some attention must be given to the absolute volume of financial activities an entity carries out. For example, a State could be authorized to exempt financial activities below a certain volume of service or a certain threshold of activity. The most oft-cited example is that of a hotel that offers its clientele foreign exchange services on an occasional basis and for limited amounts.

If a State chooses *variant 2*, it must ensure that all the activities listed in *variant 1* that are customarily carried out are covered by the entities listed. More specifically with respect to funds transfer activities, FATF SR VI requires covering both the formal sector and the sector operating outside the conventional financial sector. This is why States opting for *variant 2* must include point d) covering all persons or entities professionally engaged in the transfer of money or value. This does not apply to natural or legal persons that provide messages or any other system supporting fund transfers exclusively to financial institutions (e.g., SWIFT).

(H) "Designated non-financial businesses and professions"

FATF Recommendations 12 and 16 require various non-financial businesses and professions to be covered by the AML/CFT measures.

As for the coverage of independent legal professions, several circumstances are listed.

A State may choose to provide coverage that is limited and modeled on that of the independent legal professions in the case of independent accountants, auditors, and tax advisers. This limitation is justified by the fact that in some States these professions are able to engage in defense activities in the courts similar to those of attorneys and it would thus be discriminatory to treat them differently.

Regardless of the alternative chosen, it is important to be vigilant with respect to how the profession of attorney is covered. It would be useful to consult with this sector so as not to cover activities deemed potentially related to an exercise of the rights of the defendant.

The definition of covered businesses and professionals must avoid including thresholds that limit coverage based on their participation in an activity beyond a certain amount. Such a limitation would be inconsistent with the desire to ensure effective supervision of these professions. Thresholds are suggested in Article 2.2.5 with respect to the identification requirement.

As an option, a State may specify that the list of designated businesses and professions may be expanded by government decree, thus avoiding the need to adopt a law every time the list is extended to include a new profession.

(I) "Politically exposed persons (PEPs)"

This concept is defined in the FATF Glossary and based on the Basel Committee's standards on customer due diligence for banks. At a minimum, States must cover

foreign PEPs but may also choose to cover domestic PEPs. This option to cover domestic PEPs is advised by the Interpretative Note to FATF Recommendation 6. The FATF Glossary provides examples of PEPs: Heads of State or government, senior politicians, senior government, judicial, or military officials, directors of state owned corporations, leaders of political parties, and senior officials of international organizations. This does not apply to mid-level or lower level individuals. The definition also encompasses family members or close associates, including legal persons in which PEPs have considerable influence.

The determination of the categories of persons to be covered may be established by regulation or circular.

(J) "Payable-through account"

This definition is taken from the FATF Glossary. It is based on the work of the Basel Committee and incorporated in the relationships of correspondent banks. The payable-through account indicates a situation where a bank's customer has direct access to that bank's account at a correspondent bank to transact business on his own behalf.

(K) "Money or value transfer service"

This concept comes from FATF SR VI. A money or value transfer service may be provided by natural or legal persons by means of a formal, regulated financial system or by means of an informal system or network. In some countries, informal systems are called alternative money transfers or underground or parallel banking systems. Depending on the region, such systems may involve the following systems: *hawala, hundi, fei-chien, black market peso exchange, etc.*

(L) "Controlled delivery"

Compliance with: Art. 1 (g) 88Conv, Art. 2 (i) UNCTOC

This definition is taken from Article 2, i) of the UNCTOC. It refers to "illicit or suspect consignments and cash." One of the objectives of this technique is to follow property that is suspected to be the proceeds of crime.

(M) "Undercover operation"

There is currently no international standard that defines the particular investigative technique referred to in FATF Recommendation 27. The definition is taken from the Belgian law of January 6, 2003 on specific investigative methods.

(N) "Freezing" and (O) "Seizing"

These definitions are taken from the Interpretative Note to FATF SR III, based on Article 2, f) of the UNCTOC. The difference between freezing and seizing rests, in the case of seizing, on the fact that if the property seized is still owned by the person who holds an interest in said property, whereby the competent authority usually takes over its administration or management. Freezing is most often part of an administrative procedure (e.g., seizing of terrorist assets pursuant to United Nations

resolutions) while seizing usually occurs in the context of a judicial proceeding (e.g., seizure of real estate in the context of an investigation relating to money laundering).

(P) "Confiscation"

Compliance with: Art. 1 (f) 88Conv, Art. 2 (g) UNCTOC, Art. 2 (g) UNCAC, Art. 1 (d) CoEC

The definition is taken from Article 2, g) of the UNCTOC.

(Q)"Instrumentalities"

Compliance with: Art. 1 (c) CoEC

The definition of this term is useful for determining the objects covered in the context of provisions relating to seizure and confiscation.

(R)"Organized criminal group"

Compliance with: Art. 2 (a) UNCTOC

The definition of this term is useful in determining the aggravating circumstances of money laundering and financing of terrorism offences. The definition is taken from Article 2, a) of the UNCTOC. The definition refers to the notion of "structured group" which is defined in the UNCTOC as a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure (Article 2, c of the UNCTOC).

(S) "Beneficial owner"

This definition is fundamental in the exercise of customer due diligence. It is taken from the FATF Glossary. Obviously, the idea of control must be clarified. It is up to each State to provide content with respect to this concept, based on its domestic legislation. For example, control may be determined based on the possession of a specific percentage of shares or voting rights within a corporation. It may also indicate persons who carry out mandates within a corporation's management or administrative bodies or persons who have decisive influence over the appointment of the majority of directors.

See also the definition of beneficial owner in Art. 3 (6) of the EU Directive). This definition goes beyond the FATF definition and is more detailed both in the case of corporate entities and in the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds.

(T) "Wire transfer"

This definition is taken from the Interpretative Note to FATF SR VII. It has to be mentioned that the originator and the beneficiary may be the same person.

Title II. Prevention of money laundering and financing of terrorism

Chapter I. General preventive provisions concerning currency and bearer negotiable instruments

Article 2.1.1 Obligation to declare or disclose physical cross-border transportation of currency and bearer negotiable instruments

Compliance with: FATF SR IX

The purpose of this provision is to ensure that terrorists and other criminals do not finance their activities or launder the proceeds of their crimes through the physical cross-border transportation of currency and bearer negotiable instruments or e-money. It sets out the two types of systems that may be put in place to detect the cross-border transportation: the declaration system (variant 1) and the disclosure system (variant 2). Under the declaration system (variant 1), any person who enters or leaves the country has to declare to the competent authority the currency, bearer negotiable instruments or e-money that he or she carries in an amount equal to or above a certain threshold. In accordance with the Interpretative note to FATF SR IX, countries should not set the threshold above 15,000 EUR/USD. In other words, the 15,000 EUR/USD indicated in Article 2.1.1 is the maximum threshold that countries may adopt. Under the disclosure system (variant 2), any person who enters or leaves the country is required to disclose the currency, bearer negotiable instruments or e-money upon request by the competent authority. In both variants, countries may choose to extend the declaration/disclosure system to cover precious metals and precious stones in addition to currency, bearer negotiables and e-money.

Countries may choose which of these two systems to implement. But whichever system is implemented, countries should ensure that several elements are covered. They should ensure that they implement a system applicable to both incoming and outgoing transportation (although it does not necessarily have to be the same system for incoming and outgoing cross-border transportation of currency, bearer negotiable instruments or e-money); upon discovery of a false declaration/disclosure, the competent authorities should have the powers to request and obtain further information from the person who carries the funds with regard to the origin of the currency/bearer negotiable instruments/e-money and their intended use; the information obtained should be made available to the financial intelligence unit (FIU); there should be adequate co-ordination among customs, immigration and other related authorities; competent authorities should be able to stop or restrain currency/bearer negotiable instruments or e-money where there is a suspicion of money laundering of terrorist financing in order to ascertain whether evidence of either may be found; either system should allow for the greatest possible measure of international co-operation; persons who make a false declaration or disclosure should be subject to effective, proportionate and dissuasive sanctions.

Article 2.1.2 Limit on the use of currency and bearer negotiable instruments

Compliance with: FATF R19

This provision is optional. Many States, including France, Belgium, and Italy, have adopted legislation limiting the use of cash payments, introducing thresholds above which payments must be made using other techniques. The first two paragraphs may be adopted independently of each other or together. The first paragraph covers all payments in general while the second covers the sale of articles of value.

Chapter II. Transparency in financial transactions

Article 2.2.1 General provisions

Compliance with: Art. 52, §4, UNCAC, FATF R18, Art. 13 (5) EU Dir.

This provision deals with shell banks and takes into account the Basel Committee's recommendations on customer due diligence. A shell bank is defined in the FATF Glossary as a bank that is incorporated in a jurisdiction in which it has no physical presence and that is unaffiliated with a regulated financial group. FATF Recommendation 18 and UNCAC Article 52 prohibit States from allowing the incorporation of shell banks in their territory and prohibit financial institutions from entering into or continuing business relationships with shell banks.

Article 2.2.2 Transparency of legal persons and arrangements

Compliance with: FATF R33 andR34

FATF Recommendations 33 and 34 urge States to establish measures to ensure the transparency of legal persons as well as legal arrangements. In the FATF Glossary, "legal persons" refers to bodies corporate, foundations, *anstalt*, partnership, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property. "Legal arrangements" under FATF Recommendation 34 refers to express trust or other similar arrangements. Examples of such similar arrangements for AML/CFT purposes include the *fiducie*, *treuhand* and *fideicomiso*. Each State must consider the types of structures recognized in its domestic law. Transparency is achieved if the competent authorities can readily obtain adequate, accurate, and current information on beneficial owners and on the control of legal persons (including those that issue bearer shares) or legal arrangements. While the attainment of the goal is mandatory, the methods for attaining this are left up to the States.

Thus, a State may choose to establish a central registration system (options (2) and (3)) through a national registry that records the necessary information on the beneficial ownership and control of all corporations, legal persons, and legal arrangements including, in the latter case, information on the settlor, trustees, beneficiaries, and guardians. This information may be made public or accessible only to the competent authorities. This information must be updated periodically.

