

出國報告（出國類別：出席會議）

出席「防制洗錢金融行動工作組織」
第22屆第1次會員大會及工作組會議

出國人：法務部 調部辦事檢察官 林宗志

派赴國家：法國

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壹、前言

一、防制洗錢金融行動工作組織簡介

按「防制洗錢金融行動工作組織」(Financial Action Task Force, 下稱 FATF)係由 7 大工業國於 1989 年所創設之政府與政府間組織，為防制洗錢及打擊資助恐怖分子 (AML/CFT) 國際標準之制定者，結合立法、金融及執法專家，以達成各國在 AML/CFT 之法規改革，主要功能為：(一)促進全球 AML/CFT 標準之訂定與執行；(二)檢討並報告洗錢及資助恐怖分子趨勢、技巧及反制作為；(三)監督會員在執行 AML/CFT 執行成效。目前有 34 個會員國家與地區以及 2 個區域性組織，並有 8 個區域性防制洗錢組織以準會員身分參與運作，亞太防制洗錢組織 (Asia/Pacific Group on Money Laundering, 下稱 APG) 即為其中之一。

二、會議主題

FATF 及其 8 個區域性防制洗錢組織準會員均依據 FATF 頒布之「防制洗錢 40 項建議及打擊資助恐怖主義 9 項特別建議」(下稱「40+9 項建議」)，定期對所轄會員進行相互評鑑，該評鑑報告為日後 FATF 進行各國 AML/CFT 機制總體檢之重要參考資料。

APG 秘書處於 2010 年 9 月 6 日以電子郵件向本部調查局洗錢防制處表示，「防制洗錢金融行動工作組織」(Financial Action Task Force, 下稱 FATF)將於今年 10 月 18 至 22 日於法國巴黎經濟合作暨發展組織會議廳舉行第 22 屆第 1 次會員大會及工作組會議。FATF 為準備第四輪相互評鑑，自 2009 年 10 月開始進行「防制洗錢 40 項建

議及打擊資助恐怖主義 9 項特別建議」之修訂討論，本次會議重點，即針對前開修訂進行意見交流，形成初步共識。我國雖非 FATF 會員，惟 APG 係 FATF 準會員，我國可以 APG 代表身分與會。我國遂由法務部檢察司調部辦事檢察官林宗志、法務部調查局洗錢防制處代理處長張治平、調查官陳佩宜代表出席。

貳、會議重點

一、修正提案重點

- (一) 風險基礎法及其相關建議
- (二) 第 1 項建議 (增列稅法犯罪為洗錢防制法之前置犯罪)
- (三) 第 5 項建議 (客戶審查---說明風險基礎髮應用、說明自然人及法人之受益人要件、人壽保險政策之受益人)
- (四) 第 6 項建議 (高知名度政治人物---申報對象涵蓋國內之高知名度政治人物，對重大影響力政治人物之金融機構資產申報)
- (五) 第 8 項建議 (新技術及非面對面交易---尤其是新發明之技術)
- (六) 第 9、15 項建議 (第三者及中介引介之交易、內控、遵循及稽核---明確及延伸對第三人之信賴)
- (七) 第 20 項建議 (其他類別之非金融事業體及專門職業人員---增列其他形式之金融活動)

- (八) 第 23 項建議 (規定、監理與監控於監理方面應用風險基礎法)
- (九) 第 27、28 項建議 (執法機關、相關機關之權力---強化執法及起訴能力)
- (十) 第 33、34 項建議 (法人---利益擁有人、法律合意---利益擁有人)
- (十一) 第 35 項建議 (簽署並履行國際合作公約---增列反貪腐公約等)
- (十二) 第 36 項建議 (司法互助---強化司法互助機制)
- (十三) 第 37 項建議 (雙邊可罰性犯罪)
- (十四) 第 38、39 項建議 (凍結與國際沒收之國際合作、引渡)
- (十五) 第 40 項建議 (其他形式之國際合作)
- (十六) 第 7 項特別建議 (電匯規範---進一步提高電匯之透明度)

二、我國之因應與準備

上開修正，與法務部業務相關連者，包括第 1 項建議 (增列稅法犯罪為洗錢防制法之前置犯罪)、第 27 與 28 項建議 (強化執法及起訴能力)、第 35 項建議 (簽署並履行國際合作公約，包括反貪腐公約)、第 36 項建議 (強化司法互助機制)、第 37 項建議 (雙邊可罰性犯罪)、第 38 與 39 項建議 (凍結與沒收之國際合作、引渡)、

第 40 項建議（其他形式之國際合作）。

有關第 1 項建議，APG 於 99 年 7 月間在新加坡舉行第 13 屆年會，FATF 代表出席該次年會，於大會報告各國法制與實務運作應改善之相關內容，即已提及許多國家未將逃漏稅列為洗錢防制法之前置犯罪，建議積極改善立法，未來該項修正提案通過，我國亦當積極推動相關修法。

有關第 27、28 項建議，本部正積極推動犯罪所得查扣專責機制之試行計畫，並持續辦理強化檢察官、檢察事務官偵辦洗錢及犯罪所得查扣之技巧等教育訓練課程。

有關第 35 項建議，我國正積極推動加入反貪腐公約之簽署，並預計於 101 年推動落實本公約內國法化事宜。有關第 36、37、38、39、40 項建議，本部正積極推動國際刑事偵查及執行互助法之立法草案。

綜上所述，本部對旨揭有關 FATF 修正提案內容，大部分都正積極努力規劃或持續進行中。其中有關強化執法及起訴能力部分，於大會中有相當充分之討論，亦為本部目前積極推動之內容，故本報告擬就該部分詳述。

參、強化執法及起訴能力

一、FATF 細部修正方向

FATF 正考慮修正第 27 項建議（執法機關）及第 28 項建議（執法機關權力），以確保妥適之 AML/CFT 執法及起訴權力存在，運用必

要工具有效發揮其功能，主要目標在使該二項建議更具效能。

二、針對第 27 項建議之重要提議

- (一) 必須於全國 AML/CFT 策略架構中，指定執法機關專責負責 ML/FT 之調查。
- (二) 對於主要產生犯罪所得之犯罪，執法機關必須進行前瞻性之調查，與調查犯罪同步，並應能夠運用專業、具多種學問之小組執行調查。
- (三) 權責機關應負責確保可採取立即之行動辨識出犯罪資產，並發動扣押及凍結該等資產之行動。

三、針對第 28 項建議之重要提議

- (一) 權責機關能運用廣泛之調查技巧，從事 ML/FT 之調查，至少應包含臥底行動、通訊監察、進入電腦系統及控制下交付。
- (二) 各國應存在有效機制，可即時辨識人民所擁有或控制之帳戶。
- (三) 權責機關應有法律認可之程序，可不先通知擁有者之情形下確認資產。
- (四) 權責機關在處理 ML/FT 及其他調查時，應能向該國金融情報交換中心 (FIU) 要求相關資訊。

肆、我國查扣犯罪所得之政策與發展

一、刑法研修重點方向

本部積極推動犯罪所得查扣，深刻體會研修刑法沒收相關規定，才是正本清源之道，遂積極於 2009 年 2 月成立犯罪所得查扣研修小組，於 2010 年 6 月完成有關刑法總則相關修正草案，經送本部所召集之刑法研修小組研討，與會專家學者提出甚多寶貴意見，並要求蒐集更多立法例做為參考，並於 2011 年 1 月經本部刑法研修小組審議完成定稿。

(一) 現行刑法之缺失

現行本法總則篇之沒收規定有下列主要缺失：第一，沒收客體限於有體物，故無形之財產上利益不得沒收；第二，除違禁物外，沒收客體以屬於犯罪行為人者為限，故於第三人可責或不當得利之情況下仍無法沒收；第三，欠缺追徵規定，除有特別規定外，沒收客體不存在時，無法以追徵方式剝奪其不法利得；第四，因係從刑，未宣告主刑時不得宣告沒收，若犯罪行為人係無責任能力人或因死亡、逃匿時亦無從沒收。基於「使無人能因犯罪而受利益」的理念，消除鉅額不法利益犯罪之經濟上誘因，上述缺失實有改正之必要。

(二) 修法之參考依據

前開修法，主要參考聯合國 2003 年反腐敗公約 (United Nations Convention against Corruption, 下稱反腐敗公約)、

聯合國 2000 年打擊跨國有組織犯罪公約 (United Nations Convention on Transnational Organized Crime, 下稱巴勒摩公約)、聯合國 1988 年禁止非法販運麻醉藥品和精神藥物公約 (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 下稱維也納公約)、歐洲理事會 2005 年「關於清洗、搜查、扣押和沒收犯罪收益與資助恐怖活動公約」(Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism)、聯合國毒品與犯罪防制辦公室 (United Nations Office on Drugs and Crime, 下稱 UNODC) 2005 年防制洗錢與資助恐怖行動法範本 (Model legislation on money laundering and financing of terrorism)、美國法典 (U. S. Code)、德國刑法、瑞士刑法、日本刑法、日本昭和 49 年之刑法改正草案、日本「有關處罰組織的犯罪與規範犯罪收益之法律」(組織的な犯罪の処罰及び犯罪収益の規制等に関する法律, 下稱組織犯罪處罰法)、日本「有關國際合作為圖防止助長毒品相關不正行為的麻藥及精神藥取締法等之特別規定法律」(国際的な協力の下に規制薬物に係る不正行為を助長する行為等の防止を図るための麻薬及び向精神薬取締法等の特例等に関する法律, 下稱麻藥特例法) 等國際公約與立法例加以修訂, 以期符合國際潮流與趨勢。

(三) 修正之重點

1、刪除追徵、追繳或抵償為從刑之規定

(修正條文第 34 條)

刑法於 2005 年修正時，雖將追徵、追繳或抵償列為從刑之一，惟追徵與抵償係全部或一部不能沒收時之代替措施，故其性質應為沒收之易刑處分而非刑罰；其次，追繳立法體例不一，或為沒收之先行措施，或為沒收不能時的代替措施，難以理解其性質。基於制度簡明化的要求，本法僅以沒收作為剝奪違禁物及與犯罪有關財產之措施，而以追徵作為替代之易刑處分。抵償之概念已涵蓋於追徵，追繳之概念亦已涵蓋於沒收、追徵之內。

2、擴大沒收物的要件（客體範圍）與人的要件

(修正條文第 38 條)

聯合國反腐敗公約等國際公約，均要求沒收客體包括有形及無形財產在內。遂參照洗錢防制法，明定本條之沒收範圍包括「物或財產上利益」。又第三人以惡意或因他人犯罪不當取得利益時，如未剝奪顯失公平正義。爰參照行政罰法、美國法典及瑞士刑法等立法例，明定第三人以惡意或因他人犯罪取得利益時，得於其所受財產價值範圍內酌予沒收，以防止脫法及填補制裁漏洞。

3、增訂替代沒收之追徵規定，並明定為沒收之易刑處分

(新增條文第 38 條之 1)

除刑法分則篇或其他法律另有規定外，於沒收客體全部或一部不能沒收時，並無代替沒收之追徵或抵償規定。故如犯罪所得已不存在時，既無法沒收，復無法追徵。遂參照行政罰法、日本、

德國與瑞士刑法等立法例，明定因犯罪所得之物或財產上利益，因事實上或法律上原因（如滅失或第三人善意取得）而不存在時，得追徵其價額。

4、增訂於無法宣告主刑時，亦得單獨宣告沒收或追徵其價額（修正條文第40條）

犯罪行為人有死亡、逃匿等情形，如無法宣告沒收，將形成犯罪行為人或其親屬保有犯罪所得之不當情況。遂參照聯合國反腐敗公約、德國刑法、美國法典等立法例，明定犯罪行為人係無責任能力人或因死亡、逃匿時亦得單獨宣告沒收。

二、犯罪所得查扣專責機制之建立

本部已完成「犯罪所得專責機制試行計畫」草案，擬定由最高檢察署特偵組及臺北、臺中、高雄等三地檢署設立專責檢察官辦理犯罪所得查扣業務，並以特偵組作為全國各檢察機關辦理司法互助等相關業務之諮詢機關。並規劃於臺灣高等法院檢察署成立綜合協調小組，除督導前揭三地檢署之犯罪所得查扣業務外，亦協助處理相關爭議協調事項。

三、跨部會資源整合與聯繫機制

檢察官查扣犯罪所得，另一個難題，即是財金資訊之取得，否則無從釐清被告財產與犯罪所得之所在及狀況。本部正積極規劃中央銀行、金管會（銀行局、證期局、保險局、檢查局）、臺灣證券交易所、財團法人證券櫃檯買賣中心、臺灣集中保管結算所股份有限公司、經

濟部投資審議委員會、財政部國稅局、關稅總局、內政部地政機關、交通部汽機車監理機關、本部洗錢防制處等單位，整合跨部會資源，建立橫向聯繫機制，提高查扣犯罪所得之效能。

陸、附錄

- 一、THE REVIEW OF THE STANDARDS---PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS
- 二、OPERATION ISSUES : RECOMMENDATIONS 27 & 28 (Draft Report)
- 三、OPERATION ISSUES : RECOMMENDATIONS 27 & 28

ANNEX: DRAFT PUBLIC CONSULTATION PAPER

**THE REVIEW OF THE STANDARDS –
PREPARATION FOR THE 4TH ROUND OF
MUTUAL EVALUATIONS**



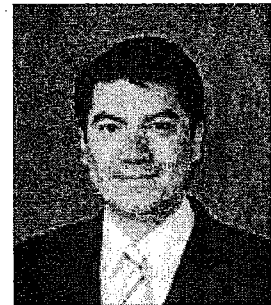
FATF • GAFI

DRAFT CONSULTATION PAPER

OCTOBER 2010

FOREWORD

The FATF exists to develop and promote global standards for combating money laundering and terrorist financing, which are set out in the FATF 40 Recommendations and the 9 Special Recommendations on Terrorist Financing. The FATF's evaluations of country's compliance with these standards provide a rigorous and transparent source of analysis, and a powerful incentive for countries to continue strengthening their national anti-money laundering / counter-terrorist financing (AMF/CFT) regimes.



The FATF is nearing the end of its third round of evaluations: by February 2011 all of its members will have been assessed, and the eight FATF-Style Regional Bodies are also near to completing evaluations of their members, using the common AML/CFT Methodology 2004. It is good practice for any standard-setter to re-examine its standards periodically, and so the FATF is currently conducting a review of the 40+9 Recommendations, to ensure that they remain up-to-date and relevant, and to learn any lessons from implementing and evaluating the current standards.

The current review is a focused and balanced exercise, aiming at maintaining the necessary stability in the standards while addressing new or emerging threats and any deficiencies or loopholes in the current FATF standards. It is based on the principles of maintaining a level playing field with equal treatment for all countries; and of openness and transparency. In particular it will look to place more emphasis on effective implementation of the FATF Standards by countries. Work has been undertaken on the first phase of this review over the last year, considering issues including the Risk Based Approach; Customer Due Diligence and Reliance on Third Parties. The initial proposals emerging from this work are set out for consultation in this document.

We are committed to conducting this review in an open and transparent manner, and the FATF is keen to involve the private sector, and in particular members of the Consultative Forum, in order to ensure that all the proposals receive proper consideration by all stakeholders. The financial sector and other businesses and professions are key partners in the FATF's efforts to combat money laundering and terrorist financing: financial institutions and other gatekeepers are the lead actors in the daily fight against this criminality. It is therefore essential for us to reflect that practical knowledge and experience in our review of the standards and how they are implemented.

The review of the standards, and this consultation, will ultimately lead to more effective AML/CFT systems worldwide. I believe this consultation is also an opportunity to further strengthen the close and constructive dialogue between the FATF and its partners across the globe.

Luis Urrutia

FATF President

INTRODUCTION

The Preparation for the 4th Round of Mutual Evaluation

1. The FATF 40+9 Recommendations have been endorsed by more than 180 countries and jurisdictions, are recognized as the international AML/CFT Standards, and have been, or are being, successfully implemented. The FATF is now moving towards the end of its 3rd Round of Mutual Evaluations, and has started a focused review of its Standards. This review, which is taking place over a two-year period, is principally focused on addressing the issues that have been identified as part of the 3rd round of mutual evaluations and from countries implementing the current FATF Standards. The review is based on several fundamental principles, which include:

- *Focused exercise* – the FATF has identified a limited number of issues, and is dealing with them on a prioritised basis. There should be a balance between the desirability of maintaining stability in the standards and the need to address new or emerging threats, or obvious deficiencies or loopholes in the standards.
- *Inclusiveness, openness and transparency* – the review process should allow for the full involvement of all FATF and FSRB members and also all FATF observers. In addition there is the current public consultation exercise, including close engagement with private sector partners.
- *Increased focus on effectiveness* – the 4th Round of Mutual Evaluations should give a higher emphasis to effective implementation of the AML/CFT requirements by countries, which could in the future lead to restructuring the evaluation process, with a greater focus on risks and vulnerabilities faced by particular jurisdictions.