The State may also require legal persons themselves to maintain and retain adequate, accurate and current information on their beneficial ownership and their control structure (option 1), as long as they make it accessible to the competent authorities.

Supplemental information on the transparency of corporate structures may be found in the 2001 OECD Report, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*.

Article 2.2.3 Identification of customers by financial institutions and designated non-financial businesses and professions (DNFBPs)

Compliance with: FATF R5, R6, R7, R8, and R12, Art. 18 ICFT, Art. 52 (1) UNCAC, FATF SRVII, Art. 13 (2) CoEC, Art. 6-10 and 13 EU Dir.

The customer identification requirement is a central pillar of the preventive measures to combat money laundering and financing of terrorism. That is why this requirement has become more complex over time, in light of practical experience.

Paragraph (1) defines five situations in which the financial institutions and DNFBPs involved must identify their customers: in business relations; with occasional customers in the case of amounts above a certain threshold; for funds transfers; when there is doubt regarding the accuracy of the data provided; and when there is suspicion of money laundering or terrorism financing. It is necessary not only to identify the customer but also to verify that customer's identity, that is, compare the identifying information with a reliable source in order to ensure that it is accurate. Identification in the case of funds transfers refers to a State's compliance with FATF SR VII. The requirement refers to any electronic transaction carried out by an originator through a financial institution for the purpose of making funds available to a beneficiary in another financial institution. The originator and the beneficiary may be one and the same person. Specific comments on funds transfer transactions are discussed in Article 2.2.7. In all cases described in paragraph (1), the identification of the customer and beneficial owner and the verification of that identity must be conducted by means of reliable independent source, documents, data or information. These source, documents, data or information can include passport, national ID card, driver's license or other such documents stipulated by regulation or other enforceable means. For identification and verification purposes, the word "when" means before or during establishing the business relationship or conducting transactions for occasional customers.

The term "domestic transfer of funds" means any transfer where the originator and beneficiary institutions are located in the same jurisdiction. Domestic therefore refers to any chain of transfer that takes place entirely within the borders of a single jurisdiction, even though the system used to effect the transfer may be located in another jurisdiction.

The term "international transfer of funds" refers to a cross-border transfer where the originator and beneficiary institutions are located in different jurisdictions. This term also refers to any chain of transfers that has at least one cross-border element.

The general rule is that financial institutions and DNFBPs should verify the identity of their customers and the beneficial owner before or in the course of establishing a business relationship or conducting an occasional transaction. Nevertheless, a country may allow the financial institutions and DNFBPs to verify the identity at a later stage, provided however that the verification occurs as soon as reasonably practicable, this is

essential not to interrupt the normal course of business (such as in non face-to-face business for example) and the money laundering risk is effectively managed. This is addressed in the optional language after Article 2.2.3 (1).

Paragraph (2) describes the type of information to be obtained to ensure adequate customer identification. Identification includes obtaining information on the anticipated purpose and nature of the business relationship. It involves determining the customer's intentions with respect to the type of transactions he or she wishes to carry out as well as the purpose of the relationship on the part of the customer. Is the customer entering into the relationship in the context of his or her professional activity or for private purposes, does he or she intend to establish an exclusive, primary, or incidental business relationship? For individuals, identification means obtaining the first and last name, address, and the date and place of birth. A State may choose to replace the address, date, and place of birth with the national identity number. When the customer is a legal person, in addition to the data identifying that person, the institution or the profession involved must identify the beneficial owners of the legal person and take reasonable measures to determine the individuals who hold a controlling interest in or direct the legal corporation in question. However, when a customer is a publicly traded company quoted on a recognized stock exchange, it is not necessary to identify the company's shareholders. When the customer is a legal arrangement, the institution must also determine who controls it. In the case of express trusts, the institution must also obtain and verify the name of the trustees, the settlor, and the beneficiary of express trusts.

Paragraph (3) refers to the requirement to identify the beneficial owner of the transaction when the customer is not acting on his or her own behalf. Identification is a requirement with respect to outcome while verification of identity is a requirement with respect to means (adoption of reasonable measures). The term reasonable measures includes but is not limited to a risk-based and adequate approach to verify the identity so that the institution or person that is required to identify the beneficial owner is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer and also obtaining information on the purpose and intended nature of the business relationship.

Paragraph (4) requires ongoing due diligence with respect to the business relationship. This due diligence includes a careful examination of the transactions effected throughout the business relationship in order to ensure that those transactions are consistent with the institution's knowledge of its customer, the customer's business activities and risk profile and, as applicable, the source of the funds. The institution must ensure the updating and relevance of documents, data, or information collected while carrying out due diligence with respect to its customers, by examining existing documents, particularly for high-risk types of customers or business relationships. The AML/CFT Methodology (criterion 5.8) provides examples of higher risk categories that require enhanced due diligence: non-resident customers, particularly when they reside in countries or territories that the FATF lists as uncooperative, private banking, legal persons and arrangements, companies that issue shares in bearer form and, of course, PEPs and non-face to face customers.

Paragraph (5) refers to the obligation to adopt measures to prevent the risk of money laundering and financing of terrorism when the business relationship is non-face to face, in accordance with FATF Recommendation 8. For example, this would include the following situations: business relationships concluded via the Internet or by other means such as mail courier, services and transactions over the Internet, including retail securities trading over the Internet or by means of other interactive computerized services, telephone banking services, transmission of instructions or orders via fax, use of prepaid, reloadable, or electronic purse cards. A State may introduce directly in its legislation a certain number of measures for managing increased risk (criterion 8.2.1 of the Methodology).

Paragraph (6) refers to the situation where the customer is a PEP, a category that must be considered high risk. The text is modeled on FATF Recommendation 6.

Paragraph (7) concerns correspondent bank relationships that generate risk due to the indirect nature of the relationship between the correspondent bank and the financial institution. The text is modeled on FATF Recommendation 7. All the measures must be adopted even if in the context of a regulation or circular.

Paragraph (8) concerns the consequences arising from the inability of the institution or profession involved to perform the obligations indicated above. In all cases, they must end the business relationship and, where appropriate, make a report to the FIU.

Article 2.2.4 Reduced or simplified identification procedures

Compliance with: FATF R5, Art. 11-12 EU Dir

This article is optional. The risk-based FATF approach allows States to adopt simplified due diligence measures when the risk is minimal. The general rule is that customers must be subject to all the measures described in Article 2.2.3 (1) to (8). Nonetheless, in certain cases, where the risk of money laundering or financing of terrorism is very small, the information on the client and the beneficial owner is public, or there are appropriate controls elsewhere in national systems. These circumstances must be clearly identified and substantiated by the competent authority.

The following may be cited as examples of customers, transactions or products where the risk may be lower. They are drawn from the criterion 5.9 of the AML/CFT Methodology:

- the customer is a financial institution subject to requirements in accordance with the FATF Recommendations and subject to supervision to verify compliance with those requirements;
- the customer is a publicly traded company quoted on the stock exchange;
- the relationship involves a life insurance policy with an annual premium of no more than EUR/USD 1,000 or a single premium of no more than EUR/USD 2,500;
- the relationship involves an insurance policy for a pension scheme, where the policy has no buyback clause and cannot be used as collateral;

- beneficial owners of pooled accounts held by institutions that are subject to obligations in accordance with the FATF Recommendations and subject to effective monitoring systems.

Further examples are provided in the AML/CFT Methodology.

In any case, the simplified procedures may not be applied when there is any suspicion of money laundering or financing of terrorism.

Article 2.2.5 Reliance on third parties identification

Compliance with: FATF R9, Art. 14-19 EU Dir.

Again, this article is optional. It refers to the possibility of relying on third parties ("introducers") to carry out some elements of the due diligence process. The country may determine to which type of financial institutions or DNFBP it applies. In practice, the use of third parties often occurs after customers are introduced by another member of the same financial group, by another financial institution, or by a legal or accounting professional. It may also occur in business relationships between insurance companies and insurance brokers or between mortgage companies and real estate agents. The third-party introducer is distinguished from the agent in that this last one is subject to the same identification requirements by itself. This does not apply to subcontracting relationships where someone participates under the terms of contractual provisions; in this case, the subcontractor is deemed to "merge" with the financial institution or DNFBP. Identification work may only be delegated to a third-party introducer subject to compliance with a certain number of guarantees indicated in FATF Recommendation 9. The State is responsible for determining which financial institutions and DNFBPs offer sufficient safeguards to delegate authority in this fashion, on the understanding that responsibility for identification and verification ultimately rests with the financial institution or DNFBP that relies on third parties.

Article 2.2.6 Special identification requirements

Compliance with: FATF R12, Art. 2 (1) and 10 EU Dir.

For certain DNFBPs, the identification requirement is justified only above a specified amount or for specific transactions.

Paragraph (1) refers to the specific arrangements for casinos. For AML/CFT purposes, the term "casino" includes internet casinos.

Paragraph (2) refers to dealers in precious metals and dealers in precious stones, and (optionally) other natural or legal persons trading in goods. Such dealers must identify their customers only when effecting cash transactions in excess of EUR/USD 15,000. The text is modeled on FATF Recommendation 12, c).

Paragraph (3) refers to real estate agents who must identify their clients only for real estate buying and selling transactions. Real estate agents should comply with FATF Recommendation 5 with respect to both the purchasers and the vendors of the

property. This excludes their activities in connection with the management or leasing of real estate (FATF R12, b).

Article 2.2.7 Obligations regarding wire transfers

Compliance with: Art. 14 (3) UNCAC, FATF SRVII

This provision implements FATF SR VII and its purpose is to keep terrorists and other criminals from having unimpeded access to electronic transfers when moving their funds. This means ensuring that information regarding the originator of the electronic transfer is immediately available to the competent authorities. The provision does not cover possible transfers resulting from a transaction effected via a credit or debit card, as long as the card number accompanies the payment, nor does it cover transfers between financial institutions when both the originator and the beneficiary are financial institutions acting on their own behalf. FATF SR VII leaves to States the option of establishing different arrangements for cross-border transfers and domestic transfers. In the first case, all correct and useful information must appear in the message. In the case of domestic transfers, the State may require only the account number of the originator or a unique form of identification provided that complete information on the originator can be made available to the beneficiary financial institution and the competent authorities within three days of receipt of a request and provided that national criminal prosecution authorities can require immediate release of such information (Interpretative Note to FATF SR VII).

FATF SR VII also provides for the possibility of not making fund transfers of less than EUR/USD 1,000 subject to these requirements. If a State wants to make use of this option, it should not hinder a financial institution's ability to provide the competent authorities with accurate and useful information regarding the originator.

Batch transfers, even when cross-border, may be subject to the same specific regime as domestic transfers as long as they involve routine transactions. The FATF defined *batch transfer*, as a transfer comprised of a number of individual wire transfers that are being sent to the same financial institutions, but may or may not be ultimately intended for different persons. Where several individual transfers from a single originator are bundled in a batch file for transmission to beneficiaries in another country, they shall be exempted from including full originator information, provided they include the originator's account number or unique reference number, and the batch file contains full originator information that is fully traceable within the recipient country.

FATF SR VII and the UNCAC also provide that States must take action in cases where a transfer is not accompanied by the desired information. The financial institution must request the missing information from the financial institution that sent the transfer. If it does not obtain the information, the institution must refuse to accept the transfer (*variant 1*) or refuse to accept the transfer and file a report with the FIU (*variant 2*).

Article 2.2.8 Special monitoring of certain transactions

Compliance with: FATF R8, R11 and R21, Art. 13 (6) and 20 EU Dir., Art. 18 ICFT

International standards (i.e., in particular the FATF Recommendations and the standards adopted by other international organizations that they refer to) require covered financial institutions and DNFBPs to step up their monitoring of complicated or unusual transactions. These may involve transactions in significant amounts or unusual transactions in terms of the customer's activities, the nature of the individuals involved, or the surrounding circumstances. Non-face-to-face transactions, transactions involving PEPs, or transactions carried out in the context of a correspondent banking relationship are typical examples. This is also true of transfers not accompanied by the required information. Some examples of unusual transactions associated with financing of terrorism are provided in the FATF document *"Guidance for Financial Institutions in Detecting Terrorist Financing"* published on April 24, 2002. Circulars may establish the list of criteria that help to identify at-risk transactions. To help in this task, financial institutions may make use of automated processing mechanisms in particular.

These transactions must be described in a written report to be retained for at least 5 years and kept available for the FIU and the competent authorities.

In accordance with paragraph (2) (and FATF Recommendation 21), particular attention must also be paid to natural or legal persons from or in countries that do not apply or insufficiently apply the relevant international AML/CFT standards, in particular the FATF Recommendations. Countries may by issuance of a decree/regulation/guideline take action with respect to business relationships and transactions with persons, including companies and financial institutions, from countries that do not or insufficiently apply the FATF Recommendations, see FATF Recommendation 21 and the examples of counter-measures listed under criterion 21.3 of the Methodology. When a country persists in its failure to implement the Recommendations, other countries must take action and implement counter-measures by issuance of a decree/regulation/guideline with respect to business relationships and transactions with persons, including companies and financial institutions, from that country. Such counter-measures may include strengthened procedures for identifying customers and beneficial owners, systematic reporting of transactions to the FIU, limitations on business relationships with the non-compliant country, and/or refusal to establish subsidiaries or branches of financial institutions from that country.

Article 2.2.9 Record-keeping

Compliance with: FATF R10, Art. 13 (2) CoEC, Art. 30 - 32 EU Dir., Art. 18 (1) ICFT, Art. 52 (3) UNCAC

All documents associated both with identification of the customer and the beneficial owner and with the transactions or business relationship must be kept by financial institutions and DNFBPs for a period set, according to international standards, at a minimum of 5 years after termination of the business relationship (*variant 1*). Nothing prevents a State from stipulating a longer period in accordance with its statute of limitation (*variant 2*) but they may not go below 5 years. The information thus retained must be in such a form that the various transactions can be reconstructed, for instance to furnish evidence in the event of criminal prosecution. This information specifically includes the name of the customer and of the beneficial owner, their

addresses, the nature and date of the transaction, the amounts and currencies involved, the type and identification number of the account involved. This information must remain available to the FIU and, if necessary, to other competent authorities.

The written report on complex or unusual transactions, as required in Article 2.2.8, must also be retained for 5 years.

Article 2.2.10 Internal programs to combat money laundering and financing of terrorism in financial institutions and designated non-financial businesses and professions

Compliance with: FATF R15, Art. 34 and 35 EU Dir.

In accordance with FATF Recommendation 15, financial institutions and DNFBPs must introduce internal control procedures and measures to prevent money laundering and financing of terrorism. These procedures must specifically cover customer monitoring measures, record keeping, detection of unusual or suspicious transactions, and reporting of suspicions to the FIU. The type and scope of these procedures may be adjusted in accordance with risk of money laundering and financing of terrorism and the size of the business activity involved.

Covered financial institutions and DNFBPs must introduce appropriate procedures when hiring employees, particularly to ensure their integrity. They must also introduce ongoing training for employees so that they will continue to be informed regarding money laundering and financing of terrorism developments, techniques, and methods and the procedures to be applied to detect suspicious transactions. Control procedures must be introduced to verify compliance with and the effectiveness of measures adopted for this purpose.

In addition, financial institutions and DNFBPs are required to designate a compliance officer at management level to be responsible for implementing these measures and verifying compliance with legal provisions in this area.

Article 2.2.11 Compliance with obligations by foreign subsidiaries and branches

Compliance with: FATF R22, Art. 3 (1 and 2) EU Dir.

When a financial institution has foreign subsidiaries or branches, it must ensure that they comply with requirements regarding customer identification, record keeping, and establishment of internal control procedures. When they are unable to honor these requirements due to impediments placed upon them by the laws, regulations, or other measures of the foreign country, the financial institution must so inform the supervisory authority of the home country.

Chapter III. Non-profit organizations

Article 2.3 Non-profit organizations

Compliance with: FATF SR VIII

Studies conducted by the FATF have demonstrated the risk of abuse of non-profit organizations in the context of financing of terrorism. FATF SR VIII requires States to adopt measures to reduce this risk. In October 2002, the FATF issued a document called *"Combating the Abuse of Non-Profit Organisations: International Best Practices"* that can help States to adopt adequate measures. At a minimum, it is important for non-profit organizations that collect, receive, or transfer funds to be subject to appropriate oversight by competent authorities. A State may adopt regulations on the subject. As an option, the State may provide a prior registration procedure directly in the law and may also establish budgetary and accounting control measures.

Title III. Detection of money laundering and financing of terrorism

Chapter 1. Financial intelligence unit

On this subject, States may consult the publication of the IMF and the WB, *Financial Intelligence Units: An Overview* (2004), which contains a wealth of theoretical and practical information on the role, organization, and operations of FIUs.

Article 3.1.1 General provisions

Compliance with: FATF R26, Art. 1 (f) CoEC, Art. 2 EU CD(FIU)

This provision defines FIUs, in accordance with the definition established by the Egmont Group of FIUs, as the central agency responsible for receiving, analyzing, and disseminating suspicious transaction reports relating to money laundering and financing of terrorism. The FIU may be either an independent government agency or part of one or more existing agencies. It may be an administrative, judicial, police, as well as a hybrid agency. What is important is that it has sufficient operational independence and autonomy to protect it from undue influence or interference. Its composition, organization, operations, and budget can be determined by regulation or decree. The appointment of the presiding officer must be protected by special safeguards.

Article 3.1.2 Confidentiality

Compliance with: Art. 5 EU CD(FIU), FATF R26

All information obtained and kept by FIUs must be subject to strict controls and safeguards to ensure that the information is used only in an authorized manner, consistent with national provisions on privacy and data protection.
The effectiveness of the reporting system presupposes that the FIU staff are bound by strict professional secrecy and may not disclose the information they obtain except as explicitly specified in the law (transmission to foreign counterparts, to prosecuting authorities, etc.). Violation of this confidentiality may be punished under provisions generally applicable to confidentiality on the part of government officials or may be subject to specific provisions. Strict and specific confidentiality should generally improve the flow of information from the private sector to the FIU.
Any exchanged information in relation to article 3.1.3 must be treated as protected by the same confidentiality provisions as apply to similar information from domestic sources obtained by the receiving FIU.

Article 3.1.3 Relations with foreign counterpart agency.

Compliance with: FATF R40, Art. 46 CoEC, Art. 38 EU Dir., Art. 1 EU CD(FIU)

The FIU must be able, spontaneously or upon request, to exchange information with foreign FIUs provided they are subject to similar professional secrecy requirements. The varied nature of FIUs (administrative, police, judicial) may not be construed as an obstacle or grounds for refusing to share information. In some States, institutions other than the FIU may perform similar functions and could be induced to exchange

information. From this perspective, it is useful to adopt a broad terminology and to speak of a similar entity or counterpart rather than an FIU.

Information exchange may be based on simple reciprocity as well as on cooperation agreements. To facilitate this exchange, it is important to allow the FIU to reach such cooperation agreements with its foreign counterparts. Since the provision is established solely for the purpose of combating money laundering and financing of terrorism, the information transmitted may be used for this purpose only. Some States also provide that any external use of the information, even within this limited context, must have prior consent from the FIU that transmits the information.

Article 3.1.4 Access to information

Compliance with: FATF R26and R40, Art. 12 and 46 CoEC, Art. 21 and 32 EU Dir.

Both the FATF Recommendations and the EU Directive give the FIU the power to ask the institutions and businesses and professions in question for supplemental information useful to the conduct of its functions. This information must be transmitted in the time and manner established by the FIU. Thus, the FIU may establish a model so as to ensure a degree of consistency in the way that information is transmitted and to facilitate its subsequent treatment and analysis. The methods specified for transmitting the information can be established by regulation or decree.

Paragraph (2) provides as an option that a State may grant the FIU the power to conduct on-site examinations of documents and information useful to its functions. This power may be useful when an institution is reluctant to provide the necessary information.