2. In October 2009, the FATF Plenary agreed on the list of issues to be considered under the preparation for the 4th Round of Mutual Evaluations, and the work on that set of issues has been structured over two years. Based on that work certain preliminary conclusions have been reached and the FATF is consulting on proposals regarding the following topics: the Risk-Based Approach and certain related Recommendations, Recommendation 1 (tax crimes as a designated category of predicate offence for money laundering), Recommendation 5 (Customer Due Diligence), Recommendation 6 (Politically exposed persons), and Recommendation 9 (Third party reliance). Work on Recommendations 33/34 and 40 is continuing. Further work has also been done on SR.VII and the issue of cover payments, and the FATF is also consulting on that issue.

The public consultation

3. The FATF wishes to receive the views of all interested parties on the proposals contained in this paper. Comments should be received, in English or French, by the FATF Secretariat **no later than Friday 7 January 2011**, and if possible the comments should be sent electronically to: fatf.consultation@fatf-gafi.org. Persons providing comments should note that comments received may be made publicly available.

1. THE RISK-BASED APPROACH

4. In 2003, when the FATF 40 Recommendations were last revised, the intention was to introduce appropriate risk-based flexibility into the Recommendations in a manner that would allow resources to be allocated in the most efficient way to address the most pressing ML/TF risks. However, the current text on the Risk-Based Approach (RBA) may lack sufficient clarity, and is located in several different parts of the FATF Standards. The different components are brought together more clearly in the RBA Guidance developed in cooperation with industry since June 2007, but such guidance does not form part of the Standards.

1.1 An Interpretative Note on the Risk-Based Approach

5. The proposal is, therefore, to develop a single comprehensive statement on RBA, which could be incorporated into the FATF Standards as a new Interpretative Note dedicated to RBA and applicable to a set of Recommendations, namely R.5, 6, 8-11, 12, 15, 16, 21 & 22. The general principles set out in the Interpretative Note on the RBA (INRBA) would apply to all the Recommendations it refers to, except where a specific Recommendation provides for a different approach. It should be noted that many of the elements set out below, for example the measures relating to higher and lower risk are already part of the existing FATF Standards.

6. The proposed draft Interpretative Note comprises the following elements:

- a) A statement on the basic principles and objectives of a risk-based approach.
- b) **The obligations and decisions for the countries** – there are five elements, with items (i), (ii) and (v) being mandatory obligations, and items (iii) and (iv) being optional:
 - i. **Risk assessment** - A country should take appropriate steps to identify and assess the ML/TF risks for the country.
 - ii. **Higher risk** - A country should ensure that their AML/CFT regime addresses the higher ML/TF risks, and that financial institutions and DNFBPs apply enhanced CDD measures in relation to these higher risks.
 - iii. **Lower risk** - If a country identifies lower ML/TF risk, it may allow financial institutions and DNFBPs to apply simplified CDD measures for certain recommendations.
 - iv. **Exemptions** - Where there is proven low ML/TF risk, and in strictly limited and justified circumstances, a country may exempt financial institutions or DNFBPs from applying certain FATF Recommendations.
 - v. **Supervision/monitoring** - Competent authorities or SROs should supervise or monitor the appropriate implementation of the RBA by financial institutions and DNFBPs, in particular the ML/TF risk assessments prepared by financial institutions and DNFBPs.
- c) **The obligations and decisions for financial institutions and DNFBPs** - there are four elements, with items (i)-(iii) being mandatory and item (iv) being optional:

- i. **Risk assessment** - Financial institutions and DNFBPs should be required to take steps to identify and assess their ML/TF risks for customers, countries or geographic areas, and products/services/transactions/delivery channels).
- ii. **Risk management and mitigation** - Financial institutions and DNFBPs should have policies, controls and procedures in place to effectively manage and mitigate their risks, which should be approved by senior management and be consistent with national requirements and guidance.
- iii. **Higher risk** - Where financial institutions and DNFBPs identify higher ML/TF risks, they should be required to take enhanced measures to manage and mitigate the risks.
- iv. **Lower risk** - Where financial institutions and DNFBPs identify lower risks, they may be allowed to take simplified measures.

1.2. Impact of the Risk-Based Approach on FATF Recommendations

7. In addition to the development of the INRBA, the FATF has also examined how the RBA was dealt with in the current Standards, and proposes some amendments to several Recommendations linked to the RBA issue:

1.2.1. Recommendation 5 and its Interpretative Note

8. Recommendation 5 (R.5) and its Interpretative Note (INR.5) contain important references to ML/TF risks. The main changes proposed for R.5 and INR.5 linked to RBA consist in giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors, as well as examples of simplified/enhanced CDD measures. The details of these proposed changes are explained below.

1.2.2. Recommendation 8: New technologies and non-face-to-face business

9. FATF Recommendation 8, which deals with specific risks, addresses two substantially different issues: (i) the misuse of new and developing technologies; and (ii) the potential risks associated with non-face-to-face relationships and transactions.

10. In working on the risk-based approach, the FATF reviewed R.8, and considered that non-face-to-face relationships and transactions should be a ML/TF risk factor to be considered by financial institutions and DNFBPs when assessing the specific risk associated with a transaction or a business relationship. The issue of non-face to face business will therefore be incorporated into the INRBA.

11. FATF is thus considering focusing Recommendation 8 on new technologies and making more explicit the requirements on financial institutions/DNFBPs, countries and competent authorities in relation to ML/TF risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms. These requirements would be risk-based, so that only in cases where there is higher ML/TF risk would financial institutions and DNFBPs be required to have procedures in place to enable them to effectively manage and mitigate the risks. In addition, it is proposed to clarify that countries should also assess the potential risks that may arise from new technologies and inform financial institutions and DNFBPs of these risks.

1.2.3. Recommendation 20: Other non-financial businesses and professions

12. Recommendation 20 (R.20) provides (in part) that "countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and

professions, that pose a money laundering or terrorist financing risk". R.20 only asks countries to consider other types of businesses and professions that are at risk, but not to consider other types of financial institutions.

13. It is proposed that other types of financial activities (other than those covered by the FATF Standards) should be added in R.20. This will give balance to the current Recommendation 20 which asks countries to consider applying the FATF Recommendations to other types of businesses or professions that present a ML/TF risk in a national context.

2. RECOMMENDATION 5 AND ITS INTERPRETATIVE NOTE

14. The main changes proposed relate to INR.5 and address the following topics: the risk-based approach, the clarification of requirements regarding legal persons and arrangements and the issue of beneficiaries of life insurance or other investment related insurance policies.

2.1. The impact of the Risk-Based Approach on Recommendation 5 and its Interpretative Note

15. Given the importance of RBA in the FATF Standards the FATF is considering amending INR.5. First, in order to assist countries, as well as financial institutions and DNFBPs, FATF has prepared a set of examples of both higher and lower ML/TF risk factors. These risk factors are derived from examples contained in the FATF Standards or Methodology, or from the nine sets of sectoral RBA guidance developed with the private sector during recent years. Second, a list has been prepared of examples of enhanced CDD measures for higher ML/TF risks, and simplified CDD measures for lower ML/TF risks. The revised INR.5 provides for a flexible approach to the implementation of the RBA, but nevertheless stipulates that the CDD measures should be appropriate or commensurate to the ML/TF risks.

16. In addition, based on the model used for the sectoral RBA Guidance papers, new text is being considered relating to "Risk variables", which will basically provide that, when assessing ML/TF risks, financial institutions (and DNFBPs through R.12) should take into account risk variables that may increase or decrease the potential risk and result in changes to the level of CDD measures considered appropriate. There is also a recognition that ML/TF risks can vary and that a "one-size-fits-all" approach is not necessary, e.g. for certain customers, normal CDD measures may be perfectly appropriate at the customer acceptance stage, but higher level of due diligence measures may be required for ongoing monitoring of transactions.

2.2. Legal persons and arrangements - customers and beneficial owners

17. A number of changes are being considered for INR.5 in relation to identification and verification of the identity of customers that are legal persons or arrangements. These are intended to introduce more clarity regarding the information that is necessary in such circumstances. In particular, the proposed changes reorganise the measures and information that would normally be needed in relation to customers that are legal persons or arrangements, and make it clearer that details of the "mind and management" of the legal person or arrangement must be obtained. These proposals do not add any new obligations with respect to customer identification data, but streamline and clarify the information that should be obtained.

18. Changes are also being considered to clarify the measures that would normally be needed to identify and verify the identity of the beneficial owners for legal persons and legal arrangements. Greater

emphasis is being placed on financial institutions understanding the ownership and control structure of legal persons and arrangements as part of the set of customer identification data.

19. As far as beneficial ownership information is concerned, the intention is to clarify that the information needed varies according to the ownership and control structure. Traditionally there has been a focus on beneficial ownership occurring through either an ownership interest, e.g. shareholding, or through control, e.g. exercising the real “mind and management”. However, it may be possible that ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising effective control of the legal person or arrangement through ownership.

20. It is proposed that, taking these elements, as well as the ownership or control structure of a legal person or arrangement, into account, financial institutions should:

- First identify and take reasonable measures¹ to verify the identity of the natural persons who ultimately have a controlling ownership interest.
- Where the ownership interest is too dispersed to exert control or there are other persons who have control of the legal person or arrangement, then it would be necessary to identify and take reasonable measures to verify those other persons that have effective control through other means (e.g. by exerting influence over the directors of a company).
- If there are no other persons identified as beneficial owners, then in such cases the beneficial owners might be the “mind and management” that has already been identified.

21. Another small change that is being considered concerns the CDD measures that are required for persons acting on behalf of a customer. In the current FATF Standards financial institutions only have to verify that a person is authorised to act on behalf of a customer when the customer is a legal person or arrangement, but in fact this check is an important component of CDD measures for all customers. For anti-fraud and other reasons, financial institutions would already check that persons who seek to operate the account of any customer would have the proper authority to do so. It is proposed that this be made explicit.

2.3. Life insurance policies

22. When developing the RBA guidance for the life insurance sector in 2009, the FATF noticed that requirements relating to the life insurance sector deserved further clarification. After carefully considering how life insurance policies operate, including policies that have investment components, FATF considers that beneficiary of life insurance policy cannot be satisfactorily considered as either a customer or a beneficial owner, in the sense that these two terms are used within the FATF Standards. It is proposed that this should be clarified, by recognising the beneficiary as a stand-alone concept, which should be separately defined in the FATF Glossary to the FATF Recommendations. FATF also recognises that the persons that are the final beneficiaries may not be identified until the end of the business relationship and that some policies have classes of beneficiaries that are designated by characteristics (e.g. all children at the time of the death) or by other means (e.g. under a will).

23. Taking all this into account, consideration is given to clarifying which CDD measures should be applied in relation to identification and verification of the identity of the beneficiary, and when this should

¹ The reasonableness of the beneficial owner identity/verification measures should be based on the ML/TF risk of the customer.

occur. It is proposed that, in addition to conducting CDD measures on the policyholder and its potential beneficial owner, financial institutions should:

- Take the name of the beneficiary(ies) that is the specifically-named natural or legal person(s) or legal arrangement(s); or
- Where there is a class of beneficiaries, obtain sufficient information concerning the beneficiary to satisfy itself that it will be able to establish the identity of the beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.
- For both cases, the verification of the identity of the beneficiary(ies) should occur at the time of the payout or when the beneficiary intends to exercise vested rights.

24. In addition, consideration is given to requiring financial institutions, in cases of higher risk, to identify the beneficial owner of the beneficiary that is a legal person or arrangement. This should occur at the time of the payout or when the beneficiary intends to exercise vested rights.

25. Similarly, and because of the higher risk involved, it is proposed that financial institutions should have risk management systems to determine whether the beneficiary of a life insurance policy is a politically exposed person (PEP), and if so to conduct appropriate CDD measures, such as informing senior management before the payout, conducting enhanced scrutiny of the whole previous business relationship with the policyholder, and considering making a suspicious transaction report.

3. RECOMMENDATION 6: POLITICALLY EXPOSED PERSON

3.1. Impact of the inclusion of a reference of the United Nations Convention Against Corruption in R.35 in relation to domestic PEP

26. At the highest levels of the international community it is recognised that AML/CFT measures are powerful tools that should be deployed in the fight against corruption and the laundering of corruption proceeds. The G20 leaders have asked the FATF to help deter and detect corruption by strengthening the FATF Recommendations, and in that context, the FATF proposes to include the United Nations Convention on Corruption 2003 (UNCAC) – the Merida Convention – into Recommendation 35.

27. The inclusion of the UNCAC in the FATF Standards also impacts Recommendation 6, which deals with politically exposed persons (PEPs). Very specifically, article 52 of the UNCAC relates to the prevention and detection of transfers of proceeds of crime, including by PEPs. The Convention does not distinguish between foreign or domestic PEPs, and refers to “individuals who are, or have been, entrusted with prominent public functions and their family members and close associates”. Based on the principle that a Convention should be interpreted in the widest sense possible, it is the understanding of the parties to the UNCAC that article 52 required enhanced scrutiny on both domestic and foreign PEPs.

28. However, taking into account the fact that the money laundering risks differ, depending on whether the customer is a foreign or a domestic PEP, the FATF is considering the following approach: (i) to leave the FATF requirements related to foreign PEPs as they are, i.e. foreign PEPs are always considered to be higher risk; (ii) to require financial institutions to take reasonable measures to determine whether a customer is a domestic PEP; and (iii) to require enhanced CDD measures for domestic PEPs if there is a higher risk.

29. The FATF is also reviewing the obligation with respect to family members and close associates of PEPs. Instead of requiring financial institutions to determine whether a customer or beneficial owner is a family member or close associate of a PEP, it proposes to focus on the cases where the PEP (either foreign or domestic) is a beneficial owner of the account, i.e. on situations where a family member or close associate has a business relationship with a financial institution and a PEP is the beneficial owner of the funds involved in such a relationship.

3.2. Beneficiaries of life insurance policy

30. As detailed above (see section 2.3), the FATF is considering requiring financial institutions to have risk management systems to determine whether the beneficiary of a life insurance policy is a politically exposed person (PEP), and if so, to conduct appropriate CDD measures. This approach would follow the general approach for PEPs: enhanced CDD measures would always be required when the beneficiary is a foreign PEP, whilst RBA would apply when the beneficiary is a domestic PEP.

3.3. Implementation issues arising under R.6

31. [To be completed by WGTM]

4. RECOMMENDATION 9: THIRD PARTY RELIANCE

32. The issue of reliance on third parties and introduced business as addressed by R.9 was initially submitted by the private sector through the FATF Consultative Forum. An Expert Group on R.9, composed of FATF and private sector representatives, was set up to undertake preparatory work: a number of issues were identified by the R.9 Expert Group, and there are three issues where the FATF is proposing changes in the context of the 4th Round.

4.1. Sectoral coverage: who can rely on a third party and who can be relied upon?

33. Who can rely on a third party? Currently under R.9 countries have a discretion to allow any type of financial institution (and under R.12 by extension, any type of DNFBP) to rely on a third party provided that the conditions in R.9 are met. The FATF considers that this should remain unchanged, and that each country will be free to decide whether reliance on a third party should be allowed for financial institutions or DNFbps.

34. Who can be relied upon? Although there is no explicit indication in R.9 on who can be relied upon, the requirements to be "supervised" de facto limits the types of entities that could be relied upon as a third party. The FATF is considering amending R.9 to explicitly extend countries' discretion regarding the types of third parties that can be relied upon, and to go beyond the banking, securities and insurance sectors to include other types of institutions, businesses or professions, as long as they are subject to AML/CFT requirement and to effective supervision or monitoring.

4.2. Delineation between third party reliance and outsourcing or agency

35. Members of the R.9 Expert Group considered that there is no clear simple test between the three concepts of reliance, outsourcing and agency, and that these concepts, in particular the outsourcing and agency concepts, differ from one country to another, and even sometimes from one financial activity to

another. Therefore, there was a general support to ask the FATF to consider clarifying what constitutes outsourcing or agency relationships as compared to reliance on third parties.

36. Rather than defining each of these three concepts, the FATF considers that a definition of outsourcing or agency should not be introduced, but it proposes instead to better delineate what constitutes third-party reliance through a functional definition constituted by a set of positive or negative elements which describe situations or elements which are characteristic of a reliance context.

4.3. Intra-Group reliance

37. One of the issues that was raised by the private sector and considered to be of some importance related to intra-group reliance, and the FATF is considering taking a more flexible approach for reliance where the third party is a part of a financial group. To this end, the FATF is considering encouraging countries to require financial groups to have an AML/CFT programme at the group level, which is applicable to all branches and majority-owned subsidiaries. These programmes should be appropriate to the business of the branches and subsidiaries.