When a suspicious transaction report has been sent to the FIU, it may, in order to supplement the information that it already has, request additional information from police units, supervisory authorities, and administrative authorities of the State (customs, tax authorities, intelligence units, etc.). In accordance with FATF Recommendation 26, the FIU must be able to access information from these authorities directly or indirectly, and on a timely basis.

A State may also choose to grant the FIU power to request additional information from judicial authorities. However, due to the special status of these authorities, particularly in connection with the confidentiality of investigations, it would be helpful to make provision for certain procedures whereby such information is to be requested.

In accordance with FATF Recommendation 40, FIUs must be able to conduct inquiries on behalf of their foreign counterparts. This is the reason for specifying that the FIU must be able to gather information for purposes of responding to requests from a foreign FIU.

Article 3.1.5 Disclosure to the supervisory authority

There is no international standard saying that the FIU should appraise the relevant supervisory authority whenever the FIU determines that a financial institution or a

DNFBP is not complying or has not complied with the obligations to combat money laundering or financing of terrorism. Sometimes the FIU receives information about a financial institution or a DNFBP that could be of great interest for the supervisory authorities and where the supervisory authority should or could have taken action against the institution or DNFBP if it had this information. It is therefore useful if the FIU has the possibility to pass this information on to the supervisory authority if the FIU finds it to be of use to the supervisory authority. This might be possible in some jurisdictions without stating it directly in the law but it might not be possible in other jurisdictions without having an article in the law.

Chapter II. Reporting of suspicions

Article 3.2.1 Obligation to report suspicious activities

Compliance with: FATF R13 and R16, FATF SR IV, Art. 13 (2) CoEC, Art. 22 and 23 EU Dir., Art. 18 (1) b) ICFT, Art. 7 (1) a) UNCTOC, Art. 14 (1) a) UNCAC

Financial institutions and DNFBPs are required to file suspicious transaction reports with the FIU when they suspect or have reasonable grounds to suspect that funds or property are the proceeds of crime, or are related or linked to, or are to be used for the financing of terrorism. This encompasses those funds that are the proceeds of a crime as defined in Article 1.2.1, (A), and covers at least all serious offences in the list attached to FATF Recommendation 1, or that show a connection to, are associated with, or are intended to be used for purposes of terrorism, or by terrorist organizations, or by those who finance terrorism. A State may also choose to cover facts or activities that may be indications of money laundering or financing of terrorism. This concept is broader and goes beyond the conduct of transactions. Covered institutions and professions may have knowledge of facts relating to their customer without there being any transactions involved. It is mainly non-financial professionals like notaries or lawyers who may encounter this type of situation. Attempted transactions must also be reported.

A system of indirect reporting designed to punish the absence of reporting when an offence is prosecuted is not sufficient. The text of the law must explicitly provide a direct obligation to report suspicions.

The reporting requirement when someone is “suspicious” rests on a subjective criterion of suspicion. The reporting requirement when there are “reasonable grounds for suspicion” rests on an objective criterion, for example, the circumstances surrounding the transaction.

States may, if they desire, provide that notaries, lawyers, and other independent legal professions, accountants, and where applicable, also auditors and tax advisors, shall report their suspicions to the FIU through their self-regulatory organizations, in order to allow such organizations to verify that the professional secrecy characteristic of the profession is not violated. Since the intervention of the self-regulatory organization is justified solely on the basis of concern for verifying respect for the rights of the client, it is important to require that these organizations transmit this information, unfiltered, to the FIU immediately after verifying it.

In order to take into account the particular situation of those professions that may represent their clients in court and to ensure the rights of the client, the State may provide that these professions do not have to transmit information that they obtain in the context of assessing their client's legal position, or performing their task of defending or representing that client in, or concerning judicial proceedings. Accountants, auditors, and tax advisors may only benefit from this exception when, according to the State's legal principles, they can represent clients in court.

Dealers in precious metals and stones (and, if the country so decides, other natural or legal persons trading in goods) are only subject to the requirement to report suspicions with respect to cash transactions in amounts equal to or greater than EUR/USD 15,000. This threshold is provided in both the EU Directive and the FATF Recommendations. This threshold keeps the FIU from being swamped with reports. This limitation may be linked to the general limitation regarding cash payments.

Real estate agents must only report their suspicions for real estate buying and selling operations and not in the context of their real estate leasing or management activities.

The FIU or another competent authority must issue a guidance note or circular determining the method for reporting suspicions (this concerns both the form and content of the report). It is recommended that a form suitable to each institutions and professions be established, compiling all information useful for processing the report.

Article 3.2.2 Cash transaction reporting

Compliance with: FATF R19

This measure is contemplated by the FATF Recommendation 19, but is not binding. For this reason, it is provided as an option.

Article 3.2.3. Postponing of transactions.

Compliance with: Art. 24 EU Dir.

Article 24 of the EU Directive provides that financial institutions and DNFBPs shall refrain from carrying out transactions which they know or suspect to be related to money laundering or terrorist financing until they have informed the FIU of the facts or suspicions.

As an option, the FIU may be empowered to suspend the execution of a transaction for a specific period of time. In any case, FATF requires States to give the FIU adequate powers to identify and trace property that could be subject to confiscation or is suspected of being the proceeds of crime. When the situation is urgent, or the amounts are significant, or the facts at stake are serious such suspension makes it possible to block the funds for a limited time period until a decision is made, in order to prevent their disappearance. This provision is applied independently of obligations on the freezing of assets related to terrorism. Some States make provision for blockage for a certain number of hours (*variant 1*) but a more pragmatic approach consists of speaking in terms of business days so as to avoid losing precious time when the period includes a holiday or weekend (*variant 2*). States should avoid

providing an excessive time period that would risk harming the relationship between the institution or professional and its customer. Some States provide for the possibility of extending the period through a decision made by the prosecutor, who could order a provisional seizure measure.

In cases where the financial institution or DNFBP is unable to inform the FIU in advance, either because it is impossible to refrain from the transaction or because it could frustrate efforts to pursue the beneficiaries of a suspected money laundering or terrorist financing operation, the FIU shall be alerted immediately after the transaction is executed.

Article 3.2.4 Prohibition of tipping-off

Compliance with: FATF R14, Art. 13(2) CoEC, Art. 28-29 EU Dir.

The effectiveness of the preventive provision would be weakened if the financial institutions or DNFBPs could inform their customers or third parties that a report had been made to the FIU, or that information was provided to the FIU. This is why both the EU Directive and the FATF Recommendations prohibit the disclosure of such information to both customers and third parties. This confidentiality requirement applies to both the directors and the officers and employees of the entities and professions involved.

However, the Interpretative Note to FATF Recommendation 14 states that a lawyer, notary, other independent legal professional, or accountant acting as an independent legal professional seeking to dissuade a client from engaging in an illegal activity should not be deemed to be in violation of this prohibition on disclosure.

Article 3.2.5 Action taken on suspicious activity reports

Compliance with: FATF R26and R31, Art. 7 (1) UNCTOC, Art. 14 (1) and 38 UNCAC, Art. 27 EU Dir.

After analyzing the information received from financial institutions and DNFBPs, the FIU may deem that there are reasonable grounds to suspect (*variant 1*) or serious indications of (*variant 2*) money laundering or financing of terrorism. The term "reasonable grounds to suspect" includes situations where the FIU, after having analyzed the information received, suspects that there might be proceeds of crime or terrorist financing. This is not an obligation for the FIU to know that it is proceeds of crime or terrorist financing. The information that the FIU disseminates is only the suspicion of a crime. It is always up to the law enforcement and/or prosecutors to find evidence and try to prove the criminal offence. The idea of indication goes beyond the notion of suspicion but does not go so far as the formal idea of evidence in the judicial sense of the term. These indications must be forwarded to the prosecutorial, investigative or judicial authorities for further action so that they can determine whether there is evidence of a criminal offence.

Preferably, the identity of the persons who made the suspicious activity report should not appear in the report that the FIU sends to the competent authorities. The purpose

of this is to protect such persons who are on the front lines against possible reprisals by those under suspicion should they have access to the court file.

Chapter III. Exemption from liability

Article 3.3.1 Exemption from liability for good faith reporting of suspicions

Compliance with: FATF R14, Art. 26 EU Dir.

Both Article 26 of EU Dir. and FATF Recommendation 14 require protecting the financial institutions and DNFBPs, their directors, officials, and employees against any type of liability resulting from harm incurred by a customer pursuant to a report of suspicions, provided that the report was made in good faith. It is immaterial whether the person making the report knows specifically what the criminal activity was or whether the illegal activity actually occurred.

Article 3.3.2 Exemption from liability for executing transactions

In addition to the exemption from liability associated with harm potentially caused by the report, the financial institutions and DNFBPs, their directors, officials, and employees are also protected against criminal liability for money laundering or financing of terrorism, even if they executed the suspicious transaction themselves, as long as they have made a report in accordance with the law.

The same exemption is enjoyed by those acting in the context of a controlled delivery or an undercover operation, see Article 4.1.2.

Chapter IV. Supervisory authorities and their obligations in regard to combating money laundering and financing of terrorism.

Article 3.4.1 General provisions regarding authorities responsible for supervising financial institutions and designated non-financial businesses and professions

Compliance with: FATF R22, R23, R24, R25, R29, and R32, Art. 7 (1) and (3) UNCTOC, Art. 14 (1) and (4) UNCAC, Art. 13 (2) CoEC, Art. 25, 31, 36 and 37 EU Dir.

The law must designate the supervisory or regulatory authorities that will be responsible for ensuring that the financial institutions and DNFBPs comply with the obligations set forth in the law. The role of these authorities may be described in this law or in sector-specific laws.

The FATF Recommendations require a licensing or registration system for financial institutions. This mechanism is optional in the case of the non-financial businesses and professions, with the exception of casinos. For banks, insurance companies and insurance brokers, mutual funds, and stock market brokers, FATF Recommendation 23 provides that regulatory and supervisory measures applicable for prudential purposes should be similarly applicable for AML/CFT purposes. This may involve prior authorization and the structure, management procedures to detect, measure,

monitor, and control significant risks, ongoing supervision, and worldwide consolidated supervision.

Regardless of the nature of the authority (supervisory, regulatory, self-regulatory), such authorities are bound by a certain number of obligations. However, through regulations, these obligations can be defined differently on the basis of risk and the size of the sector involved.

These authorities must take the legislative or regulatory measures necessary to prevent criminals or their associates from taking control, directly or indirectly, of the entities or professions involved, from being beneficial owners thereof, from acquiring significant interest or control of them, or from occupying management positions therein, including positions on the executive committee, board of directors, or other division of a financial institution. The directors of financial institutions must be evaluated on the basis of fit-and-proper tests.

These authorities must ensure that financial institutions and casinos comply with their obligations with respect to customer identification, record-keeping, and reporting of suspicious transactions.

The law should consider giving these authorities the powers necessary to require the submission of papers, documents, or information needed to monitor compliance with these obligations.

They must also establish guidelines to assist financial institutions and DNFBPs with the effective implementation of their obligations with respect to customer identification, record keeping, and reporting of suspicious transactions. The guidelines should include at least a description of money laundering and terrorist financing techniques as well as methods and measures supplemental to the law that the entities and professions involved should take to ensure the effectiveness of their measures.

They must cooperate with judicial and other competent authorities in the context of investigations and share such information as they may have with respect to money laundering and financing of terrorism.

They must develop procedures for the reporting of suspicions that take into account other national or international standards.

They must ensure that financial institutions verify that their foreign branches and majority owned subsidiaries comply with the measures established by law. On this subject, Criteria 63 to 69 of the Basel Committee's recommendations on customer due diligence for banks specify that parent entities must communicate their policies and procedures to their foreign branches and subsidiaries. Where the minimum standards of the home and host country differ, branches and subsidiaries must apply the higher standard. FATF Recommendation 22 also provides that the entities and professions involved must inform the supervisory authorities of the home country when a branch or subsidiary is unable to comply with appropriate measures because it is prevented from doing so by local law and regulation.

They must report to the FIU all information relating to transactions or facts they suspect are related to money laundering or financing of terrorism, particularly information they discover in the context of their inspections.

They must cooperate and exchange information with their foreign counterparts both regarding investigations on money laundering or financing of terrorism and the failure to comply with obligations provided by law on the part of the entities or professions they regulate and control.

Designated supervisory and disciplinary authorities must have complete statistics regarding inspections they have conducted, sanctions and measures they have applied on the subject, and requests for assistance they have made.

Article 3.4.2 Special provisions concerning money or value transfer services.

Compliance with: Art. 18 ICFT, FATF R23, FATF SR VI

FATF SR VI urges States to implement control mechanisms and regulations for persons and entities carrying out funds transfers. This applies to all natural and legal persons professionally engaged in these activities. According to the Interpretative Note to FATF SR VI, this means persons who carry out this activity as a primary or substantial part of their business, on a regular or recurring basis, including an ancillary part of a separate business enterprise.

The State must designate a supervisory authority responsible for issuing the license or registering persons engaging in this activity. In effect, FATF SR VI leaves open the choice between a registration mechanism (*variant 1*) or licensing (*variant 2*). However, it is not necessary to have a different authorization or registration system or to designate another competent authority with respect to those remittance services that are already authorized or registered as financial institutions in the country. In addition, FATF SR VI states that persons providing money or value transfer services on an unlicensed or unregistered basis should be liable for appropriate administrative, civil, or criminal sanctions (prohibition on engaging in the professional activity, submission to judicial surveillance, criminal or administrative fines, etc.).

The designated authority must have an updated list of names and addresses of services handling funds transfers and must conduct regular inspections of these services. These methods and minimum conditions of operation may be specified by regulation or decree.

Article 3.4.3 Licensing of casinos.

Compliance with: FATF R24, Art. 36 EU Dir.

In accordance with FATF Recommendation 24, casinos must be subject to prior authorization. They must be subject to a complete system of regulation and supervision designed to ensure that they actually take the measures necessary to combat money laundering and financing of terrorism, including measures to prevent criminals or their associates from holding or being the beneficial owner of a

significant or controlling interest, holding a management function in, or being an operator of a casino. The details may be specified by regulation or decree.

Article 3.4.4 Registration of other designated non-financial businesses and professions

Compliance with: FATF R24, Art. 36 EU Dir.

As an option, the State may also provide a mechanism for registering DNFBPs. In any case, it is important that these businesses and professions be subject to effective mechanisms to monitor and control compliance with their obligations. Such measures must be taken on the basis of risk-sensitivity. This oversight might be exercised by a governmental authority or by an appropriate self-regulatory organization.

Chapter V – Sanctions for failure to comply with the provisions of Titles II and III

Article 3.5.1. Powers of supervisory authorities and administrative violations

Compliance with: FATF R17, Art. 39 EU Dir.

In accordance with FATF Recommendation 17, States must have effective, proportional, and dissuasive sanctions, whether criminal, civil, or administrative, that are applicable to entities and professions not in compliance with the obligations established by law. A range of sanctions may be suggested, from a written notice to administrative penalties, to withdrawal of the license to operate. It is important for States to be sure to establish rules of procedure applicable to the pronouncement of sanctions so as to ensure, if necessary, respect for the rights of the defense. For example, an adversarial procedure could be provided that allows the non-complying party to present its defense. Sanctions will be all the more effective if given a certain amount of publicity. Finally, it is useful for the supervisory authority to advise the FIU of the sanctions it imposes on the entities and professions it oversees.

Article 3.5.2 Ancillary money laundering offences

The law should clearly mention under what circumstances a person may be sanctioned and indicate clearly that anyone who fails to comply with the preventive measures required by the AML/CFT law is punishable. Article 3.5.2 addresses this by listing all the failures that should entail a sanction.

Title IV. Investigation and secrecy provision

Chapter I. Investigation

Article 4.1.1 Investigative techniques

Compliance with: FATF R28, Art. 12 (6) and 20 UNCTOC, Art. 31 (7) and 50 UNCAC, Art. 7, 17, 18 and 19 CoEC

In accordance with FATF Recommendation 28, competent authorities must be able to access useful documents and information, including, if necessary, through compulsory measures (search, seizure, etc.). Monitoring of bank accounts, video-surveillance, and phone taps are techniques that make it possible to obtain evidence useful to the conduct of investigations to combat money laundering and financing of terrorism. Nonetheless, such measures may be considered as detrimental to privacy and fundamental freedoms. This is why they may only be used when certain safeguards are in place and when there are serious indications that such offences have been committed.

Article 4.1.2. Undercover operations and controlled delivery

Compliance with: FATF R27, Art. 20 UNCTOC, Art. 50 UNCAC

The FATF Recommendations and other international standards require States to develop as far as possible special investigative techniques such as controlled deliveries and undercover operations. The exceptional nature of these measures necessitates prior authorization from the competent judicial authority. Other safeguards may also be established by law, such as the requirement to draft a detailed report on the conduct of the operation.

Officials carrying out such operations may be led to commit violations. This is why it is important to establish a provision to protect them against any risk of subsequent prosecution, provided they have complied with the requirements established by law. In any case, the law does not authorize them to perform entrapment.

For an example of regulations governing this issue in depth, consult the Belgian Law of January 6, 2003 on specific search methods and some other investigative methods.[2]

Article 4.1.3. Anonymous testimony and witness protection.

Compliance with: Art. 24 UNCTOC, Art. 32 UNCAC

The UNCTOC and UNCAC provide for the adoption of measures intended to protect people who have given testimony. Provision may be made for differing degrees of protection based on the risk incurred by the witness. If the competent authority finds that there is serious risk involved, provision can be made to ensure that certain identifying information will not be mentioned in the hearing record. If the physical safety of the witness or his or her family members is endangered, it can be specified

[2] Available on the Ministry of Justice site www.just.fgov.be by clicking on *Moniteur Belge*.

that the identity of the witness will remain a secret. However, to the extent that this technique undermines the rights of the defendant, it may only be contemplated when there are no other techniques that can be used to achieve the same result. In addition, a conviction cannot be based exclusively on anonymous testimony.

Nothing prevents a State from establishing supplemental measures such as heightened security around a person's residence, a new residence, financial assistance, etc.

Chapter II. Professional secrecy or privilege.

Article 4.2.1. Prohibition on invoking professional secrecy or privilege.

Compliance with: FATF R4, Art. 12 (6) UNCTOC, Art. 31 (7) UNCAC

It goes without saying that the financial institutions and DNFBPs may not invoke professional privilege to refuse to implement the provisions of the law. This provision does not, however, impede in any way the right of lawyers, independent legal professionals, and other similar professionals to invoke their specific privilege in the context of exercising the rights of the defense.

Title V. Penal and provisional measures

Chapter I. Provisional measures, freezing and seizure of assets and instrumentalities

Article 5.1.1 Provisional measures

Compliance with: FATF R3, Art. 5 88Conv, Art. 12 UNCTOC, Art. 31 UNCAC, Art. 8 ICFT, S/RES/1373, Art. 4-6 CoEC

All the international standards encourage the States to adopt provisional measures designed to prevent the transfer, conveyance, and movement of goods or funds that may be subject to confiscation. This may involve a procedure for freezing or seizure based on the law of the land inasmuch as these measures fall into the category of a judicial proceeding because goods subject to confiscation are involved. These measures may also consist of monitoring bank accounts, movements of funds, or goods. These procedures target both the proceeds and the instruments of money laundering and financing of terrorism. They are temporary and it must be possible to lift them either because prosecution is abandoned or the good faith owner invokes his or her rights over the assets. A State generally has such procedures in its general criminal law.