38. Financial institutions which belong to a financial group that effectively implements AML/CFT group programmes, and that are effectively supervised at a consolidated or group level, could then be considered as meeting (through their group AML/CFT programme) some of the conditions normally required under R.9 (namely - to satisfy themselves that copies of identification data will be made available from the third party upon request, and to satisfy themselves that the third party is regulated and supervised and has measures in place to comply with R.5 and R.10). Another proposed change which will add flexibility to R.9 is that reliance on a third party would not be limited to third parties which are based in countries that adequately comply with the FATF Standards. It is proposed that competent authorities may decide that this last requirement is not applicable when the reliance is between financial institutions belonging to the same financial group that applies a group compliance programmes and that is effectively supervised at a group level.

5. TAX CRIME AS A PREDICATE OFFENCE FOR MONEY LAUNDERING

39. The FATF is considering including tax crimes as a predicate offence for money laundering in the context of R.1. More precisely, it proposes to amend the list of designated categories of predicate offence for money laundering as follows:

- To clarify the current designated category of “smuggling” by referring to: smuggling (including in relation to customs and excise duties and taxes).
- To add a separate designated offence category: tax crimes - related to direct taxes and indirect taxes.

40. For the private sector, the key issue for this change will not be the impact of this change on R.1, which concerns the predicate offences to money laundering, but in relation to the obligation to report suspicious transactions under R.13. Thus transactions related to the laundering of the proceeds of tax crimes would have to be reported as suspicious transactions.

6. SR.VII: COVER PAYMENT: IN PROGRESS WITHIN WGTM]

41. *[To be completed by WGTM]*

7. OTHER ISSUES INCLUDING IN THE PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS

42. In addition to the issues presented above, the FATF is also reviewing Recommendations related to international cooperation, with a view to reinforcing requirements for countries on mutual legal assistance, extradition (R.36-39) and cooperation/exchange of information between competent authorities (R.40), and to clarifying that these requirements equally apply for ML and TF situations. These changes under consideration will affect countries, but they should not impact private sector.

43. Moreover, the FATF is considering revising Recommendation 27 (law enforcement authorities) and Recommendation 28 (powers of law enforcement authorities), with a view to ensuring that appropriate AML/CFT enforcement and prosecution powers and mechanisms exist, with the necessary tools to effectively carry out their functions. The objective is to make these two Recommendations more effective. The changes currently under consideration should not impact private sector.

8. USEFULNESS OF MUTUAL EVALUATION REPORTS

44. FATF Mutual Evaluation Reports are intended to be used by the private sector, as well as the FATF and its members, as a key source of information and analysis about national AML/CFT systems and their implementation. In the lead up to the 4th Round, the FATF will consider how the value of reports could be improved, both with respect to how they are used within the FATF; and how they could be made more useful to the private sector and others. Initial consideration has identified a number of issues which the FATF will consider, including:

- The overall length of reports. Reports could be made shorter, e.g. as a result of more focused evaluations which did not examine every recommendation in as much detail, or by including less background information.
- The executive summary. The contents of the executive summary could be adjusted to more clearly set out the overall level of compliance, and the key strengths and weaknesses, and include the most critical information for readers, potentially as a stand-alone document.
- Risk information: The content and structure of reports could give more emphasis to risk factors and how they are or could be mitigated, and such information could be the basis for readers own risk assessments.

- **Timeliness.** The duration of the Mutual Evaluation process means that the publication of reports takes place some time after information is gathered. The FATF will consider whether this is a problem and whether the length of the evaluation process can or should be shortened.
- **Structure.** Could the structure of Mutual Evaluation reports be improved to make them easier to understand and navigate?
- **Sectoral Information.** Reports could include additional information in specific areas, e.g. for those recommendations which apply to several different types of actor (banking, securities, insurance etc) conclusions on risk and compliance could potentially be set out for each type of institution.

45. In order to inform the FATF's work on these issues, it would be valuable to have your views on the proposals above, and on the following general questions:

- a) Do you use FATF reports and, if so, how?
- b) Which elements or features of current reports are most useful, and which least useful?
- c) How would you like to see the FATF's reports improved?

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Financial Action Task Force
Groupe d'Action Financière

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Working Group on Typologies

OPERATIONAL ISSUES: RECOMMENDATIONS 27 & 28

Draft Report

18 October 2010, OECD Headquarters, Paris, France

FATF-XXII

Please bring this document with you to the meeting, as no paper copies will be available at that time.

This revision takes into account comments and changes proposed by delegations by 13 October 2010. They are marked in the text.

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I. INTRODUCTION

1.1 *Background: starting point and initial steps*

1. The current project on *Operational Issues* was initiated with a view to increase the focus on operational issues within the Financial Action Task Force's overall Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) effort. The FATF Plenary endorsed "*Specific focus on Operational AML/CFT Issues*" as one of the new areas of work for the Working Group on Typologies, and this was subsequently reflected in the paper "New directions in the work of the WGTY" [FATF/WGTY(2009)28] as well as in the "Mandate for the Working Group on Typologies" [FATF/WGTY(2009)20], which were both adopted by the FATF plenary in October 2009.
2. Addressing the operational AML/CFT network has gained urgency given the larger context of preparation for the 4th round of mutual evaluations and the possibilities in that initiative to refine or adjust the FATF standards. In October 2009, the FATF Plenary tasked WGTY to look at Recommendations 27 and 28 as part of this work in order to assist WGEI (which has the overall responsibility for co-ordinating the 4th round preparation). According to the mandate, this work should result in the development of policy proposals regarding the two Recommendations – and potentially other matters that may be related - by October 2010.
3. During the Joint FATF/CFATF Meeting of Experts on Typologies in November 2009, a workshop was held in order to begin organising WGTY's efforts on operational matters. The workshop discussed Recommendations 27 and 28, as well as a number of other elements that merit further examination in the context of this project, such as: the role of financial investigation, the functions of operational AML/CFT authorities, the use of STRs and other information, co-operation among these authorities at the national level, AML/CFT knowledge and expertise, measuring effectiveness of the operational side of the AML/CFT effort and the relation of operational issues with (combating) corruption.
4. Based on the discussions during the Joint Experts Meeting in November 2009, an elaborate questionnaire was prepared and distributed among FATF-members (including FSRBs), addressing many of the subjects mentioned in paragraph 3. The response to these questionnaires has served as important input into the work of the project team that started its work in February 2010.
5. All of the issues mentioned in paragraph 3 are to some extent related to Recommendations 27 and 28, although in certain cases dealing with them may have an impact on other FATF Recommendations. It was therefore confirmed that the scope of this project – both in terms of examining the two Recommendations and in defining concrete policy proposals – may have relevance to other FATF standards (considered under the 4th round preparation or not). This is in line with the formulation of the mandate of WGTY with regards to operational issues, as endorsed by the FATF plenary in October 2009.
6. In addition, the FATF plenary of February 2010 concluded that the Working Group on Typologies would look at the issue of corruption. In particular, this project briefly addresses the current assessment methodology related to Rec. 26 (FIUs) and more generally the impact of corruption on overall effectiveness.
7. On the basis of the principles set out in the Project Plan (as attached to the Project Update on Operational Issues which was prepared for the February 2010 WGTY), a Project Team was created to take on the work set out. This Project Team consists of representatives of some 17 FATF members, associate members and observers, representing different operational AML/CFT authorities as well as policy making bodies and international organisations.

1.2 *Outline of this document*

8. The policy related output presented in this report consists of the following four elements, which can all be found in the concluding chapter of this report (Chapter V).

- a) **a proposal for new structure and wording of Recommendations 27 and 28, including texts for the relevant assessment Methodology.** This new wording is based on a series of policy proposals which are developed in chapter III in this paper.
- b) **a proposal for changes relating to other Recommendations which are directly related to the work of the operational issues project.** With regards to the assessment methodology of Rec. 30 it is proposed to raise 30.4 from additional element to essential criterion to take into account the conclusion of the discussion whether or not to include courts in the context of 27/28 (see section 2.3).
- c) **a proposal to develop guidance on issues which are relevant for the operational work on AML/CFT but do not necessarily require a change in the standard.** Financial investigation is one of the core elements of the operational Recommendations. In addition to the proposed changes to the standards that relate to this, the current project has identified financial investigation as a potential subject for additional guidance.
- d) **a proposal to forward other issues to WGEI for their consideration.** Some issues were perceived as relevant for operational AML/CFT work, but at the same time were not considered to be clearly within the mandate of this project team. It is proposed to forward these issues to the WGEI for their consideration in the preparations of the 4th round.

9. Chapter II starts off with describing the background to 'operational issues', providing why this topic merits attention and explaining the approach taken in this project. Subsequently, section 2.2 provides some definitions and descriptions which contribute to clarifying the scope of the project, including the issue whether or not courts should be included under these Recommendations.

10. Chapter III is the core of the document. This chapter analyses the current text of Recommendations 27 and 28 and puts forward policy proposals for new Recommendations, including new wording. In developing these policy proposals, reference is being made to other work that has been done by the project team, as reflected in subsequent chapters and annexes.

11. Chapter IV deals with the issue of corruption, which has been added to the mandate of this project in light of the recent discussions in the plenary. It touches upon the role of the FIU specifically, as well as on the overall impact on operational effectiveness.

12. Chapter V, summarizes the output of the paper, as outlined in paragraph 8.

13. Annex I looks at the operational 'network' and the main binding element that creates a network from individual entities: information flow. This annex aims to highlight a number of important factors in relation to information and information sharing throughout the operational network. It looks at intelligence and STRs, access to data and cooperation within the network and provides the groundwork for some of the policy proposals in chapter III. In addition, it could serve as a starting point for possible future work on the issue of the use of STRs.

14. Annex II deals with financial investigation. The annex highlights a number of key elements/requirements related to the timing and nature of such investigations and lists some elements for

guidance on this subject that could be developed in addition to the new wording of the relevant Recommendation(s).

15. Annex III briefly touches upon some issues related to confiscation and the management of frozen / seized assets. The policy proposals elaborated in this section do not relate to Recommendations 27/28, but are still considered relevant in the context of the current project. It is therefore proposed to forward some of the issues raised in this annex to the WGEI for their consideration in the preparation of the 4th round of mutual evaluations. Annex IV provides some existing texts for easy reference.

II. DEFINING THE ISSUE

2.1 *Problem definition: why the current focus on operational issues?*

16. The FATF 40 Recommendations and 9 Special Recommendations (the standards) are designed to inform jurisdictions about the elements required to develop and implement an effective national framework to combat money laundering (ML) and terrorist financing (TF) and to protect the financial system from abuse. When the standards are effectively implemented in a well integrated national AML/CFT framework, a jurisdiction should be able to demonstrate that it is:

- a) **preventing** illicit financial activity from taking place;
- b) **discouraging** money launderers and financiers of terrorism from operating by making things more difficult for them; and
- c) **detecting, bringing to justice and sanctioning** any individuals and organisations who conduct these serious illegal activities. This includes:
- d) enforcing laws, imposing fines, imprisonment and confiscation of assets.

17. Preventing illicit financial activity from taking place and making it difficult for money launderers and terrorist financiers to operate, are both essential goals of any AML/CFT regime. Nevertheless, jurisdictions should recognize that regardless of the size, scope and level of risk to their financial sector, it is potentially subject to abuse by criminal elements. In implementing a national AML/CFT regime, jurisdictions should therefore take a holistic approach which takes into account known and emerging threats to their financial sector. Part of such a holistic approach necessitates that in addition to having preventative measures in place, jurisdictions must also have a solid legal and operational framework to detect, investigate, prosecute and sanction those who engage in illicit financial activity.

18. After three rounds of FATF mutual evaluations, the general level of legal systems' compliance with the standards by FATF members appears to be relatively thorough (FATF Recommendations 1, 2 and 3). Of the FATF jurisdictions assessed to date¹, 68% have been rated as largely compliant or compliant with Recommendation 1; 77% rated as largely compliant or compliant with Recommendation 2; and 78% rated as largely compliant or compliant with Recommendation 3. However, the level of effectiveness of AML/CFT systems in pursuing and obtaining convictions on the separate offences of ML/TF is less apparent. In about 20 Mutual Evaluation reports (MERs), the effectiveness of the implementation of the Recommendations 1, 2 or 3 was either questioned or could not be proven due to a lack of ML convictions or other relevant statistics. In addition, FATF has recognised that the current standards and evaluation methodology do not offer the optimal set of tools to evaluate the actual level of effectiveness of the AML/CFT effort in different jurisdictions.

¹ September 2010.

19. Therefore, the issue of measuring the effectiveness of AML/CFT regimes has been included as part of the review framework for the fourth round of evaluations being conducted by the WGEI. A common objective would be that future mutual evaluations would provide a more meaningful picture of the way AML/CFT systems operate in practice. Within the scope of the broad review of effectiveness, questions have been raised within the FATF on the effectiveness of the 'operational network'². In particular: Do the current FATF standards and the FATF Methodology adequately address the operational and law enforcement issues relevant to AML/CFT and are these adequately assessed in mutual evaluations?

20. It is therefore relevant to focus on the specific effectiveness of operational authorities in detecting, investigating and prosecuting and sanctioning for ML and TF. It is also important to focus on the effectiveness of operational authorities' ability to identify, trace, seize, restrain and confiscate criminal assets. In doing so, the FATF Recommendations and methodology would benefit from a more integrated approach towards operational issues. Such an approach would imply a greater focus on the overall performance of the operational network.

21. Moreover, there is a significant interaction in both directions between the effectiveness of the operational chain and the effectiveness of the FATF preventative measures. First, the effectiveness of the operational chain is impacted directly by the quantity and quality of information fed into the law enforcement intelligence function by reporting entities primarily via the FIU. Second, the effectiveness of FATF preventative measures to deter launderers and terrorists from using the financial system only works if the launderers and terrorists actually believe that the information being collected about them and reported onwards will actually be used by the operational chain to secure convictions and impose sanctions.

22. In examining whether the current FATF standards and Methodology adequately address the operational and law enforcement issues of AML/CFT, the following three questions are relevant:

- a) **The balance between prevention and detection of ML/TF:** Is there a balance between those Recommendations that seek to prevent, deter or displace ML/TF and those Recommendations that set standards for jurisdictions to detect, investigate, prosecute and sanction for ML/TF?
- b) **The division of powers and responsibilities of operational authorities:** Who within the 'operational network' has the powers to conduct ML/TF investigations (and trace and confiscate criminal assets); and is the application of these powers coordinated within a jurisdiction?
- c) **The ability to measure the overall effectiveness of AML/CFT systems during mutual evaluations:** Do the FATF Recommendations and Methodology provide for an adequate and appropriate framework to assess overall effectiveness of the operational AML/CFT effort during the mutual evaluation process?

23. A full answer to the first question lies beyond the scope of the current project. Nevertheless, the question is highly relevant to place this project in the context of the preparation of the 4th round of mutual evaluations. The starting premise of this project has been that the relative weight of detection, investigation, prosecution and sanctions in the standard and methodology does not fully reflect the importance that this side of the AML/CFT system is currently being afforded in many jurisdictions.

² See paragraph 8 FATF/WGTY(2009)28.

24. In the standards, Recommendations 27 and 28³ mainly aim to (partly) address question 2. Recommendation 27 requires that jurisdictions have designated law enforcement authorities who are responsible for ML and TF investigations and Recommendation 28 requires that competent authorities be able to obtain documents and information for use in subsequent investigations, and in prosecutions. Both Recommendations are not intended to be assessed in isolation. Recommendations 27 and 28 assess only some elements of the 'operational network' and need to be viewed in conjunction with other related Recommendations that set standards for additional aspects of the operational process.

25. Therefore, in MERs Rec.27&28 are assessed together with Rec.30&32 (competent authorities, their powers and resources, including the recording of comprehensive statistics). Furthermore, the effectiveness of the 'operational network' can influence the assessment of Rec.1&2 and SR II (the scope of ML/TF offenses) as the assessment includes statistics of the number of investigations, prosecutions and convictions.

26. Recommendations 27 and 28 are contained within Section C of the 40 Recommendations – institutional and other measures necessary in systems for combating ML and TF⁴. This section also includes Recommendations 26 (establishment of an FIU), 30, 31 (domestic coordination and development of activities to combat ML/TF) and 32.

27. With respect to question 3 (paragraph 22), discussions within the FATF indicate that the current framework of Recommendations and the Methodology might not adequately expose impediments to successful ML/TF investigations and prosecutions or the ability of operational authorities to identify, trace and confiscate criminal assets. Examples of such impediments include:

- Ambiguity about, or lack of, institutional and/or legal powers to fulfil the operational functions – have operational authorities been given the legal authority to pursue ML/TF offenses and criminal assets, and if so, do they understand and utilise the range of powers available? Have too many authorities been given similar powers to enforce AML-CFT laws and do they each think it is the other's primary responsibility to enforce them?
- Lack of adequate legal tools to execute tasks – do operational authorities have adequate legal tools to effectively pursue ML/TF investigations and prosecutions?
- Inadequate legislative and institutional basis for inter-agency cooperation and data exchange – does the legal and institutional framework encourage cooperation and exchange of information in ML/TF investigations?
- Lack of knowledge, expertise, resources and policy guidance – are investigations and prosecutions impeded by a lack of technical expertise, resources and guidance, and/or lack of understanding of the imperatives that exist along the operational network? Are the various agencies involved in ML/TF investigations fully aware of the types of information held by, and powers of, other sister-agencies that are involved in ML/TF investigations, prosecutions or detection, for example, the FIU?