Article 5.1.2 Freezing of funds associated with financing of terrorism

Compliance with: R1267 [S/RES/1267(1999)] and other UN Security Council Resolutions, FATF SR III

A clear distinction should be made between this provision and Article 5.1.1. Freezing in this provision means specifically allowing the freezing of assets of those persons who finance terrorism and terrorist organizations and whose names are on the list established by the United Nations Security Council pursuant to Chapter VII of the United Nations Charter. A State must also be empowered to itself designate, beyond the United Nations list, those persons or entities whose funds should be frozen according to this specific procedure. In this case, freezing occurs independently of any judicial proceeding. The aim of the measure is preventive. A State may either adopt a ministerial decree providing for the inclusion of the United Nations list in its domestic law and establishing the conditions under which seizure will occur, or it may adopt an administrative decision. The order or decision must be published in the official gazette for purposes of public disclosure. The law must specify that financial institutions and DNFBPs as well as any person or entity holding such funds must immediately freeze them. A State must designate the competent authority responsible for enforcing seizure measures. This may be the FIU or another competent authority. This procedure serves to supplement existing civil or criminal law on seizure and confiscation. States may consult the FATF document *Freezing of terrorist assets. International Best Practices* dated October 3, 2003.

Based on FATF SR III, freezing measures must apply to funds or property owned or controlled individually or jointly, directly or indirectly, by persons designated on the lists, terrorists, those who finance terrorism, or terrorist organizations, as well as funds or other property derived from or generated from money or other property owned or

controlled, directly or indirectly, by persons on the lists, terrorists, those who finance terrorism, or terrorist organizations.

Persons and entities holding such funds must immediately so notify the competent authority as indicated above.

In the event of failure to comply with the provisions established in Article 5.1.2, these persons and entities shall be subject to civil, administrative, or criminal sanctions.

Based on resolutions and recommendations, the law must provide a mechanism for removing the names of suspected persons from the list. Those involved must be allowed a period of time from the publication date of the list in which to establish that an error has been made and to ask that their name be removed from the list and their funds unfrozen.

Chapter II. Criminal offences

Article 5.2.1 Criminal offence of money laundering

Compliance with: FATF R1 and 2, Art. 3 88Conv, Art. 5, 6 and 8 UNCTOC, Art. 23, 24, 27 and 28 UNCAC, Art. 9 CoEC

Paragraphs (1) and (2) of Article 5.2.1 provide a definition of money laundering modeled on the terminology used in the various UN Conventions, which include the three behaviors that constitute money laundering as well as participation in or the attempt to engage in such behaviors.

As for the moral element to be taken into consideration, the provision suggests, for each behavior, three variants entailing a greater or lesser degree of knowledge regarding the illicit origin of the funds. A State requires either knowledge or objective factual circumstances whereby a person knows or would of necessity know that the property was the proceeds of a crime (*variant 1*). This is the minimum moral element that every State must incorporate in its criminal system. In fact, provision is made in all the international standards for an intentional element that is inferred from objective factual circumstances. A State may go further by covering not only a person who knew or should have known in view of objective factual circumstances but also a person who suspected that the property constituted the proceeds of a crime (*variants 2 and 3*). This means a lesser burden of proof. This moral element is the same for all money laundering activities indicated.

In accordance with 88Conv, UNCTOC and the AML/CFT Methodology, the proceeds of crime refer to any property derived from or obtained, directly or indirectly, through the commission of an offence.

For paragraph c), which concerns the simple acquisition or possession of property, the State may provide, as an option, that the moral element must exist at the time the person comes into possession of the property and that learning subsequently about the illicit origin of the property does not constitute a money laundering offence. This choice lends an immediacy to the offence and may cause difficulty in prosecuting money laundering activities carried out in the territory of another State that are later

prosecuted in the territory of the State in question. In fact, the immediate offence is perpetrated directly in the territory of the State where the perpetrator comes into possession of the property.

The criminal offence covers the direct author of the behavior but also all activities involving varying degrees of direct complicity in providing counsel, material assistance, participation in a conspiracy or association, as well as the attempt to engage in the criminal activity.

A State criminalizes money laundering even though the money comes from a predicate offence committed abroad, provided that the activity generating capital constitutes an offence in both the country where it was committed and in the territory in question. This is the principle of dual criminality. A State may choose to go further and cover actions committed abroad even if they do not constitute an offence therein, provided they are considered crimes in its territory.

A State may consider charging with money laundering someone who committed the predicate offence (*variant 1*), which is the criminalization of the so called "self-laundering," or may deem that only those who did not commit the predicate offence may be prosecuted for money laundering (*variant 2*). In effect, in some countries, constitutional principles—based primarily on the principle of *non bis in idem*—prohibit prosecuting someone simultaneously for money laundering and a predicate offence.

States must punish the offence with imprisonment and/or a fine. The UN Convention against Transnational Organized Crime does not provide for a minimum prison term; however, it characterizes as serious those offences that incur sentences of four or more years (see Article 2, b of the UNCTOC). This is also the minimum threshold established for the offence of money laundering by the European Council's Framework Decision of June 26, 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. As an option, a State may set a fine in an amount proportional to the laundered amount.

A State either provides the same penalty for related offences (attempt, complicity, abetting) as for the money laundering offence itself or a reduced penalty that may, for example, be a fraction of the main penalty.

Article 5.2.2 Criminal offence of financing of terrorism

Compliance with: Art. 2 ICFT, FATF SR II, S/RES/1373

It is useful to consult the 2003 IMF manual *Suppressing the Financing of Terrorism – A Handbook for Legislative Drafting*.

This provision ensures the criminalization of the financing of terrorism. Moreover, terrorism should be criminalized by a State based on the definitions of terrorist acts, terrorist organizations, and terrorist contained in Article 1.3 (D), (E), and (F). Indirect criminalization of the financing of terrorism through criminalization of the laundering

of money derived from terrorist activities is not enough. Financing of terrorism must be criminalized separately.

The criminal offence is modeled on the language of Article 2, §1 of the ICFT. The offence must be committed willfully with the intention that the funds be used to commit a terrorist act or in the knowledge that they will be used for this purpose by terrorists. The State has some latitude as to how it frames the intentional nature of the offence. For example, it may state that a person should reasonably have thought that the funds were going to be used for terrorist purposes.

The offence of financing of terrorism must be applied to all funds whether they have a legitimate source or not.

Intent is the determinant of the existence of the offence. This is why the offence exists despite the fact that the funds may not have actually been used to commit or in an attempt to commit terrorist acts.

The ICFT requires defining as an offence the attempt to commit the offence defined in paragraph (1). Moreover, it prescribes the criminalization of participation as an accomplice in one of these offences, the organization of such offences, or giving orders to others to commit this offence.

States must punish the offence with imprisonment and/or a fine. The ICFT provides only a minimum threshold for imprisonment. As noted, the UNCTOC characterizes as serious those offences punished with 4 or more years (see Article 2, b of the UNCTOC in particular).

The State either provides the same penalties for related offences (attempt, complicity, abetting) as for the offence of money laundering itself, or it provides a reduced penalty that may, for example, be a fraction of the main penalty.

Article 5.2.3 Association or conspiracy to commit money laundering

Compliance with: FATF R1, Art. 6 UNCTOC, Art. 23 UNCAC

Participation in an association or conspiracy to commit the offence indicated in Article 5.2.1 must be punished with the same penalties as the commission of the offence of money laundering itself.

Article 5.2.4 Association or conspiracy to commit financing of terrorism

Compliance with: Art. 2 ICFT, FATF SR II

Participation in an association or conspiracy to commit the offence indicated in Article 5.2.2 must be punished with the same penalties as the commission of the offence of financing of terrorism itself.

Article 5.2.5 Penalties applicable to legal persons

Compliance with: FATF R2, Art. 5 ICFT, Art. 10 UNCTOC, Art. 26 UNCAC, Art. 10 CoEC, Art. 39 EU Dir.

All current international standards encourage States to incorporate the liability of legal persons in their criminal systems. Various types of liability may be contemplated: civil, administrative, or criminal. It is important for a State to provide a proportional and dissuasive penalty, whether criminal or not. The wording of this provision is modeled on Article 7 of the EU Council's Framework Decision of June 13, 2002 on combating terrorism. This language has the advantage, given its precision, of clearing up the question of the attribution of liability. A legal person may be considered liable for actions carried out within it provided the actions were carried out by someone having power to represent the legal person or authority to make decisions in the name of the legal person, or by someone with controlling power within the legal person. It is important that this liability coexist with the liability of natural persons who have committed, tried to commit, or participated in the commission of the offence. Where a State already has a general system on the liability of legal persons, it is important to verify that this system satisfies the conditions indicated above.

This text is also modeled on Articles 7 and 8 of the Framework Decision of June 13, 2002, providing that legal persons are also held liable for failures of monitoring or control on the part of one of the persons with the power or authority indicated in paragraph (1), negligence that permitted the commission of an offence of money laundering or financing of terrorism on behalf of the legal person by someone subject to the authority of the person with the power or authority indicated in paragraph (1). The language also provides a series of sanctions that may be civil, administrative, or criminal and that a State may incorporate in its legal system at it sees fit.

Articles 5.2.6 and 5.2.7 Aggravating circumstances for money laundering and financing of terrorism

There is no international standard on aggravating circumstances in the case of money laundering and financing of terrorism. However, the conventions require punishing these offences based on their seriousness and most criminal systems provide mechanisms for aggravating circumstances. This is why a State may choose to introduce such circumstances into its system in order to adjust the penalty based on criteria increasing the degree of seriousness of the offence. A State either provides a specific penalty (*variant 1*) or provides that the penalty will be a multiple of some factor (*variant 2*). These circumstances may, in certain cases, be applied both to financing of terrorism and money laundering. This is the case, in particular, when the offence is perpetrated in the context of a criminal organization or a professional activity. Other circumstances are more specific to money laundering such as the fact that the predicate offence generating the laundered funds is itself a very serious offence, or the fact that the amounts laundered are particularly high.

Articles 5.2.8 Mitigating circumstances

Most criminal systems provide a mitigating circumstances system that may be found to apply to money laundering and financing of terrorism. This provision is optional.

This provision seeks to lighten the penalty for a defendant who cooperates with judicial authorities in their investigations and prosecution by providing them with useful information. This mechanism is provided in Article 26 of the UNCTOC and Article 37 of the UNCAC.