³ See full text of these Recommendations, their assessment methodology and interpretative note in Annex IV.

⁴ Special Recommendations VII-IX would also fall into this category.

28. An important aim of this current project is to develop policy proposals to increase the possibilities of the FATF standards and assessment methodology to address these impediments. In addition, the policy proposals developed in this project aim to strengthen the requirements for jurisdictions on operational issues in general and on rec. 27 and 28 specifically.

2.2 *Scope: definitions and descriptions*

29. The term 'operational issues' from the title of this project serves as a general description and is therefore not prescriptive or normative. This reflects the fact that the focus of this project is not necessarily on specific or individual entities or functions, but rather on the overall functioning of an AML/CFT 'operational system', as has been set out in chapter I and section 2.1 above. Nevertheless, it is important to make it clear to which entities and/or functions different parts of the analysis and policy recommendations contained in this paper apply.

30. Legal and institutional arrangements differ from jurisdiction to jurisdiction. The FATF, through the standard, does not prejudge the legal and/or institutional arrangements in any jurisdiction, as long as such arrangements allow full and effective implementation of the standard. The standard should be universally applicable, regardless of legal or institutional differences. Given the scope of these differences⁵, a certain level of ambiguity in the terminology used for the purpose of the current project, can and should not be avoided, especially when used in the context of FATF Recommendations.

31. For the purpose of this report and its policy proposals, some definitions and descriptions are included below.

Competent authorities⁶: All administrative and law enforcement authorities concerned with preventing and combating money laundering and terrorist financing, including the FIU and supervisors.

Operational authorities: All competent authorities with designated responsibilities and legal powers for the execution of (parts of) the following functions:

- collection, dissemination and analysis of financial, administrative and law enforcement information
- detection and investigation
- prosecution
- identifying and tracing the proceeds of crime for purposes of freezing, seizure and confiscation.

Unless explicitly stated otherwise, throughout this paper the term 'operational authorities' includes FIUs, and prosecutors. To the extent that it concerns financial investigation, authorities would include investigative magistrates if they exist in a jurisdiction, but it would exclude courts in general, even though it is recognised that the discretionary element of sentencing can play a role in determining the effectiveness of the operational network. Section 2.3 below will go into more detail on the matter of inclusion or exclusion of courts.

Operational network: the combination of all operational authorities that are involved in the fight against money laundering and terrorist financing. The term network reflects the interdependency

⁵ For example common law versus civil law, FIU with versus without law enforcement responsibility, wide ranging differences in the responsibilities and powers of prosecutors, etc.

⁶ Definition taken from the 'Glossary of definitions used in the methodology' from the FATF's assessment methodology; the same definition is currently used in the interpretative note to Rec. 40.

that exists between the different entities. In any jurisdiction, some of the entities in the network may have (partly) overlapping roles/functions.

32. In order to better illustrate the term ‘operational issues’, Table 1 below sets out an operational ‘network’ that covers the roles/functions that are considered (at least partly) ‘operational’ in nature. For each of these roles/functions, some authorities are listed as an illustration. In analysing the operational system in a large number of jurisdictions, it is found that there is very little difference in the roles/functions, and much more variety in which agencies are responsible for them. For this reason, the ‘definition’ of operational authorities given in paragraph 31 does not result in a ‘list’ of entities that are to be considered ‘operational’. The defining factor is not the type or name of the organisation, but their function or responsibility.

Table 1: roles and functions in the AML/CFT operational network

Role (Function / Responsibility)	Authorities (examples)
RAISING SUSPICION (monitoring and reporting)	Financial Institutions & DNFBPs ⁷ , Law Enforcement
INTELLIGENCE DEVELOPMENT (analysis, tracing & poss. investigation)	FIUs, law enforcement agencies
INTERVENTION & INVESTIGATION ⁸ (restraint/seizure of assets, evidence gathering, investigation & consolidation/synthesis)	law enforcement agencies, recovery agencies, confiscation unit
PROSECUTION	Public prosecutors, magistrates or others who litigate criminal matters and/or <u>NCB-non conviction based</u> or criminal confiscations.
DETERRENCE (decision & sanction)	Judiciary, courts
CONFISCATION (recovery & confiscation)	Recovery agencies, law enforcement agencies, confiscation units, courts

33. In the paper ‘New Directions in the Work of the WGTY’ (WGTY (2009)28), ~~the operational function was previously is described by the WGTY~~ as a chain that starts with reports, or suspicions, of ML or TF and extends through a series of “actors” (the operational agencies) until reaching a final outcome (a conviction or confiscation of the proceeds of crime). It is important to note, however, that there is not a ‘typical’ or ‘blue print’ operational chain. There is not a fixed order in which the different operational authorities are involved. In addition, experience from many law enforcement agencies has demonstrated that quite often the start of the operational ‘chain’ does not stem from an STR, but rather from ‘traditional’ law enforcement activity, which may or may not involve FIU information. We therefore will use the word ‘network’ instead of chain throughout this paper, to make clear that there is not a unique, one-directional

⁷ These reporting entities are mentioned in order to provide a more complete picture, as they play an important role in monitoring financial traffic and raising suspicions with the authorities; they are of course not considered to be part of the ‘operational network’ from a policy point of view.

⁸ For sake of completeness of the figure, we include the term ‘intervention’ together with investigation. This illustrates the broad scope of actions associated with this key operational role. Since most of the operational responsibilities that can be labelled ‘intervention’ can also be considered part of an investigation, we will throughout this paper make reference to the operational responsibility of ‘investigation’ (instead of ‘intervention and investigation’).

path. Table 1 illustrates the essential roles of the operational authorities and throughout this paper reference will be made to these functions.

34. In the context of these functions, it is important to note that there are important differences between jurisdictions. These differences relate often to legal powers and responsibilities of specific authorities. The two most important examples are FIUs and courts. Regarding FIUs it is useful to make a distinction between the initial analysis of STRs and the point in the chain when they are forwarded to LEAs as suspected criminal activity. We acknowledge that some jurisdictions have a FIU with far reaching law enforcement powers, or FIUs that otherwise have a direct role in preparing law enforcement 'evidence'. However, many FIUs do not have that role.

35. On courts, the matter of whether (and/or to what extent) courts should be included within the framework of Rec.27 and Rec.28 merits some elaboration. It was one of the questions which were formulated in the mandate of this project (see....) and after analysing feedback from different jurisdictions, it appears that ~~there are jurisdictions have taken~~ diverging views on this issue.

2.3 Courts

36. One of the questions that ~~wasere~~ raised in the mandate of the current project is whether or not courts should be considered part of the operational network - whether or not courts would fall under Recommendation 27/28. In this section, the term courts refers to 'trial courts' or similar judiciary authorities, as opposed to so called 'investigative magistrates' which are common in some jurisdictions. Given their explicit role in the (financial) investigation, investigative magistrates are considered to be part of the operational network. For trial courts, there are arguments for and against including them.

37. According to supporters of the inclusion, Rec. 27 and 28 deal with the law enforcement element of money laundering and terrorist financing investigations. Since courts play a relevant role in the ~~law enforcement overall criminal justice~~ process, courts should be included within this framework. Courts determine the outcome of ~~any-most~~ police investigations and are involved in important issues such as searches, bailment and communications interventions, which are procedures aiming to assist in the investigation and clarification of the crime.

38. Moreover, the existing standards already made reference to "competent authorities" in investigations, which do appear to cover the circumstances where court judges (in civil law systems) and prosecution authorities play a role in the investigative process. There is scope to give further consideration to including the courts explicitly in these standards, as courts play a role in taking the investigative process forward by approving court orders (e.g. search warrants) in a timely manner, which can impact on the effectiveness of the investigative process. Appropriately set-up channels dealing with AML/CFT cases with the courts could be useful to reduce lags in subpoena production times, as well as expediting processing and eventual conviction of involved subjects. The role of the courts could to some degree be explored as part of an evaluation. For instance, the evaluators could explore if the handling of cases is unreasonably slow or problematic so that investigations are hampered. At the investigative stage this primarily concerns the handling of requests concerning the use of coercive measures. In systems where courts play an investigative role, evaluators could possibly review how courts decide whether to pursue or dismiss ML and TF offences. More particularly, if courts have discretion with regard to charging decisions, evaluators should examine how that discretion is used.

39. With respect to effectiveness, statistics relating to the court system and prosecutions are currently included under the FATF standard relating to statistics (Rec. 32) which requires statistics such as numbers of investigations, prosecutions, convictions and confiscations etc. In addition, the inclusion of courts could

be relevant because it means that countries have to consider issues such as how to stimulate the financial knowledge in courts.

40. On the other hand, the inclusion of courts within the framework of Rec. 27 and Rec. 28 also encounters opposition. This opposition mainly refers to the fundamental principle of the independence and impartiality of the judicial system. One of the cornerstones of a fair system of justice is the independence of judges. Given the principle of separation of powers, including courts might be seen in various jurisdictions as putting their independence in jeopardy. Judicial independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

41. Moreover, judicial independence presupposes total impartiality on the part of judges. Courts are not law enforcement authorities and have no role in investigating and prosecuting financial criminal offences other than to be impartial gatekeepers for many of the compulsory measures used by law enforcement in their investigations, e.g. wiretaps, search warrants, arrest warrants and seizure warrants. This also applies to the investigating judge - a figure characteristic of the legal system of some FATF member states.

42. The independence of the judiciary confers rights on judges of all levels and jurisdictions, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training which they have a duty, as well as a right, to undergo. The importance of this training is recognised in international instruments⁹. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰.

43. Constitutional principles should guarantee the independence and impartiality on which the legitimacy of judges depends, and judges for their part should ensure that they maintain a high degree of professional competence¹¹. The answer to the question whether (and/or to what extent) courts should be included within the framework of Rec.27 and Rec.28 should thus take the following two fundamental elements into account: on the one hand the guarantee of independence and impartiality of judges and on the other hand the internationally recognised need of their training.

44. Based on the previous elements, it follows that courts ~~might be~~ should not be included in Rec. 27 and Rec. 28 as such, but a stricter -with special- requirements concerning training of the judiciary could be included in the standard. As such the FATF could recommend that, in each country, specific AML/CFT training be organised for judges. From the perspective of the FATF standard, this conclusion would not have direct consequences for Rec. 27 or Rec. 28, since courts would NOT be included in the description of and requirements for other operational roles. It would, however, relate to Recommendation 30. Currently, there is an additional element in the assessment methodology of Recommendation 30 which looks at special training programmes for judges and courts. In order to take into account above conclusion on including courts, it could be considered to raise this element to an essential criterion.

⁹ For example: the UN Basic Principles on the Independence of the Judiciary, adopted in 1985, and Council of Europe texts adopted in 1994 (Recommendation N° R (94) 12 on the independence, efficiency and role of judges) and 1998 (European Charter on the Statute for Judges) and was referred to in paragraph 11 of the CCJE's Opinion N° 1

¹⁰ United Nations, General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, 24 March 2009.

¹¹ See paragraph 50 (ix) of the CCJE Opinion N° 3 (2002) on ethics and liability of judges, Strasbourg, 19 November 2002.

Policy proposal (1)

Consider raising current criterion 30.4 from additional element to essential criterion. This would include a rewording from a question into a requirement:

30.4. Special training or educational programmes should be provided for judges and courts concerning ML and FT offences, and the seizure, freezing and confiscation of property that is the proceeds of crime or is to be used to finance terrorism.

III. RECOMMENDATIONS 27&28: analysis and policy proposals

3.1 Current compliance with Rec. 27 and Rec. 28

45. A review of the compliance ratings for the third round of evaluations of FATF members demonstrates that Rec.27&28 had a substantially higher level of compliance ratings in comparison to the remainder of the 40+9 Recommendations. As per September 2010, 31 mutual evaluation reports of FATF members have been adopted by the plenary. All 31 jurisdictions (100%) were awarded Compliant (C) or Largely Compliant (LC) on Rec. 28. On Rec. 27, only 3 FATF members scored a Partially Compliant (PC) whereas the 28 other jurisdictions (90%) scored an LC or C rating.

46. In comparison, when looking at all ratings of the 31 FATF members on all of the 40+9 Recommendations, only 55% of all scores was LC or C. Furthermore, on half of the 40+9 Recommendations, a majority of the jurisdictions has scored PC or NC. ~~Below is a snapshot of the compliance ratings for Rec. 27&28:~~

47. A similar picture emerges when we look at the compliance ratings for all jurisdictions that have been evaluated using the FATF standard (including all FSRB-members). Out of 145 evaluations on the basis of the current standard, 124 jurisdictions (86%) were awarded C or LC on Rec. 28, and 84 jurisdictions (58%) on Rec. 27. In comparison, only 37% of all ratings¹² were C or LC, indicating that Rec. 27 and Rec. 28 are among the 'easiest' Recommendations to comply with¹³.

48. The reasons for such high-level compliance ratings for Rec. 27 and Rec.28 may be multi-faceted; however the limited number of essential criteria (two) and the general nature of these criteria in both Rec.27 and Rec.28 may be a contributing factor. There are difficulties in making distinctions between (a) technically meeting the criteria and (b) determining effective implementation.

49. At present, Recommendation 27 has only one mandatory obligation – that a jurisdiction has designated law enforcement authorities that are responsible for ensuring money laundering and terrorist financing offences are properly investigated (criteria 27.1). Only in rare instances is a designated investigative agency NOT identified in legislation criminalising ML and TF. Assessors look for the existence of competent authorities and their legal powers, but the project team is of the opinion that not much enough emphasis is given to operational effectiveness or if-whether the ML/TF offences are being "properly investigated", which comprises half of the criteria. Regardless of the relatively high compliance scores for this Recommendation, it is currently very difficult to adequately demonstrate overall technical compliance with this obligation because of the lack of assessment 'tools' to measure this.

50. Recommendation 28 has only two essential criteria which appear to be relatively easy to meet. In the current assessments, for instance, if investigative authorities have any power to compel production of, search, seize and obtain bank records, then criterion 28.1 is viewed as fully met. Very rarely does the

¹² Taking all 49 ratings of 145 jurisdictions.

¹³ In fact, with 86%, Rec. 28 is the most complied with Recommendation, followed by Rec. 4 (81%).

assessor look into the details of the operational application of how these powers are used (e.g., subpoenas, summons, search and seizure warrants, or court orders). In some cases the legal threshold for obtaining such powers were excessively high thus prohibiting their use in practice. In other cases, these powers could be used, but resulted in mandatory notification of the account holder. This rendered the use of these powers ineffective, inter alia, for asset identification, tracing and seizing purposes. In such cases, a criterion 28.1 was still considered to have been fully met. Criterion 28.2 only asks whether authorities have the power to take witness statements. In almost every case, the answer is 'yes' which results in a fully met. Very rarely do assessors verify whether this practice is used or check to determine if there were any problematic issues.

51. It is fair to say that the generally positive results of FATF-members when evaluated with respect to Recommendations 27 and 28 do not fully reflect an assessment of the effectiveness of the operational AML/CFT network in those jurisdictions. As was stated in chapter II, the current standard and methodology (rec. 27 and 28) do not adequately expose impediments to successful ML/TF investigations and prosecutions or the ability of operational authorities to identify, trace and confiscate criminal assets. On the basis of input from jurisdictions, we have found that reasons for a lack of effectiveness include:

- lack of pro-activeness and a tendency to stop investigation and prosecution at the predicate offence;
- lack of sufficient technical and other resources;
- lack of adequate and relevant training;
- lack of legal provisions allowing law enforcement to use special investigation techniques;
- where these techniques are available, law enforcement either do not always know how and when to use them (partly owing to the lack of the necessary training, skills, technical and other resources), they are not allowed to use them, or predominantly use them for predicate offences and not for ML/TF investigations;
- poor interagency cooperation (which reduces the effectiveness of the investigations);
- hesitation on the part of prosecutors or judges to pursue to go after the complex (third party / stand alone) money laundering cases.

Need for better measures to evaluate effectiveness

52. In terms of measuring effectiveness, the current wording of the Recommendations 27 and 28, as well as the methodology, provides too little guidance for assessors. It would be helpful for assessors to better understand how operational agencies actively pursue ML/TF offences when investigating criminal activity.

53. The process of measuring a regime's effectiveness varies little in many jurisdictions. Program evaluation often includes statistical analysis of investigations, charges, prosecutions, convictions, seizures, forfeitures, confiscations, etc. Also, there should be a review of anti-money laundering outreach activities undertaken, including interviews with stakeholders and partners on the strengths and weaknesses of the current regime.

54. Reliable statistics are very important in increasing the focus on effectiveness. Law enforcement agencies should be evaluated in terms of actual investigations that they undertake as well as the scope of their complexity. In addition, there needs to be a better grasp, reflected in the evaluation methodology, of

what constitutes effective AML/CFT work in the operational area. This involves a qualitative approach in addition to the quantitative approach which follows from statistics. Elements of this qualitative approach possibly include some of the other subjects in the FATF Methodology (cooperation, feedback, knowledge/expertise, information sharing).

55. ~~Law enforcement agencies should be evaluated in terms of actual investigations that they undertake as well as the scope of their complexity, rather than only the number of prosecutions.~~

~~Though the number of convictions is one of the measures of AML/CFT regimes, law enforcement should not be judged solely by the number of successful prosecutions.~~

56. The project team notes that the issue of 'operational' effectiveness also has to be seen in the light of the broader discussions on overall effectiveness of AML/CFT regimes, which is on the agenda of WGEI in the context of preparing the 4th round of mutual evaluations.

3.2 *General structure of Recommendations 27 and 28*

57. Recommendation 27 generally addresses the need for jurisdictions to designate specific law enforcement authorities or bodies that are responsible for the investigation of the ML and TF offences defined under Recommendation 1 and Special Recommendation II. Other elements within Rec. 27, such as special investigative techniques, are additional and not mandatory. Rec. 28, on the other hand, addresses the need for law enforcement authorities to have adequate powers or legal authority to access records (e.g. bank records) for criminal investigation purposes. However, Rec. 27 also includes the use of the "special investigative techniques", which detracts from the desired focus on function.

58. In order to make a clearer distinction between the types of obligations, it could be considered to use Recommendation 27 to address the existence of competent authorities, and Recommendation 28 to include all investigative powers and tools which are necessary for these authorities to implement Rec.1, SRII and Rec.3. The requirements regarding powers and 'instruments' would consequently be solely located in Recommendation 28.

Policy proposal (2)

Consider creating the following functional distinction between the two Recommendations: the new Recommendation 27 relates to "functions and responsibilities" and the new Recommendation 28 relates to "powers and tools".

3.3 *New Recommendation 27: "functions and responsibilities"*

59. The core obligation within current Rec.27 is whether the designated law enforcement authority is 'properly' investigating ML and TF offences. This assessment is most commonly based on an analysis of the number and nature of ML and TF investigations, relative to the overall size of the jurisdiction, which in turn is indicative of effectiveness. The number and scale of other forms of criminal investigations that may be related to ML or TF (e.g. drug, property, or terrorist offences) provide a benchmark against which the effectiveness aspect of this Recommendation is assessed, and are indicative of the extent to which the jurisdiction may be 'properly' investigating ML and TF.

60. In some cases, money laundering or financial investigations only result in a charge and conviction of a predicate offence. Furthermore, some cases may start out as money laundering prosecutions but the charged person may plead guilty to lesser offences such as structuring, illegal money remitting, bulk cash smuggling or underlying drug or fraud offences, which, generally generate lower sentences than

pleading guilty to ML charges would. Though these predicate offences could be assessed as additional benefits, the ultimate outcome of the FATF standard is to ensure that the ML and TF activity is criminalized and to enforce sanctions for those who commit these offences~~address AML/CFT regimes~~. As stated above, ~~rather than focusing on prosecutions and convictions~~, evaluations should focus more on how ML, TF and other illicit financial activity are actively being pursued by operational agencies as well as the scope and complexity of actual investigations~~actual investigations that are undertaken, as well as the scope of their complexity~~¹⁴.

Parallel Investigations

61. Rec.27 should be strengthened to ensure that law enforcement authorities develop a complementary financial component to investigations of underlying predicate offences. Countries should aim to mainstream financial investigations throughout the law enforcement apparatus. The development of a financial component should be proactive,~~independent~~ whether or not there is~~an~~ FIU referral and should be treated as a core component of the overall investigation of major proceeds generating cases and not as a separate investigation. These parallel investigations may be carried out simultaneously and be used to locate and secure assets in addition to the criminal prosecution of the underlying predicate offence or money laundering. Designated authorities should pro-actively investigate financial information in all cases involving lucrative crime.

Identifying and ~~F~~Tracing, freezing and seizing (provisional measures)

62. Some of the competent authorities per current Rec.27 ('law enforcement' authorities) could also have the authority for identifying, tracing, or even freezing, seizing or ~~even~~ confiscation of criminal assets, which is currently not clearly stated in Rec.27¹⁵. Alternatively, there might be designated authorities that have responsibility for identifying, tracing or confiscating proceeds related to a predicate offence that may not have a legal mandate to investigate and pursue the ML and TF offences. Recommendation 3¹⁶ requires that some authorities be given the powers for tracing and identifying property in the context of (possible) freezing or confiscation. Furthermore, these powers are referenced in the current 'operational' Recommendations under Rec. 28 ('related actions' in current essential criterion 28.1). However, there is currently no requirement similar to the new Rec. 27 ("functions and responsibilities") for designating authorities that are responsible for executing such powers. Given that freezing and confiscation are an essential part of the operational AML/CFT effort, the new text of Rec. 27 should logically include the requirement for jurisdictions to ensure that competent authorities have responsibility for ~~tracing, freezing and seizing~~ identifying and tracing property in the context of (possible) freezing or confiscation.

Multidisciplinary and specialised investigative groups or Task Forces

63. Effective coordination, cooperation and exchange of information among FIU, law enforcement agencies and prosecution authorities is crucial in order to ensure the effective implementation of Rec. 27&28 by jurisdictions.

¹⁴ The current evaluation framework already provides an opportunity for this, at least partly, through Annex 3 of the Handbook for assessors, which mentions "ML/TF investigations initiated".

¹⁵ In this respect, the project team acknowledges the fact that in many jurisdictions, law enforcement agencies would not have the power to freeze assets but that this would be within the powers of the judiciary.

¹⁶ Essential criterion 3.4 in the methodology: "law enforcement agencies, the FIU or other competent authorities should be given adequate powers to identify and trace property that is, or may become subject to confiscation or is suspected of being the proceeds of crime".

64. Greater emphasis should be given to a multi-disciplined approach to investigating the ML/TF offences such as the use of specialised groups or task forces which are also used to identify, trace and confiscate proceeds of crime (e.g. asset recovery units). These specialised units could be either permanent or temporary. This would include making the current additional element 27.5(a) an essential criterion.

65. When referring to 'specialised groups', the project team implies that the type of specialisation should be left to each country and could take various forms: countries can opt to have a number of specialist police officers, judges, prosecutors and administrative officers or to have agencies or units with special responsibility for various aspects of combating ML/TF. Such agencies or units can be either special services set up to take charge of AML/CFT actions or they can be specialist units within existing bodies.

66. The Recommendation on functions and responsibilities should also address a "joint investigation" approach where law enforcement agencies will share and join their experiences and knowledge to ensure that all investigative skills, techniques and disciplines are utilised when conducting financial investigations including ML/TF investigations. This also bears a relationship to the requirements of Recommendation 31 on domestic cooperation mechanisms. In this context, cooperation between designated law enforcement authorities and the FIU is especially important. Law enforcement should be able to effectively exchange information with the FIU and ought to have proper protocols in place to ensure that this is possible. Countries with separate law enforcement bodies that investigate the AML and /CFTF offences should ensure that formal information sharing agreements are in place.

Shared National AML/CFT strategy

67. In order to ensure consistency, continuity and effectiveness in the operational AML/CFT effort within a jurisdiction, jurisdictions should have an over arching 'national' AML/CFT policy which serves as a baseline for all competent authorities to combat money laundering and terrorist financing. This nNational sStrategy should include a wide range of issues, such as estimating the ML and TF threat, assessing the impact and cost of same on civil society, setting a prioritisation of operations (e.g. with respect to types of crime, types of investigations and prosecutions, etc.), setting forth training requirements and goals, identifying typologies, addressing resource implications, and identifying real or perceived legal and practical barriers to successful implementation of the strategy. In this regard, the establishment of a national committee tasked with, among other things, looking at all issues relating to the operational side of combating money laundering and terrorist financing could be eonsidereduseful, but the project team notes that there might be other means to achieve the same goal.

International cooperation – Joint Investigations

68. Law enforcement agencies should be encouraged and legally be allowed to enter into joint investigation agreements or task forces with their international counterparts to enhance their ability to conduct financial investigations across borders. This issue is currently considered an additional element in additional criterion 27.5(b). Special secure data exchange channels should be created, as well designated and centralised points of contact should be established. Countries should create specialised units which are designed to facilitate operational work bilaterally or multilaterally. Assessors should also ensure that criteria 40.4 and 40.5 are taken also into consideration when assessing R.27. The FATF should also consider producing comprehensive manuals and guidance on the-how the exchange of law information between participating countries can be accomplished.

Resources and training

69. Rec. 27 specifies that countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Considerations to be taken into

account while assessing the countries effectiveness with this Recommendation include resources, capacities and expertise. These considerations regarding law enforcement are also addressed under Rec.30 along with FIUs, prosecution agencies, supervisors and other competent authorities involved in combating ML and TF. Rec.30 states that these entities should be adequately structured, funded, staffed and provided with sufficient technical and other resources to fully and effectively perform their functions.

70. Operational authorities, specifically law enforcement and prosecution authorities, should receive ongoing training to ensure retention of expertise on new money laundering trends. FATF standards require law enforcement officers and senior officers who inherit an AML/CFT role to be educated/trained (Rec.30) on financial investigations. This could be considered to include training on how to conduct asset-financial investigations, parallel investigations, forensic accounting and net worth analysis. Police academies could have a responsibility for training in financial investigations and make available such training for other operational authorities, e.g. tax and customs. In any case it is important, also for assessors to verify, that all designated authorities have access to the relevant training.

Other issues

71. The French version of Rec.27 is not very clear. The first sentence deals with investigations that should be assigned to *des autorités de poursuite pénale spécifiques*. In contrast, the English version speaks of "designated law enforcement authorities", which is not the same thing. The word - *unité d'enquête* (investigative unit) may be a better term than *poursuite pénale spécifiques*. Moreover, it is not clear if the Recommendation requires designated money laundering and terrorist financing law enforcement teams.

Policy proposal (3)

Consider including the following elements in the new wording of Recommendation 27:

- *Ensure that law enforcement authorities develop a pro-active ~~complementary-simultaneous~~ financial investigation when pursuing the ML and TF offences and ~~component to investigations of~~ underlying predicate offences.*
- *Ensure the use of a multi-disciplined approach to financial investigations through specialised groups / task forces / dedicated units which are also used to identify, trace and/or confiscate proceeds of crime.*
- *Ensure that operational authorities in a jurisdiction are guided by a ~~shared-general~~ national AML/CFT strategy.*
- *Ensure effective mechanisms for international cooperation: raise current 27.5(b) to essential and ensure essential criteria 40.4 and 40.5 are taken into consideration when assessing 27.*
- *Ensure authority for the ~~immediate~~ identification and tracing, ~~freezing and seizing~~ of property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.*
- *Underline the usefulness of ~~a national committee, sharing~~ typology and strategic studies, best practices, trends and other forms of coordination which could be done through a national coordinating committee or other body.*
- *Promote the use of 'joint investigation' where different law enforcement agencies cooperate closely. In any case, cooperation among competent authorities is essential for effective operation. Therefore, the methodology should, establish the link with Rec. 31.*
- *Include reference to Rec. 30, since Rec. 30 (resources) can negatively affect the ratings for Recs. 27.*

72. Below is a proposal for new wording for the text of Recommendation 27 and assessment methodology¹⁷. The basis for this proposal is the list of elements in the policy proposal from the previous paragraph. The proposed text is meant as a direct transposition of those elements into the appropriate format. Some of the policy proposals presented in this document aim to modify the assessment methodology in order to set concrete and objective criteria to evaluate the performance and effectiveness of the implementation of jurisdictions. This includes both amending the essential criteria related to Rec. 27/28 to better reflect factors that contribute to the overall analysis of effectiveness as well as expansion of the essential criteria to better reflect expectations. It should be noted that the Methodology changes are not part of the main package of material to be settled for the first year's work of WGEI in preparing the 4th round of mutual evaluations. Therefore, these would be added to a secondary set of material which will be discussed later. Nevertheless, WGTYP considers the current proposals for changes in the methodology in this report, to ensure an integral approach to the operational recommendations as well as consistency between the text of the recommendation and the methodology. If there is no consensus on one or more of the elements proposed above, this would have to be reflected by amending the corresponding part in the text of the Recommendation and methodology below.

Proposal for new wording of Recommendation 27

New Recommendation 27:

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of a shared-national strategy. At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active simultaneous financial investigation when pursuing money laundering and terrorist financing offences and underlying predicate offences. ~~by conduct investigations regarding the relevant financial aspects.~~ Countries should ensure that competent authorities have responsibility for immediately identifying and tracing without delay, freezing and seizing property that is, or may become subject to confiscation or is suspected of being the proceeds of crime. Countries should ensure that, where applicable, effective use is being made ~~be able to make use of~~ permanent or temporary multi-disciplinary groups specialised in financial or asset investigations and that co-operative investigations with appropriate competent authorities in other countries are taking place.

Assessment Methodology for Recommendation 27:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 27 as well as Recommendation 26, 30, 31 and 40 (Note to assessors: where there are deficiencies in the essential criteria 30.1, 30.2, 30.3¹⁸, 30.4, 31.1¹⁹, 40.4~~5~~ and 40.5~~6~~, such deficiencies should also be noted in Rec. 27 and be taken into account in the assessment of the rating for Rec. 27.

Essential criteria

- 27.1 *There should be designated law enforcement authorities that have responsibility for ensuring that all types of ML and FT offences are properly and pro-actively pursued and investigated.*
- 27.2 *There should be a national AML/CFT strategy which guides the designated law enforcement authorities.*

¹⁷ Note: this proposal does not include an interpretative note. The current interpretative note would be deleted.

¹⁸ Note to assessors: "adequate and relevant training" (as per criteria 30.3) could be considered to include training on how to conduct asset investigations, parallel investigations, forensic accounting and net worth analysis. In addition, such training should be available to all designated authorities per Rec-criteria 27.1 and 27.6.

¹⁹ Note to assessors: designated authorities as per Rec. 27 should have proper protocols in place that allow effective exchange of information with the FIU.

27.3	At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active simultaneous financial investigation when pursuing the ML and TF offences and underlying predicate offences, conduct investigations regarding the relevant financial aspects.
27.4	Countries should be able to make use of permanent or temporary multidisciplinary groups specialised in investigating all financial aspects the proceeds of crime, to include direct and indirect criminal proceeds. An important component of the work of such groups or bodies would be focused on the investigation, freezing, seizure, freezing and confiscation of the proceeds of crime.
27.5	Competent authorities should be legally permitted to enter into Countries should enable co-operative investigations with appropriate competent authorities in other countries, including the use of investigative techniques, provided that adequate safeguards are in place.
27.6	Countries should ensure that Criteria 3.4 (in R.3) is fully met and that law enforcement agencies, the FIU or other competent authorities are specifically designated to identify and trace without delay property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.
27.6	Countries should ensure that competent authorities have responsibility for immediately tracing, freezing and seizing of property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.
27.7	ML and FT methods, techniques and trends should be reviewed by law enforcement authorities, the FIU and other competent authorities (as appropriate) on a regular, interagency basis. The resulting information, analyses and studies, as well as FATF typologies, should be disseminated to law enforcement and FIU staff, as well as staff of other relevant authorities.
<u>Additional elements</u>	
27.8	Is there a national committee <u>or alternative arrangement(s) which ensures with responsibilities for AML/CFT policy coordination, sharing of typologies and best practices?</u>
27.9	Is there a "joint investigation" approach where law enforcement agencies share and join their experiences and knowledge to ensure that all investigative skills, techniques and disciplines are utilised when conducting financial investigations including ML/TF investigations?

3.4 New Recommendation 28: "powers and tools"

Financial investigation

73. Annex II to this document deals with the issue of Financial Investigation. Many jurisdictions have indicated that, in addition to strengthening the text of the standard, there is a need to identify further guidance on conducting financial investigations. It is therefore proposed to ~~elaborate~~ develop FATF Guidance on financial investigation. This guidance could subsequently be referred to in the assessment methodology to Rec. 28. This guidance could include tools and techniques to conduct financial investigations and multi-disciplinary investigative strategies, including known best practices. In Annex II, a number of elements relevant for this guidance are introduced.

Policy proposal (4)

- ~~Consider elaborating~~ developing Guidance on "Financial Investigations", on the basis of the elements set out in this section as well as Annex II to this document.

Assessment framework: what powers and tools are needed?

74. When investigating ML/TF and tracing the proceeds of crime, competent authorities should have the legal powers and instruments to be able to obtain documents, information and other forms of evidence for use in those investigations and subsequent prosecutions and related actions. Rec. 28 should include minimum requirements for investigative powers, tools and techniques which are necessary to ~~implement~~ combat ML/TF. The existence of legal powers should be verified along with the exercise of these powers. Assessors should also look at how the authorities are applying these powers in practice.