Chapter III Confiscation

Article 5.3.1 Confiscation

Compliance with: FATF R3, FATF SRIII , Art. 5 88Conv, Art. 8 ICFT, Art. 12 UNCTOC, Art. 31 UNCAC, Art. 3-5 CoEC

The confiscation system must cover all funds and property that can be tied directly or indirectly to money laundering or financing of terrorism. Thus, it covers the following:

(a) the proceeds of crime as defined in Article 1.3 (A) or the economic benefits derived from predicate offences to money laundering as well as the benefits derived from the offence of money laundering or financing of terrorism. Also indicated are funds and property that replace the proceeds of crime as well as income, profits, or other benefits derived from the proceeds of the crime. Thus, if the proceeds were transferred, sold, or traded for other property or securities, the confiscation shall apply to said property and securities and their replacement value. Confiscation may also apply to interest on amounts invested or on rents from property constituting the proceeds of a crime;
(b) funds and property that are the object of the offence of money laundering or financing of terrorism. Thus, this covers laundered funds that constitute the proceeds of a predicate offence as well as funds and property, whether legal or illegal, providing financing for terrorism;
(c) funds and property constituting the proceeds of crime, income or other benefits invested, or replacing, or commingled with legitimately acquired funds and property. Property legitimately acquired shall be confiscated up to the estimated value of the proceeds of the crime that have been commingled. Thus, when funds derived from a predicate offence are placed in a bank account or mixed with income from a legitimate source, this fact shall not diminish the ability to confiscate a value equivalent to the funds of illicit origin as well as the portion of interest produced by these funds.
(d) instruments used to commit the offence of money laundering or financing of terrorism as well as instruments intended to be used to commit these offences;
(e) these funds or property could be confiscated even if they are not found among the assets of the accused, except if their owner establishes that he or she has acquired them legitimately through payment of a consideration and did not know of their illicit origin.

Paragraph (2) provides optional language for a mechanism to reverse the burden of proof. These mechanisms are authorized by the UN Conventions and encouraged by the FATF Recommendations. Nonetheless, they should be accompanied by a certain number of guarantees of due process. The language allows for the confiscation of funds and property found among the assets of the accused, provided that the judge has

reasonable indications that they derive from the offence and that the accused fails to prove their legal origin. To provide a link between the economic benefits and the offence committed, the provision establishes a time limit. These funds and property should have been acquired during a specific period of time preceding the indictment of the accused, for example, a period of 5 years.

Article 5.3.2 Invalidation of certain legal instruments

Compliance with: FATF R3

FATF Recommendation 3 provides that the competent authority must be able to take measures to prevent or invalidate contractual actions or other actions in which the persons involved knew or should have known that the actions would impede the ability of the authorities to recover the property subject to confiscation. This is why the provision enables the court to order the invalidation of these instruments so that it can proceed with confiscation. Nonetheless, a good-faith buyer must be able to recover the amount that he or she paid.

Article 5.3.3 Disposal of confiscated property

Compliance with: FATF R38, Art. 8 ICFT, Art. 14 UNCTOC, Art. 57 UNCAC

This provision regulates that confiscated funds and property shall accrue to the State unless otherwise provided for. As an option, the State may provide that confiscated property will be allocated to a fund to be used by criminal prosecution authorities, in health, education, or for any other appropriate purpose. Such allocations are provided for in the UN Conventions.

To the extent that the confiscated property is encumbered by certain *in rem* rights established for the benefit of good-faith third parties (e.g., real estate mortgages or bank proceeds), States must ensure the preservation of such third-party rights.

Chapter IV. Establishment of a central seizure and confiscation authority

This chapter is provided as an option. It is intended to facilitate the implementation of provisions relating to seizure and confiscation as well as to provide for the management of seized and confiscated assets. In effect, the UN Conventions require that States take the necessary measures to identify, detect, freeze, and administer assets frozen, seized, and confiscated. The pertinent provisions are based on the Belgian law of March 26, 2003 on creation of a central seizure and confiscation agency and provisions for the value-based management of seized assets.

Article 5.4.1 and 5.4.2 Establishment of a central authority for seizure and confiscation and management of seized funds and property

The idea is to establish an agency within the judicial structure with broad powers in the area of seizure and confiscation. Such an agency, comprising of officials from various Ministries, including Ministries of Finance and of Interior, can assist judicial authorities in the identification and detection of funds and property to be seized or confiscated. It can also be responsible for ensuring the implementation of seizure

measures and confiscation penalties. It also has authority, as advised by the Ministry of Justice, to define policy in this area. It possesses and manages a database on seized and confiscated property and on decisions ordering confiscation. It may also provide assistance in the context of international mutual legal assistance.

Seized and confiscated property runs the risk of losing value if no provision is made for its management. This is why such an office can be responsible for preserving the constant value of property seized, either by maintaining it in comparable condition pending its restitution or confiscation or by transferring the property and retaining the seizure on the proceeds obtained. Transfer is authorized in well-defined cases: either holding on to the property could entail significant depreciation, or the associated retention costs would not be reasonably commensurate with the value of the property. The measures adopted must take into consideration the interests of good-faith third parties with rights over the property involved.

It is useful for the State to adopt a regulation or decree in order to define these provisions in detail.

Title VI. International Cooperation

This section is generally based on conventions on mutual legal assistance. Most States have already ratified mutual legal assistance treaties to serve as the legal basis for international cooperation, have signed cooperation agreements with specific States, or have established provisions in their domestic systems to govern international legal cooperation. In any case, it will be up to the States to verify whether their systems are consistent with the provisions established below and, if necessary, to amend their existing laws.

Chapter I. General provisions

Article 6.1.1 General provisions

Compliance with: FATF R36 and 37, FATF SR V, Art. 7 88Conv, Art. 7, 15 and 16 CoEC, Art. 12 ICFT, Art. 18 UNCTOC, Art. 43 and 46 UNCAC

This provision introduces the general basis of international cooperation, involving mutual legal assistance or extradition for investigations, prosecutions, and related procedures involving money laundering and financing of terrorism.

FATF Recommendation 37 urges States to remove the obstacle of dual criminality, particularly for non-binding measures. This principle associated with guarantees of due process is actually losing its meaning as criminal law and criminal definitions are becoming increasingly standardized. Nonetheless, should a State retain this principle, it is important that technical differences between the laws of the State making the request and the State receiving the request—such as the category or name that each country gives to an offence—do not impede the granting of legal assistance.

Chapter II. Requests for mutual legal assistance

The following provisions are similar to those found in most conventions on mutual legal assistance.

Article 6.2.1 Purpose of requests for mutual legal assistance

Compliance with: FATF R36, Art. 18 (3) UNCTOC, Art. 46 (3) UNCAC

In accordance with FATF Recommendation 36 and the international conventions, a State must be in a position to offer the widest possible range of legal assistance measures for investigations, prosecutions, and related procedures with respect to money laundering and financing of terrorism. Mutual legal assistance should include the following:

- production, search, and seizure of information, documents, or evidence (including financial records) from financial institutions or other natural or legal persons;
- collecting evidence or statements from individuals (testimony, depositions);

- providing originals or copies of documents (administrative, banking, financial, commercial documents) and related records (evidentiary items) as well as any other information or piece of evidence;
- effecting service of judicial documents;
- examining objects, conducting on-site inspections;
- facilitating the voluntary appearance of individuals for the purpose of providing information or testimony to the requesting country;
- identifying, locating, freezing, seizing, or confiscating assets that have been or were intended to be laundered, the proceeds of money laundering and assets used or meant to be used to finance terrorism, as well as the instrumentalities of such offences and assets of an equivalent value.

Article 6.2.2 Refusal to execute requests

Compliance with: FATF R36, Art. 18 (21) UNCTOC, Art. 46 (21) UNCAC, Art. 28 CoEC

In accordance with FATF Recommendation 36, mutual legal assistance must not be subject to unreasonable, disproportionate, or unduly restrictive conditions. The following conditions are unacceptable: a blanket refusal to grant assistance on the grounds that the legal procedure did not begin in the requesting country; requiring conviction before granting assistance; and interpreting the principles of reciprocity and dual criminality in an overly restrictive manner.

A number of grounds for refusal are customarily found in treaties on mutual legal assistance. These involve issues relating to jurisdiction or procedures to be followed in order for the request to be valid, risks to public order, sovereignty, security, and the essential interests of the State, the principle of *non bis in idem* (where an offence is already the subject of criminal prosecution or a final judgment) and risk of discrimination based on the characteristics of the individual. Other grounds for refusing are suggested as options.

The requested State may not invoke laws imposing secrecy or confidentiality on financial institutions or the fact that the offence involves fiscal issues in order to refuse to comply with the request.

Decisions made in the context of mutual legal assistance may be appealed to the Office of the Public Prosecutor, provided the decision is subject to appeal under domestic law. For example, a decision whether or not to confiscate property may be subject to appeal.

Article 6.2.3 and 6.2.4 Request for investigative measures, provisional measures

Compliance with: Art. 18 (17) UNCTOC, Art. 46 (17) UNCAC, Art. 21-22 CoEC

In principle, requests for investigation and hearings such as the hearing of witnesses, and requests for provisional measures such as freezing or seizure of property, are carried out in accordance with the domestic law of the requested State. If specific methods are stated in the request, they shall be honored only to the extent that they are not in violation of domestic law. If a requested provisional measure is not provided

for in the law of the requested State (e.g., tapping of a telephone), the competent authority may replace it with the provisional measure most similar to it in terms of its effects.

Article 6.2.5 Requests for confiscation

Compliance with: FATF R38, Art. 13 UNCTOC, Art. 54-55 UNCAC, Art. 23-24 CoEC

The requesting State may ask the requested State to issue a confiscation order for property located in the territory of the requested State. In this case, the request is sent to the competent authority to issue and enforce a confiscation order. On the other hand, the requesting State may ask the requested State to execute a confiscation order that the requesting State has already issued. In this case, the request is sent to the competent authority for it to execute the confiscation order issued by the court of the requesting State. The requested State is bound by the findings of fact on which the order is based, and it is not free to readjudicate the matter.