Investigative techniques / powers

75. The actual wording contained in Rec.27 makes reference to “controlled deliveries, undercover operations and other relevant techniques” under criterion 27.3. It is proposed here to expand the list of referenced investigative techniques in order to strengthen the standard and to better reflect the term “wide range of investigative techniques” currently in the Recommendation. The proposed minimum ‘set’ of techniques that should be available would include controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems.

76. Criterion 36.1 from the Methodology stipulates investigative powers in the context of mutual legal assistance and Rec. 40 deals with more general requirements for international cooperation. It would seem appropriate that all investigative powers that are required in the context of this form of international cooperation, would also have to be available for domestic use. Alternatively, any shortcomings in these powers domestically (as per Rec. 28) would have to negatively impact the assessment of Rec. 36 and Rec. 40. This raises a consistency issue between Recommendation 28 and Recommendations 36 (criterion 36.1 in the Methodology) and 40.

Issue for consideration WGEI (5)

- Consider the issue of consistency between the requirements under the new Rec. 28 and those in Rec. 36 (36.1) and Rec. 40.

Use of FIU information by law enforcement

77. Annex I provides a detailed background on the flow of information in an operational network. This Annex includes analysis of the nature of STRs (including their ‘value added’) as well as the use of FIU output by designated law enforcement authorities.

78. Mutual evaluations do not always indicate how law enforcement authorities use data from the FIU (STRs and other information) when investigating ML/TF offences. There needs to be an understanding if law enforcement only investigates these offences “reactively” when given a referral by the FIU or if law enforcement is “proactively” utilising FIU data in the conduct of their criminal investigation.

79. STR data is currently being used proactively by law enforcement in a number of jurisdictions. However, the access to this data is usually indirect and in many cases, those investigating officers will not have the ability to see the actual STR filed. In almost every case, STR data cannot be used as evidence in criminal investigations nor can it be admissible in court proceedings. That said, this data is extremely valuable in identifying leads for and targeting new investigations and helping investigators connect other pieces of information. FIU information can be a useful tool for fact finding activities carried out by the Public Prosecutor’s Office to identify bank accounts and the amounts carried out by the accused individual. The information obtained can support applications for evidential search warrants and electronic interception warrants. Reports from the FIU should be used by law enforcement as a catalyst for an investigation, to add value or provide new leads to a current investigation, to confirm present intelligence and for strategic intelligence value.

80. The ability for law enforcement to request information held by the FIU and the extent to which this actually occurs should be taken into account in the ratings. FATF should actively encourage as wide as possible access by law enforcement authorities to information held by the FIU, taking into account the specific role of the FIU in receiving STRs, protecting the declaring institutions and analyzing the received information. The project team notes that in many countries direct access of law enforcement to STR data

is not allowed. The proposal in the standard does not aim to change this. The meaning of “information held by the FIU” in this context is any information that a particular FIU is legally allowed to share with law enforcement authorities (results of own FIU analysis, reports, aggregated or anonymous data, etc). Law enforcement requests to the FIU could for example be facilitated through law enforcement personnel seconded at the FIU or vice versa. Law enforcement should be able to effectively exchange information with the FIU (Rec.26) and ought to have proper protocols in place to ensure that this is possible. Law enforcement should also share priorities with the FIU and other operational authorities to ensure that priorities amongst different agencies are aligned.

81. As stated, Annex I provides more analysis on the role of STRs in the operational network. This is a subject of particular interest, which has become more prominent given recent discussions in the FATF plenary on the issue of ‘quality versus quantity’ of STRs²⁰. Further work on the nature of STRs, their use in the operational network as well as their role in mutual evaluations is considered useful. There is a close relation with issues that are already on the agenda of the WGEI in the context of the preparations for the 4th round of mutual evaluations. In particular, this is an issue that could be looked at in the quality and consistency review that is currently being proposed, which would include a project on ‘measuring effectiveness’.

Issue for consideration WGEI/WGTYP (6)

- *Consider doing further work, in close cooperation between WGTYP and WGEI, on the nature, role and use of STRs in AML/CFT regimes, including using STR-related statistics as a basis for measuring effectiveness.*

Use of other data by law enforcement

82. Law enforcement should have access to a minimum set of data bases that contain commercial or public data that they can use to assist in their investigations. This data should be made available to law enforcement upon request. Appropriate information systems should be maintained by law enforcement authorities to exercise their powers. There is a variety of information collected by other agencies which is valuable to a ML/TF investigation or can assist in identifying illicit proceeds. Consideration should be given to consolidating multiple systems into a single system of criminal information to assure interconnection and exchange of information among federal and state agencies to combat crime.

Freezing and Seizing

83. With respect to freezing and seizing, Rec. 3 already touches on some of the powers needed for the implementation of provisional measures. The project team notes that it would be useful to emphasise the need to use provisional measures early in the investigation, which could be seen as part of the overall investigative strategy. In order to avoid overlap in the standards, this issue will not be included in Rec. 28. It is proposed to identify this issue for consideration of WGEI. In addition, the early use of provisional measures would likely be addressed in any future guidance on financial investigation (see policy proposal (4)).

Issue for consideration WGEI (7)

- *Consider addressing in the context of work on Recommendation 3 the explicit need for swift and early provisional measures in order to increase effectiveness of these measures.*

²⁰

These discussions emerged in the context of recent mutual evaluation reports.

Financing of Terrorism

84. Current essential criterion 27.2 of the Methodology refers to measures countries should consider taking when investigating ML cases for the purpose of identifying persons involved in such activities or for evidence gathering, but does not require the same for FT cases. The addition of FT should be included in the new Recommendation 28.

CoE Conventions

85. This section looks at parts of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ('the CoE convention'), which entered into force on 1 May 2008. Of interest is the relation of some provisions of this Convention to financial investigations. In addition some aspects of the CoE convention on Cybercrime will be taken into consideration.

86. Article 7, paragraph 2 of the CoE²¹ Convention contains a provision on special investigative techniques to ensure at a national level consistency with what countries may be requested to provide under international cooperation requests in respect of information on accounts, requests for (historic) information on financial transactions and requests for the (prospective) monitoring of financial transactions. The current language of 28.1 appears to be focused on the production, seizure etc. of records, i.e. documentation that already exists. The precise ambit of the Methodology in this area has been unclear to law enforcement evaluators. Firstly, it does not cover the need for countries to have mechanisms in place to identify whether persons own or control accounts (whether there are central registers of bank accounts or other less centralised systems). Such mechanisms are necessary both for domestic law enforcement purposes and also for international cooperation where all the requesting country needs to know initially is whether a suspect owns or controls accounts in a given country. Secondly, whether for domestic law enforcement purposes or in response to international cooperation requests, Criterion 28.1 does not explicitly cover the technique of prospective (future) monitoring of accounts by financial institutions for investigative purposes whether on a day to day basis, weekly basis or in real time. Numerous countries have stated they cannot do this at the request of law enforcement without specific provisions in their laws to permit this and Recommendation 28 and Methodology Criterion 28.1 does not give them a clear enough international standard on this.

87. Prospective monitoring has been a valuable law enforcement tool in many countries where this is permitted and should be more widely available to countries in the transnational fight against organised crime and thus should be recognised explicitly in the FATF standards.

88. Article 7, paragraph 3 of the CoE convention intended to make States aware of new investigative techniques which are common practice in some states, but which are not yet implemented in other states. The paragraph imposes an obligation on States at least to consider the introduction of new techniques which have proved successful in combating serious crime. The special techniques that are covered are:

- I. orders to produce specific documents. (*i.e.* judicial orders to a financial institution to give information about transactions conducted through an account held by a particular person with the institution);
- II. observation (*i.e.* covertly watching the movements of persons, without hearing them);
- III. interception of telecommunications (including interception of telephone conversations, email, telex, telefax communications, etc.);

²¹ See Annex IV for the full text of the relevant articles of the CoE Convention.

IV. access to computer systems, as well as production orders (*i.e.* orders which require individuals to produce specific records, documents or other items of property in their possession).

89. The present Rec. 27 only encourages States to develop special investigative techniques (SITs). It is proposed that this should be strengthened and more specific. Moreover the language in Rec. 27 “other relevant techniques” is too vague if law enforcement authorities are to be properly empowered domestically in investigations of ML, FT and other serious proceeds generating cases.

90. As well as controlled delivery and undercover operations, it is suggested that the international standard on this aspect takes inspiration from the CoE Convention. It is important that the law enforcement standards require countries to have powers to intercept (tele)communications and of increasing importance to law enforcement today – access to computer systems.

91. It is crucial that law enforcement have the same capabilities to obtain and collect evidence through production orders in respect of computer/electronic data as exists traditionally for non-electronic data. With regard to evidence from computer systems, the Council of Europe Convention on cybercrime (ETS 185) defines the means of access to computer systems by law enforcement authorities. The procedural powers contained in the Convention on Cybercrime are particularly relevant in this context²². They are applied to criminal offences established by the Convention on Cybercrime, other criminal offences (including ML and FT) committed by means of a computer system, and the collection of evidence in electronic form of a criminal offence (including ML and FT).

92. In the additional criteria countries could be encouraged to sign, ratify and fully implement the Convention on Cybercrime, which is an open convention, so law enforcement in more countries can make use of the detailed procedural powers therein. The project team notes, however, that reference to this convention, might be considered in Recommendation 35 (see Criterion 35.2) instead of here in Recommendation 28.

Policy proposal (8)

Consider including the following elements in the new wording of Recommendation 28:

- *Include minimum requirements for investigative powers, tools and techniques which are necessary to ~~implement Rec.1, SRII and Rec.3~~ combat ML and TF. These minimum requirements would include controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems;*
- *Include the requirement for countries to [consider to] have mechanisms in place to identify whether persons hold or control accounts ~~(whether through central registers of bank accounts or other less centralised systems);~~*
- *Include the requirement for countries to ensure that designated competent authorities are able to request [and receive] information held by the FIU;*
- *Include an additional element which references to the technique of prospective (future) monitoring of accounts by financial institutions for investigative purposes;*

²²

These include expedited preservation of stored computer data, expedited preservation and partial disclosure of traffic data, search and seizure of stored computer data, real-time collection of traffic data and interception of content data.

- *Include an additional element which invites countries to sign, ratify and fully implement the Convention on Cybercrime (ETS 185) and/or the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198).*

93. Below is a proposal for new wording for the text of Recommendations 28 with relating assessment methodology²³.

Proposal for new wording of Recommendation 28

Recommendation 28: *When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence. Countries should ensure that competent authorities are able to use a wide range of investigative techniques suitable for the investigation of money laundering and terrorist financing. These investigative techniques include at a minimum controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems. In addition, countries should [consider to] have mechanisms in place to identify whether natural or legal persons hold or control accounts. When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to request [and receive] information held by the FIU.*

Assessment Methodology for Recommendation 28:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 28.

Essential criteria

- 28.1 *Competent authorities responsible for conducting investigations of ML, FT and other underlying predicate offences should have the powers to be able to:*
- *Compel production of,*
 - *Search persons or premises for, and*
 - *Seize and obtain*
- transaction records, identification data obtained through the CDD process, account files and business correspondence, and other records, documents or information, held or maintained by financial institutions and other businesses or persons. Such powers should be exercised through lawful process (for example, subpoenas, summonses, search and seizure warrants, or court orders) and be available for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions e.g. actions to freeze and confiscate the proceeds of crime.*
- 28.2 *Competent authorities responsible for conducting investigations of ML, FT and other underlying predicate offences should ~~develop and use a wide range of appropriate investigative techniques on the basis of implementation of Rec.1, SR-II and Rec.3,~~ including controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems. Countries should ensure that measures are in place, whether legislative or otherwise, that enable and regulate the use of these techniques when conducting investigations of ML or FT.*
- 28.3 *Countries should [consider to] have mechanisms in place to identify whether persons hold or control accounts, ~~whether through central registers of bank accounts or other less centralised systems.~~*
- 28.4 *Countries should ensure that designated competent authorities are able to request information held by the FIU.*
- 28.5 *[Competent authorities referred to above should have the powers to be able to take witnesses' statements for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions.]²⁴*

²³ See paragraph 73, which applies here as well.

²⁴ Essential criteria 28.5 and 28.6 are included here between square brackets. The project team notes that these elements are of limited value, as they represent 'standard' policing powers which are widely available; to the knowledge of the project team, there are virtually no known jurisdictions where these

28.6 *[Countries should consider taking measures, whether legislative or otherwise, that allow competent authorities investigating ML and FT cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering.]*²⁴

Additional elements

28.7 *Are measures in place that allow prospective (future) monitoring of accounts by financial institutions for investigative purposes?*

28.8 *Has the [Convention on Cybercrime (ETS 185)] / [Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198)] been signed, ratified and fully implemented?*²⁵

28.9 *Do competent authorities have access to a minimum set of data bases that contain commercial or public data that they can use to assist in their investigations.*

IV CORRUPTION

4.1 Background

94. It has been well publicised that the G20 has called upon the FATF “to help detect and deter proceeds of corruption.” At the February 2010 meeting, the FATF Plenary discussed a paper on “FATF current and possible future work against corruption”. The Plenary inter alia decided that WGTY should undertake work on Recommendation 26 in the context of its work on operational issues. More precisely (as set out in WGTY(2010)10), it was decided that the operational work of the WGTY would involve looking at implementation and effectiveness issues of Rec. 26, with the aim to consider: *i*) enhancing the analytical capability of FIUs and dissemination of information gathered by FIUs to law enforcement agencies; *ii*) enhancing the capacity of FIUs to manage STRs related to politically exposed persons (PEPs) and/or possible instances of corruption; and *iii*) the preventive and reactive measures applicable to the personnel of FIUs and other AML/CFT operational agencies.

95. The current work on operational issues looks at the overall effectiveness of the operational network. Therefore, in addition to looking at Recommendation 26 implementation issues in relation to corruption, the impact of corruption on the overall effectiveness of the operational network also falls within the scope of the current project.

96. The APG/FATF Anti-Corruption Research Paper of 2007 discusses the “concerns that PEPs may block AML investigations, impede the suspicious transacting reporting system, and undermine good governance standards.”²⁶ Corruption can severely hamper the effectiveness of institutions designated to combat ML/TF, for that reason assessors attempt to describe the level of corruption in a country and in particular the institutions involved in AML/CFT activity.

4.2 Rec. 26: the FIU and current FATF assessment methodology

97. One of the operational authorities that play an important part in collecting, retaining, analysing and disseminating intelligence in the operational network is the FIU. The FIU is an important conduit for

criteria are not met. It could be considered to remove them, in order to focus on the more critical requirements.

²⁵ The project team notes that referral to (one of) these conventions, both containing relevant material for operational instrumentalities and responsibilities, might be considered in Recommendation 35 instead of here in Recommendation 28.

²⁶ Dr. David Chaikin and Dr. Jason Sharman, APG/FATF Anti-Corruption Research paper September 2007, p. 21.

intelligence available for all ML, TF and financial investigations, including where instances of corruption are detected.

98. Within the framework of the FATF Recommendations, Recommendation 6 places an explicit obligation on financial institutions and DNFBPs to perform additional due diligence on business they conduct with PEPs and to conduct enhanced monitoring on business relationships. As a result of this obligation, STRs in relation to PEPs (and more broadly on ML in relation to bribery and corruption) are likely to be forwarded to FIUs. In addition, STRs relating to PEPs may be forwarded to the FIU without initially identifying that the person who prompted the suspicion was a PEP. The PEP will be identified when the information from the initial STR is combined with other information that the FIU has access to that exposes the person as a PEP. Nevertheless, it is noted that it is often difficult for many FIUs to easily identify STRs related to PEPs (as noted in the FATF/PLEN(2010)5 – discussion paper on FATF current and possible future work against corruption).

99. Ensuring a jurisdiction's FIU is secure, has appropriate controls, policies and procedures in place and that the FIU has operational independence in handling intelligence – and in particular STR intelligence – in relation to ML related to corruption is an important institutional element in national efforts to combat corruption.

100. The ability of an FIU to receive, analyse and disseminate intelligence in relation to suspected ML in relation to corruption offences and provide an intelligence service in support of national anti-corruption efforts can increase the capacity of a jurisdiction to assess and handle intelligence related to ML and corruption.

101. Currently, the FATF Methodology sets standards for FIUs in relation to:

- Methodology criterion 26.1: the establishment of a national centre to receive analyse and disseminate disclosures of STRs and relevant information.
- ~~The establishment of an independent FIU.~~
- Methodology criterion 26.5: The authority of the FIU to disseminate financial information to domestic authorities for investigation when there are grounds to suspect ML of TF.
- Methodology criterion 26.6: The operational independence of the FIU from undue influence or interference.
- Methodology criterion 26.7: The protection of information, ensuring that it is only disseminated in accordance with the law.

102. Of the FATF jurisdictions assessed to date, only (3) three mentions have been made about potential corruption issues with respect to the FIU – all in relation to possible compromises of autonomy. These noted deficiencies in operational autonomy do not explicitly indicate that potential FIU intelligence work into alleged cases of corruption has been compromised.

4.3 Corruption and effectiveness of the operational network

103. Corruption is relevant to the discussion on effectiveness when observing the extent to which authorities combat corruption in countries where it is considered a serious issue and such activity generates a considerable amount of illicit proceeds. Corruption can have a crippling effect on a country's AML/CFT regime if the corruption occurs within the institutions designated to combat ML/TF.

104. In order to better determine the operational effectiveness of law enforcement and how to better gauge the impact of corruption on law enforcement, assessors need indicators that could reflect how countries combat corruption in these institutions. Since corruption usually occurs in clandestine fashion and those involved rarely divulge its presence, it is difficult for assessors to determine its impact from statistics and other similar methods.

105. Currently, the attention being paid to corruption issues in assessments is rather formalistic, and there are few pointers to assist an assessor in trying to find sources of information on how corruption affects effectiveness of AML institutions. Assessors, however, are required (in the FATF Handbook on Evaluations²⁷) to note any shortcomings in the appropriate measures to combat corruption, including high ethical and professional requirements for police officers, prosecutors and judges. In addition, essential criterion 30.2 requires that the staff of competent authorities should be of high integrity.

106. There is perhaps room for a more formalised and systematic method to address corruption in relation to operational authorities and provide guidance and indicators to assessors to attempt to better identify the impact this type of corruption might have on rating operational effectiveness of a country's AML/CFT regime and especially with regard to law enforcement agencies (Rec. 27 & 28).

4.4 *Assessing effectiveness with respect to corruption and the operational Recommendations*

107. In the current standard, Recommendation ~~criteria~~ 30.2 states that "staff of competent authorities should be required to maintain high professional standards, including standards concerning confidentiality, and should be of high integrity and be appropriately skilled." The reference to high integrity could provide a platform for a more elaborate assessment of the authorities' activities to combat corruption within their organisation.

108. Below are some questions that might help assessors to assess whether a jurisdiction has duly considered the risk of corruption to the operational AML/CFT network and whether mechanisms are in place to promote and safeguard integrity.

Issue for consideration WGEI/WGTM (9)

Consider incorporating (some of) the questions of ~~paragraph 109 below~~ into the assessment framework (for example through essential criterion 30.2 of the methodology, the handbook for countries and assessors, or through other appropriate channels) in order to assess the competent authorities' endeavours to combat the threat of corruption to the effective functioning of their organisations. ~~In addition, further work on this issue, in close cooperation with WGTM, could be considered.~~

- I. Do designated law enforcement authorities and other competent authorities have codes of conduct? If so, are there sanctions for breaching them? If not, are they considering adopting them?
- II. Have the designated law enforcement authorities conducted a risk analysis of the threat of corruption to their agency(s)? Have the results of such an analysis been applied, and if so, how?
- III. Have there been cases identified of personnel from the designated law enforcement authority involved in corruption? Have there been successful prosecutions of personnel for corruption offences? Have there been investigations opened for possible corruption offences? Have there

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<http://www.fatf-gafi.org/dataoecd/7/42/38896285.pdf>

- been administrative sanctions imposed on personnel (including administrative sanctions for ethics violations)?
- IV. Do the designated authorities have an Internal Affairs division/agency whose mandate is to investigate allegations of wrongdoing to include corruption offences within their organisations? Do countries have an independent anti-corruption agency which is mandated to pursue ML, TF and financial investigations? How many investigations, related to corruption, has the agency conducted in a specified period of time? If such an agency does not exist, have the competent authorities considered creating such an agency?
- V. Do the designated authorities have a system in place for the protection of “whistleblowers”? Has such a status ever been granted to any personnel? If such a program does not exist, have the designated authorities considered initiating it? If they exist, are there any indications that such programs have been applied?
- VI. Are there mechanisms, similar to civil service protections, given to employees of the designated authority that allow for the filing of grievances for adverse personnel actions, harassment, hostile working environment, etc.? If not, have the designated authorities considered implementing such programs? Are there any indications that such programs have been applied?
- VII. Do the designated authorities ~~require~~ encourage employees to submit an annual or periodic asset declaration? If so, are such submissions verified? If not, have the designated authorities considered implementing such a program?
- VIII. Do the designated authorities conduct periodic background investigations on employees? If so, what is the extent of these background investigations regarding financial improprieties? Have there been any dismissals as a result of negative findings? If no such program exists, have the competent authorities considered implementing such a program?
- IX. Do employees of designated authorities receive ethics and anti-corruption training? If so, how often and what is the content of such training? If not, have the designated authorities considered implementing such a training program? What is the budget devoted to training programs?
- X. What safeguards are in place to protect the integrity of ML/TF cases conducted by designated authorities to include case files, evidence, access to data, etc.? How are such safeguards applied?
- XI. Do jurisdictions have a demonstrable exchange of intelligence along the operational network in relation to corruption investigations?
- XII. Do FIUs and anti-corruption agencies/investigators exchange information (including on an operational level)?
- XIII. Are adequate statistics kept in relation to corruption and ML?
- XIV. Are FIUs with supervisory responsibilities actively engaged in providing guidance to financial institutions on parties that may do business with PEPs? If so, what type of guidance are they providing?

V. OUTPUT SUMMARY

5.1 Recommendations 27 ~~and~~ 28 and other related policy proposals

109. Below is the proposal for new wording of Recommendations 27 and 28, based on acceptance of all policy proposals outlined in chapter III.

New Recommendation 27:

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of a shared national strategy. At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active simultaneous financial investigation when pursuing money laundering and terrorist financing offences and underlying predicate offences. ~~ly conduct investigations regarding the relevant financial aspects.~~ Countries should ensure that competent authorities have responsibility for immediately identifying and tracing without delay, freezing and seizing property that is, or may become subject to confiscation or is suspected of being the proceeds of crime. Countries should ensure that, where applicable, ~~effective use is being made~~ be able to make use of permanent or temporary multi-disciplinary groups specialised in financial or asset investigations and that co-operative investigations with appropriate competent authorities in other countries are taking place.

Assessment Methodology for Recommendation 27:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 27 as well as Recommendation 26, 30, 31 and 40 (Note to assessors: where there are deficiencies in the essential criteria 30.1, 30.2, 30.3²⁸, 30.4, 31.1²⁹, 40.45 and 40.56, such deficiencies should also be noted in Rec. 27 and be taken into account in the assessment of the rating for Rec. 27.

Essential criteria

- 27.1 There should be designated law enforcement authorities that have responsibility for ensuring that all types of ML and FT offences are properly and pro-actively pursued and investigated.
- 27.2 There should be a national AML/CFT strategy which guides the designated law enforcement authorities.
- 27.3 At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active simultaneous financial investigation when pursuing the ML and TF offences and underlying predicate offences. ~~conduct investigations regarding the relevant financial aspects.~~
- 27.4 Countries should be able to make use of permanent or temporary multidisciplinary groups specialised in investigating all financial aspects ~~the proceeds of crime,~~ to include direct and indirect criminal proceeds. An important component of the work of such groups or bodies would be focused on the investigation, freezing, seizure, freezing and confiscation of the proceeds of crime.
- 27.5 Competent authorities should be legally permitted to enter into ~~Countries should enable~~ co-operative investigations with appropriate competent authorities in other countries, including the use of investigative techniques, provided that adequate safeguards are in place.
- 27.6 Countries should ensure that Criteria 3.4 (in R.3) is fully met and that law enforcement agencies, the FIU or other competent authorities are specifically designated to identify and trace without delay property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.
- ~~27.6 Countries should ensure that competent authorities have responsibility for immediately tracing, freezing and seizing of property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.~~

²⁸ Note to assessors: "adequate and relevant training" (as per critterion 30.3) could be considered to include training on how to conduct asset investigations, parallel investigations, forensic accounting and net worth analysis. In addition, such training should be available to all designated authorities per Rec-criteria 27.1 and 27.6.

²⁹ Note to assessors: designated authorities as per Rec. 27 should have proper protocols in place that allow effective exchange of information with the FIU.

27.7 ML and FT methods, techniques and trends should be reviewed by law enforcement authorities, the FIU and other competent authorities (as appropriate) on a regular, interagency basis. The resulting information, analyses and studies, as well as FATF typologies, should be disseminated to law enforcement and FIU staff, as well as staff of other relevant authorities.

Additional elements

- 27.8 Is there a national committee or alternative arrangement(s) which ensures with responsibilities for AML/CFT policy coordination, sharing of typologies and best practices?
- 27.9 Is there a "joint investigation" approach where law enforcement agencies share and join their experiences and knowledge to ensure that all investigative skills, techniques and disciplines are utilised when conducting financial investigations including ML/TF investigations?

Recommendation 28: When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence. Countries should ensure that competent authorities are able to use a wide range of investigative techniques suitable for the investigation of money laundering and terrorist financing. These investigative techniques include at a minimum controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems. In addition, countries should [consider to] have mechanisms in place to identify whether natural or legal persons hold or control accounts. When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to request [and receive] information held by the FIU.

Assessment Methodology for Recommendation 28:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 28.

Essential criteria

- 28.1 Competent authorities responsible for conducting investigations of ML, FT and other underlying predicate offences should have the powers to be able to:
- Compel production of,
 - Search persons or premises for, and
 - Seize and obtain
- transaction records, identification data obtained through the CDD process, account files and business correspondence, and other records, documents or information, held or maintained by financial institutions and other businesses or persons. Such powers should be exercised through lawful process (for example, subpoenas, summonses, search and seizure warrants, or court orders) and be available for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions e.g. actions to freeze and confiscate the proceeds of crime.
- 28.2 Competent authorities responsible for conducting investigations of ML, FT and other underlying predicate offences should develop and use a wide range of appropriate investigative techniques on the basis of implementation of Rec.1, SR.11 and Rec.3, including controlled delivery, undercover operations, intercepting telecommunications and accessing computer systems. Countries should ensure that measures are in place, whether legislative or otherwise, that enable and regulate the use of these techniques when conducting investigations of ML or FT.
- 28.3 Countries should [consider to] have mechanisms in place to identify whether persons hold or control accounts, whether through central registers of bank accounts or other less centralised systems.
- 28.4 Countries should ensure that designated competent authorities are able to request information held by the FIU.
- 28.5 [Competent authorities referred to above should have the powers to be able to take witnesses' statements for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions.]³⁰

³⁰ Essential criteria 28.5 and 28.6 are included here between square brackets. The project team notes that these elements are of limited value, as they represent 'standard' policing powers which are widely available; to the knowledge of the project team, there are virtually no known jurisdictions where these

28.6 [Countries should consider taking measures, whether legislative or otherwise, that allow competent authorities investigating ML and FT cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering.]²⁴

Additional elements

- 28.7 Are measures in place that allow prospective (future) monitoring of accounts by financial institutions for investigative purposes?
- 28.8 Has the [Convention on Cybercrime (ETS 185)] / [Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198)] been signed, ratified and fully implemented³¹?
- 28.9 Do competent authorities have access to a minimum set of data bases that contain commercial or public data that they can use to assist in their investigations.

Policy proposal (2)

Consider creating the following functional distinction between the two Recommendations: the new Recommendation 27 relates to “functions and responsibilities” and the new Recommendation 28 relates to “powers and tools”.

5.2 Policy proposals: other Recommendations

Policy proposal (1) – see section 2.3

Consider raising current criterion 30.4 from additional element to essential criterion. This would include a rewording from a question into a requirement:

30.4 Special training or educational programmes should be provided for judges and courts concerning ML and FT offences, and the seizure, freezing and confiscation of property that is the proceeds of crime or is to be used to finance terrorism.

5.3 Policy proposal: Guidance

Policy proposal (4) - see section 3.4

Consider ~~elaborating~~ developing Guidance on “Financial Investigations”, on the basis of the elements set out in Annex II to this document.

5.4 Other issues

Issue for consideration WGEI/WGTYP (6) – see section 3.4

- Consider doing further work, in close cooperation between WGTYP and WGEI, on the nature, role and use of STRs in AML/CFT regimes, including using STR-related statistics as a basis for measuring effectiveness.

criteria are not met. It could be considered to remove them, in order to focus on the more critical requirements.

³¹ The project team notes that referral to (one of) these conventions, both containing relevant material for operational instrumentalities and responsibilities, might be considered in Recommendation 35 instead of here in Recommendation 28.

Issues for consideration WGEI/WGTM (9) - see section 4.4

- *Consider incorporating (some of) the questions of paragraph 109 into the assessment framework in order to assess the competent authorities' endeavours to combat the threat of corruption to the effective functioning of their organisations. In addition, further work on this issue, in close cooperation with WGTM, could be considered.*

Issues for consideration WGEI (5,7,9,10)

(5) – section 3.4

- *Consider the issue of consistency between the requirements under the new Rec. 28 and those in Rec. 36 (36.1) and Rec. 40.*

(7) – section 3.4

- *Consider addressing in the context of work on Recommendation 3 the explicit need for swift and early provisional measures in order to increase effectiveness of these measures.*

~~(9) – section 4.4~~

- ~~• *Consider incorporating (some of) the questions of paragraph 109 into the assessment framework (for example through essential criterion 30.2 of the methodology, the handbook for countries and assessors, or through other appropriate channels) in order to assess the competent authorities' endeavours to combat the threat of corruption to the effective functioning of their organisations. In addition, further work on this issue, in close cooperation with WGTM, could be considered.*~~

(10) – Annex III (issues related to CoE conventions)

- *mandatory confiscation in serious proceeds generating cases*
- *legal arrangements relating to confiscation (Rec. 3.7)*
- *proper management of frozen or seized property prior to confiscation*
- *international cooperation in relation to civil recovery*
- *investigative assistance which would have to be carried out in instances of international cooperation in relation to civil recovery*

ANNEX I. INFORMATION & THE OPERATIONAL NETWORK

NOTE

110. This annex is included for informational purposes and to provide background to some of the individual policy proposals in chapter III. The content of this section is mainly based on the input from delegations received through questionnaires. This annex does not contain policy proposals and does not aim to either prejudice any policy decision by FATF or to prescribe operational or legal arrangements to FATF (associate) members. It merely serves to provide background on the information flow within an operational network, and the way in which this information flow can influence the operational effectiveness of the network, since this subject was considered very important by many delegations. Should FATF decide that further work on this or related topic(s) would be necessary, this Annex might serve as a useful starting point for such work.

1.1.a Introduction

111. Execution of the functions that constitute the operational network, as enumerated in chapter II, involves a number of different operational entities. We make reference to a 'network' in this context because of the necessary interaction between these entities. This interaction, which follows from the respective responsibilities of the entities involved, is to a large extent based on information. Once information is collected it is then, analysed, exchanged and utilised by the relevant operational authorities.

112. We use 'information' here as the broadest possible term to include concrete data (such as STRs³²), intelligence and any other flow of relevant information, either on individual transactions, cases, entities, or on an aggregated level. The function of an individual actor in the operational network is quite often determined by its position and function in relation to such information. In addition, the ability of various actors to exchange good quality information in a timely manner is an important factor contributing to the effectiveness of an operational AML/CFT system.

113. In a well-functioning operational network, information may be assessed and enriched as it passes along between entities. This means that the quality and importance of the information is increased accordingly. In other words, the input is not always equal to the output. A well-functioning operational network is also dependent on all the actors receiving the relevant information for their specific use. The purpose of this section is to describe and emphasize the importance of a well functioning operational network and to underline the role of information in this network.

114. When describing the operational network and the interaction between the links within it, it is self-explanatory that for the network to operate properly it is necessary for information to be exchanged. Information is very much context-driven. For example, the terms "information", "intelligence" and "evidence" are all examples of different forms of data which is handled differently within the framework of a jurisdiction's domestic legislation. The information also faces changing context running through the network. A reporting entity may define what it disseminates as information and receiver may define the

³²

See 3.2.

input differently depending of type of receiver. It is important to recognize that information and intelligence will also be handled differently by operational authorities during the transformation process; an example:

- an STR made by a reporting entity to the FIU;
- an enhanced information package handed by the FIU to law enforcement;
- intelligence (collected) and evidence (gathered) handed by law enforcement to a prosecuting authority;
- evidence submitted by the prosecuting authority to the court.

115. When describing the operational information network, it is necessary to have an understanding of who the participants in this network are. Table 2 illustrates the information flow in an operational network.