The request shall only be enforced if it involves property that is subject to confiscation under this law and is located in the territory of the requested State. It shall be executed in accordance with the domestic law of the requested State.

Article 6.2.6 Disposal of confiscated property

Compliance with: FATF R38, Art. 8 (3) ICFT, Art. 14 UNCTOC, Art. 57 UNCAC

In principle, property confiscated by the requested State at the request of the requesting State belongs to the requested State. However, this cannot be to the detriment of legitimate owners, whose property must be restored to them by the State. In addition, nothing prevents States from entering into agreements for the purpose of disposing of such property in some other manner.

FATF Recommendation 38 and the international conventions encourage the States to provide agreements establishing regular or case-by-case sharing of confiscated assets in order to encourage cooperation.

Article 6.2.7 Joint investigations

Compliance with: Art. 19 UNCTOC, Art. 49 UNCAC

In order to facilitate cooperation, a State should establish a provision to serve as the legal basis for joint investigations, such as those indicated in the UN Conventions. For example, this could involve setting up investigative teams comprised of representatives from the various States involved. To this end, a State may either enter into bilateral or multilateral agreements or make decisions on a case-by-case basis.

Chapter III. Extradition

Article 6.3.1 Extradition requests

Compliance with: FATF R39, Art. 6 88Conv, Art. 11 ICFT, Art. 16 UNCTOC, Art. 44 UNCAC

The offences of money laundering and financing of terrorism defined in the law should be considered as giving rise to extradition. A State must act to establish the legal basis necessary to do this and it is immaterial whether this legal basis is found in a treaty or in a State's own law. All States Party to the 88Conv, the UNCTOC, the ICFT, and the UNCAC have such a basis, even in the absence of other treaties or domestic legal provisions. Thus, when a State receives an extradition request from a State with which it has not concluded a treaty, it may consider these conventions as constituting the legal basis for extradition.

Article 6.3.2 Dual criminality

Compliance with: FATF R37, Art. 16 (1) UNCTOC, Art. 44 (1) UNCAC

The extradition measure is a coercive measure that justifies the granting of a certain number of guarantees, including the principle of dual criminality. However, technical differences in the laws of different States, such as differences in the category or name that each State gives to an offence, must not be obstacles to extradition. Moreover, a State may choose to grant the extradition of someone for a predicate offence to money laundering that would not be punishable under its own domestic law.

Articles 6.3.3 and 6.3.4 Mandatory and discretionary grounds for refusal

Compliance with: FATF R39, Art. 10 ICFT, Art. 16 (10and 15) UNCTOC, Art. 44 (11 and16) UNCAC

A State must refuse to extradite someone when the principle of non-discrimination is undermined, if the person has already been tried in the territory of the requested State for the same actions, if he or she benefits from immunity or a statute of limitations, or if he or she is at risk of being subjected to inhuman or degrading treatment in the requesting State. Tax issues may never be invoked to refuse to grant extradition.

A State may choose to provide other grounds for refusing to extradite, provided such grounds are reasonable in terms of the principles governing legal cooperation. Grounds for refusing to extradite often include a State's refusal to extradite its own nationals. These are acceptable grounds provided the principle of *aut dedere aut judicare* presented in the following provision is respected.

Article 6.3.5 The duty to extradite or prosecute under international law

Compliance with: FATF R39, Art. 10 ICFT, Art. 16 (10) UNCTOC, Art. 44 (11) UNCAC

When a State refuses to extradite someone even though prosecution is possible, such as in the case where the person is a national, the State must, without undue delay, submit the matter to its competent authorities for prosecution, and it is immaterial whether or not the offence was committed in its territory. In such cases, the competent

authorities must make their decisions and carry out their proceedings as they would for any other serious offence in the context of domestic law.

Article 6.3.6 Simplified extradition procedure

Compliance with: FATF R39, Art. 16 (8) UNCTOC, Art. 44 (9) UNCAC

The FATF and the UN Conventions urge the States to establish simplified extradition procedures, such as authorizing direct transmission of requests between competent ministries, dispensing with the supervisory agency's opinion regarding conditions, and waiving the principle of specialization. However, these procedures may only be allowed with the consent of the interested party.

Chapter IV. Provisions common to requests for mutual legal assistance and requests for extradition

Article 6.4.1 Political nature of offences

Compliance with: Art. 14 ICFT

In accordance with the ICFT, the offence of financing of terrorism may not be considered a political offence and thus used to justify refusal to grant mutual legal assistance or extradition. The same should apply to the money laundering offence.

Article 6.4.2 Transmission and processing of requests

Compliance with: Art. 18 (13-14) UNCTOC, Art. 46 (13-14) UNCAC

In accordance with the UN Conventions, a State must designate a central authority responsible for receiving requests for mutual legal assistance and for executing them or transmitting them to the competent authorities for execution. This authority is responsible, in particular, for monitoring compliance with legal conditions and for ensuring speedy and proper execution of the request. However, nothing prevents a State from providing more expeditious channels for urgent cases.

The designated central authority or the authority responsible for executing the request acknowledges receipt and quickly informs the requesting State of any inadequacies in the request.

Article 6.4.3 Content of requests

Compliance with: Art. 18 (15) UNCTOC, Art. 46 (15) UNCAC

Based on the nature of the request (testimony, seizure, confiscation, extradition, etc.), the requesting State must be sure to include all data and information necessary for the request to be carried out. Thus, when carrying out a decision adopted by the requesting State, such as a confiscation order, it is important for the requested State to have a certified true copy of the decision and an enforceable instrument.

Article 6.4.4 Additional information

Compliance with: Art. 18 (16) UNCTOC, Art. 46 (16) UNCAC

The State may request additional information from the foreign competent authority if it appears necessary to execute or facilitate the execution of the request.

Article 6.4.5 Requirement of confidentiality

Compliance with: Art. 18 (20) UNCTOC, Art. 46 (20) UNCAC

The requesting State may require that the requested State keep secret the request and its substance, except to the extent necessary to execute it.

Article 6.4.6 Delay in complying with request

Compliance with: Art. 18 (25) UNCTOC, Art. 46 (25) UNCAC

The State may delay the referral of requests to the competent authorities if it can substantially interfere with an ongoing investigation or proceeding. In these cases, the State shall inform the requesting authority thereof.

Article 6.4.7 Costs

Compliance with: Art. 18 (28) UNCTOC, Art. 46 (28) UNCAC

In principle, costs incurred to execute a request are borne by the requested State. However, nothing prevents States from consulting each other in cases where expenses are particularly high in order to establish the conditions under which costs shall be paid.

Model (*decree, regulation*) on the financial intelligence unit, issued for purposes of application of Article 3.1.1 of (*the UNODC/IMF model law on money laundering and financing of terrorism*)

The decree/regulation seeks to provide details on the composition, organization, operations, and budget of the FIU. It is difficult, however, for a model to take into account the many types of FIUs. The nature, organization, and powers of FIUs may differ significantly from one State to the next, beyond a certain number of rules that constitute the basic platform of an FIU. This model thus provides the minimum framework to which the decree must conform. It is likely that it will be useful, even essential, to provide greater depth than in the provisions discussed below. Accordingly, States may use the example of the regulatory texts of those States whose FIUs are closest to the model of the FIU in the State concerned. Information can also be found in the IMF and WB manual, *Financial Intelligence Units. An Overview.*

Organization

Article 1. In accordance with FATF Recommendation 26, an FIU must have sufficient independence and operational autonomy to protect it from undue influence and interference. This independence may be the result of various factors such as the existence of tutelary or hierarchical ties with other government authorities, the granting of legal status to the FIU, the title of the person presiding over the FIU, the method for appointing the members of the FIU, and the FIU's power over its budget.

Article 2. The composition of an FIU is of fundamental importance. It must respond to multidisciplinary criteria and thus must be comprised of individuals with expertise in the areas of finance, banking, law (commercial law, criminal law, etc.), criminology (typology, channels, etc.), customs, and police investigation. Liaison officers are advisable for ensuring that information is circulated, particularly to police and customs authorities. Logistics teams of computer specialists (for creating and using databases) and document specialists should also improve the efficiency of the FIU.

Article 3. In order to ensure the independence of the FIU, the head, liaison officers, and all others working in the FIU should not simultaneously carry out activities in a financial institution, designated profession, or any other assignment or position that might affect their independence. It is also helpful to state that the head may not perform functions in financial institutions or designated professions in the years preceding his or her term.

Operation

Article 4. The decree must provide methods for transmitting information from financial institutions and DNFBPs to the FIU. To ensure the completeness of the information sent, it is advisable for the FIU to establish a model suspicious transaction report summarizing all items of information that are essential and useful to proper understanding and subsequent processing (information on the person making the report, the customer, and the beneficial owner, description of suspicious transactions or activities, period during which the transaction should be carried out, indications of money laundering or financing of terrorism, etc.).

The decree may specify the technical channels for transmitting information (fax, e-mail, etc.). It is important to provide safe and rapid methods. If information is transmitted via telephone, it must be confirmed later in writing.

Article 5. The handling and processing of reports will be facilitated by setting up a computerized database so that it will be possible to analyze and verify information and provide reliable statistics.

Article 6. In order to keep the State and the public informed as well as to provide a measure of control over its own activities, the FIU should issue an annual report of its activities to be submitted to the supervisory authority (*variant 3*), the government (*variant 1*), Parliament (*variant 2*), or several of these entities at the same time. Sending it to Parliament has the advantage of generating public discussion. This report may contain information on the organization, operations, and budget of the FIU, typologies and analyses of stylized cases, statistics on suspicious transactions, the results of analyses, information on cooperation and outreach activities during the past year.

Operating budget

Article 7. The operating budget of the FIU may be allocated from a State's budget, which is the most common practice, or it may be based on contributions paid by financial institutions and designated professions. The latter system is used in Belgium in particular. It increases the independence and autonomy of the FIU and serves to establish a linkage between an increase in the number of reporting persons and an increase in the resources made available to the FIU. However, a degree of control is exercised by the supervisory authority, which sets the maximum amount of the budget.