Table 2. The AML/CFT operational network

Operational Role / Function	Operational Authorities (examples)	Operational information flow
RAISING SUSPICION (monitoring and reporting)	<u>Financial Institutions & DNFBS³³, Law Enforcement</u> Financial Institutions, DNFBS, Law Enforcement	Reports or suspicions of possible proceeds of crime / TF
INTELLIGENCE DEVELOPMENT (analysis, tracing & poss. investigation)	<u>FIUs, law enforcement agencies</u> FIUs, law enforcement agencies	Collection of supplementary information
INTERVENTION & INVESTIGATION (restraint/seizure of assets, evidence gathering, investigation & consolidation/synthesis)	<u>law enforcement agencies, recovery agencies, confiscation unit</u> Investigation authorities (law enforcement agencies, central authorities)	Collation of evidence and intelligence and submission of an evidential case
PROSECUTION	<u>Public prosecutors, magistrates or others who litigate criminal matters and/or non conviction based or criminal confiscations</u> Public prosecutor, prosecution agencies	Case evidence
DETERRENCE (decision & sanction)	<u>Judiciary, courts</u> Judiciary / Courts	Ruling (jurisprudence & poss. indicators or typologies)
CONFISCATION (recovery & confiscation)	<u>Recovery agencies, law enforcement agencies, confiscation units, courts</u> Recovery agencies, law enforcement, confiscation unit	Data on identified proceeds /terrorist funds

1.2.a Suspicious Transaction Reports

116. In all FATF jurisdictions, reports on suspected instances of ML or TF are made by the reporting entities to the national FIU. These reports are commonly referred to as Suspicious Transaction Reports (STRs), though in some jurisdictions they are termed Suspicious Activity Reports (SARs). In some cases,

³³ These reporting entities are mentioned in order to provide a more complete picture, as they play an important role in monitoring financial traffic and raising suspicions with the authorities; they are of course not considered to be part of the 'operational network' from a policy point of view.

SARs require the reporting of suspicious individual and business activity as well as suspicious transactions. For the purposes of uniformity both STRs and SARs will be generically referred to as STRs in this report.³⁴

117. Since 2003 the member jurisdictions of the FATF have reported a general trend of rising numbers of STRs³⁵, increasing the amount of potentially relevant information available to support ML, TF and asset recovery investigations. The level of information and detail contained within a STR varies drastically by jurisdiction. Some financial institutions are only required to provide a minimum level of basic data. In other cases, by filing an STR the reporting institution may provide to the FIU not only the identification of the customer, but an identification of people or businesses with whom they associate, a description or profile of their banking activity, and why the financial institution believes the activity is suspicious.

118. According to Recommendation 13, STRs are filed when a reporting entity suspects or has reason to suspect that funds are the proceeds of criminal activity or if those funds suspected to be linked to, or related to, or to be used for terrorism, terrorist acts or those who finance terrorism. STRs are not to be considered as criminal charges and should not be viewed as “criminal activity reports”. However, in many cases, the financial activities reported on the STRs are themselves illegal, such as check, credit card or loan fraud, check kiting, counterfeiting, embezzlement and the structuring of transactions to avoid the filing requirement of threshold based reporting.

119. An STR might contain enough information to initiate a criminal investigation. However, in most jurisdictions the information that is contained within the STR can ‘only’ be used as a basis to reconstruct suspected criminal activity, as intelligence or a pointing device, and generally speaking cannot be used as evidence in its own right. Another important factor is that multiple STRs are often needed to justify the opening of a criminal investigation. For instance, STRs that have been submitted to the FIU over a long period of time from various reporting entities and with no apparent connection at the time they were submitted. With complex criminal cases this is more often the case than not.

120. STRs are a source of information that can inform the various actors in the operational network. Information contained in STRs, when checked against operational or historical intelligence databases, can complement existing ML/TF investigations by helping to identify laundered money, money intended for terrorist use and money launderers and terrorist financiers. STRs can provide information on where the proceeds of criminal activity or funds intended for terrorist use are located and when and where these funds are moved, or even by what methods those funds are being laundered at the “placement,” “layering” or “integration” stages of money laundering. STRs can also be a proactive source of information on ML or TF that has not yet been detected. Activities suspected of being related to ML or TF, which are identified by financial institutions and DNFBPs and reported to FIUs as STRs, can also relate to ML or TF that has not yet been identified by operational authorities.

121. However, data from a single STR or report often has minimum investigative value and when compared with other information, the significance of an STR is often greatly increased. The real added value of an STR lies in the subsequent analysis/assessment (usually in the first instance by the receiving FIU), when an STR is combined with other information, other STRs, other types of transaction reports and open and closed sources of intelligence.

³⁴ Of note, some jurisdictions also require the financial sector to submit Currency Transactions Reports (CTRs) which are reports of cash transactions above a certain threshold— these are another available source of financial intelligence.

³⁵ From examination of mutual evaluation reports and FIU annual reports: 16 of the 20 jurisdictions who responded to the Op Issues questionnaire indicated a rise of STRs between 2006 and 2008).

122. Many jurisdictions have noted that STRs also have an historic value and that the true value of an STR may not be realised in the short term. That is, it may not be immediately linked to a ML or TF investigation, or be assessed as relevant for dissemination to operational authorities for further development. At a later date however, when additional information or intelligence becomes available that links the STR (or a set of STRs) to potential ML/TF activity, the intelligence is then able to be developed further. When FIUs identify ML or TF schemes that include multiple STRs they will often produce enhanced information or an intelligence package, including an analysis that will be disseminated to the appropriate operational authority for investigation.

123. The STRs and related information or intelligence collected will also contribute to strategic assessments of ML and TF within a jurisdiction. The STR information, and feedback from ML and TF investigations where STRs have contributed intelligence value, can be used by FIUs to produce periodic strategic assessments of ML/TF methods and trends. Criterion 26.8 of the Methodology provides that FIUs are required to produce public reports that include typologies and trends. A number of jurisdictions indicated that their FIUs analyse aggregated STR information they collect to produce regional, national and international intelligence reports that are made available to operational authorities.

124. STR information can enhance other personal, business and financial intelligence which is available for development by the FIU, and by other operational authorities. When asked how the role that STRs serve in the operational network could be further strengthened, a number of jurisdictions indicated that enhancing the understanding of how STR information can be used, including training and the development of best practices, would be beneficial.

125. Other comments indicated that more inter-agency or collaborative work in the development of STR intelligence and the requirements for effective feedback mechanisms might encourage more effective development and use of STR intelligence. It was noted that a greater awareness of the role of financial intelligence at all levels of government, and, in particular, at all levels of the agencies responsible for the investigation and prosecution of ML/FT cases, would be beneficial.

126. Effective use of STR intelligence within the operational network requires that the right information / intelligence / evidence is available, in the right format, to the appropriate operational authority, in a timely manner. As numbers of STRs increase, FIUs, as a fair arbiter of the STRs received, face the challenge of providing (or making available) STR information to operational authorities within their national AML/CFT legal framework. It should therefore be recognised that any data collected by the FIU can be used to enhance virtually any type of criminal investigation.

1.3.a Other intelligence / information

127. All participants in the operational network acquire additional information that can be labelled [financial intelligence]. This is information that is not directly captured in STRs, but stems from the intelligence work that authorities conduct when assessing, investigating and analysing the information available in the operational network. These can include, for example:

- Police reports – (reports made by law enforcement in relation to ML or TF investigations, or where predicate crimes have generated proceeds that will have been laundered).
- Intelligence reports – (intelligence reports by operational authorities into actual or suspected cases of ML or TF).
- Strategic reports – (made by operational authorities into regional, intra- regional, jurisdictional or international methods and trends in ML and TF).

128. Information, intelligence and evidence gathered and retained within the operational network has more than one use. This report is primarily concerned with examining how the information and intelligence is available in support of ML and TF investigations and prosecutions and the identification of assets for confiscation efforts.

129. A number of jurisdictions have created multi-agency task forces which serve to integrate numerous law enforcement and intelligence data which had previously been separated by organisational and technical boundaries. In some jurisdictions this required changes in laws and regulations or may require formalised agreements such as MOUs. These task forces leverage existing technologies and develop new technologies in order to provide cross-agency integration and analysis of various forms of data. For instance, task forces which are designed to combat major drug trafficking organisations collect, store, and analyse all-source related to drugs and related financial investigative information to support coordinated, multi-jurisdictional investigations focused on the disruption and dismantlement of significant drug trafficking and their related money laundering enterprises. Furthermore, this information is stored in centralised databases so that any future investigation of any new target of a participating task-force agency can be cross-referenced against that historical data.

130. Similarly, telephone numbers used in all undercover or proactive law enforcement operations can be stored and are cross-referenced on a regular basis to avoid possible investigatory conflicts between agencies with overlapping investigatory responsibilities. Such conflicts are more likely when investigating the money laundering side of any diversified criminal enterprise, for example, the laundering of an organisation's human trafficking proceeds, VAT fraud monies and drug trafficking proceeds may all be laundered in the same methods or channels even though the predicate offences are being investigated by different operational agencies, so one agency could easily stumble into another agencies' more mature investigation. Naturally, when such databases are used there must also be de-confliction procedures. Stored known criminal telephone numbers are also a very good source of information to pursue further investigations by exploiting the toll (calling) records of those numbers. Such work requires a lot of resources, but when used judiciously can lead to the "money men" of the organisation or the FIs or DNFBPs used by the criminals.

131. These task forces and related databases described above will utilize human analysis enhanced by sophisticated link analysis tools to conduct comprehensive analysis of the available information, produce investigative leads for investigators in the field, and support the coordination of multi-agency, multi-jurisdictional investigations targeting the most significant criminal organisations. In addition, the task force approach will offer a means to identify the most effective and efficient use of limited national criminal investigative and intelligence resources, both foreign and domestic, particularly against complex, large and transnational criminal organisations.

1.4.a Access to data: products and recipients

132. Who produces the different information and intelligence products and where information and intelligence is (and can be) held, will differ between jurisdictions. Additionally, who, nationally and internationally, can have access to what information or intelligence, and under what circumstances, presents a challenge to jurisdictions when designing an effective AML/CFT legal and operational framework. Within each jurisdiction there will be differences in the way that different types of information held within the operational network can be made available to operational authorities and this may be influenced by legal requirements including human rights considerations (such as freedom of information and privacy legislation).

133. As noted above, understanding and linking STR information with the information held on the different intelligence systems of the various operational authorities within the national AML/CFT legal

framework, is key to realising STR added value during ML and TF investigations. Once STR intelligence relating to suspicions of ML or TF is linked with information or intelligence indicating that ML or TF offences are being committed, operational authorities are in a position to begin developing evidence for a potential prosecution or confiscation proceedings.

134. FIUs hold valuable information on suspected instances of ML/TF, including domestic STR information and information received from foreign FIUs. The national and international frameworks for providing access to FIU/STR information are important in determining how intelligence can be made available to operational authorities and developed into investigative leads or evidence. In developing a system to exploit STRs, FIUs should take a lead role in developing and evaluating the capabilities of data mining or linking tools to query, target and analyse STR and other financial forms within the framework of its national AML/CFT framework. In addition, because FIU analysts are specialists in the use of technology to analyse large volumes of financial data, they are often the catalyst for innovative analytical techniques. To do this effectively, an FIU must be given adequate resources to fulfil the task. The required amount of resources will largely depend on the model of the FIU (investigatory versus administrative), the size and complexity of the financial sector, the ML and TF risks in that sector, and the volume of reports that need to be analysed. Criterion 26.3 of the Methodology is therefore very important in this respect.

135. FIUs are able to develop different intelligence products in line with the intelligence requirements of the operational authorities investigating ML and TF offences. Examples of an FIU's different types of enhanced information or intelligence product are often included in the FIU's annual report. Recipients of financial intelligence and STR information may include:

- Police
- Customs authorities
- Tax authorities
- Regulators and supervisors
- Corruption investigators, where they exist
- Asset Recovery Agencies/Offices
- Prosecutors
- National Security Intelligence Services

136. The challenge faced by stakeholders within the operational network is the ability to make relevant information available to the operational authorities investigating ML and TF through appropriate gateways and in a timely manner. This includes the ability to provide an appropriate and timely response to requests for information by law enforcement when there is a current ML or TF investigation.

137. In some jurisdictions, a national AML/CFT strategy states the goals and objectives of the AML/CFT regime and how these goals should be efficiently and effectively delivered. An important feature of such a strategy is that it describes for all involved agencies which responsibilities they have, and what they will be expected to do to deliver on the jurisdiction's AML/CFT goals. For the operational authorities in particular, this strategy assists in defining the specific responsibilities within the national AML/CFT framework, assists in resource allocation and provides a basis for encouraging effective co-operation between the operational authorities. It also provides appropriate contact points, where there may

be more than one recipient of STR/ intelligence, which operational authority should be the primary ML/TF investigator and can guide FIUs and operational authorities in determining what information exchange gateway should occur between them to support the strategy.

1.5.a Cooperating with the recipients³⁶

138. As stated earlier, FIUs generally analyse the information contained in the STRs. Some FIUs submit the STRs directly to recipients or make the full database available to the recipients. In almost all cases there is some form of transmission of information or intelligence to the competent authorities for further investigation (which may be administrative investigations or judicial inquiries). Designation of competent authorities may differ depending on the jurisdiction involved: it may be the police, prosecuting authorities, or it may be other law enforcement authorities for administrative investigations such as customs, tax authorities, financial regulators, intelligence services, etc.

139. The way to engage and commit the recipient at an early stage may depend on what information or intelligence can be sent and which recipient is involved. Nevertheless, methods of cooperation may be similar. Good practices noted in FATF jurisdictions include:

- Regular coordination between the FIU and their recipients, which may include operational meetings on new trends of ML/FT.
- Writing reports on typologies and trends that are shared in the operational network.
- Including agents from the recipients in the FIU or vice-versa to facilitate the cooperation.

140. The various actors in the operational network need to cooperate in order to make the products as useful as possible for the recipient. In this regard, there is an obligation for all operational authorities to aim for "tailor-made" intelligence and information products to be made available within the operational network. In particular, it is important to establish how useful the information is for the recipient (what is his need in this particular case or setting) and whether the information is conveyed at the right time (the question of when the information should be disseminated).

141. Disseminating enhanced information or intelligence from the FIU in a timely manner so it can be investigated promptly is a very important challenge for the FIU. Also important is making sure that the information is conveyed in the most useful format (what kind of product should be sent to the recipient, such as a charge, a police report, a strategic report, an intelligence report etc). Depending on the nature of the recipient, it is important that the recipients fully understand any STR 'intelligence packages' or reports they receive and that this information is in the correct format for operational authorities to initiate an investigation or support an on-going investigation. It is also extremely important that the recipients understand the use limitations on such materials, and that there be some type of audit trail of who received information, when it has received and how it was used.

142. It is important that when the FIU is developing a set of data which it will disseminate that the recipients fully understand the format of how the data will be presented at an early stage. When the information from the FIU may be a series of computer files (a report in Word, an excel spreadsheet, a link chart, bank statements etc.) it is always useful to understand how operational authorities can best receive the intelligence. Sending them the information in an appropriate file format can avoid re-keying of data and

³⁶

'Recipient' here refers to any competent authority that receives information from the FIU.

ANNEX II. FINANCIAL INVESTIGATION – ELEMENTS FOR GUIDANCE

2.1.a Introduction

150. A financial investigation means an enquiry into the financial affairs of a suspect or entity. Such enquiries can vary from simply obtaining bank statements in relation to accounts held by a suspect, to a major review of the financial accounts of large enterprises including criminal enterprises.

151. The majority of financial investigations rely heavily on proving offences through a paper trail. The financial investigative component often becomes critical to proving ML and TF offences and the underlying (predicate) crime, in addition to serving as a basis for confiscation. In some cases, the financial component is also necessary to develop evidence against the higher level criminals. For example, trading records may implicate a securities broker or trader in a market manipulation. However, by following the money trail, financial investigators may develop evidence against the head of the brokerage firm or president of the public company. The financial investigation may also expose huge gaps in AML/CFT compliance and uncover criminal liability of a FI or DNFBP. Financial investigators also would be identifying assets that could be frozen, seized, and confiscated.

152. Any guidance that the FATF develops on the effective use of financial investigations would be beneficial for all jurisdictions and also for assessors to help them apply the new Criteria in the proposed new framework for Recommendations 27 and 28. It would be beneficial for all jurisdiction when the FATF would elaborate criteria and guidance that can contribute to effective use of financial investigations. The policy proposals in section 3.4 already ~~proposes~~ suggest changes to the standards to incorporate this to some extent. In addition, a guidance paper could provide further direction. Below are some 'building blocks' for such guidance, which would have to be elaborated on.

2.2.a Financial investigation as an instrument

153. Financial investigations are important tools to detect ML and ~~other~~ proceeds-generating crimes, as well as to enable the freezing, seizure and confiscation of proceeds of crime. Financial investigation involves the collection, collation and analysis of all available information with a view towards assisting in the prosecution of and the deprivation of the proceeds and instrumentalities of crime. Criminals usually like to maintain some degree of control over their assets and as a result there is usually a "paper trail" that will lead back to the offender. That "paper trail" can also be followed to identify additional offenders, potential location of evidence and instrumentalities used to commit the crimes. The ability of law enforcement agencies to conduct financial investigations is essential to effectively combating ML and TF offences and will often establish the existence of otherwise unknown assets that have been purchased with proceeds of criminal activity, that then become available for confiscation. The recently adopted FATF best practice paper on Confiscation has identified some best practices that related directly to this. It states that it is best practice for jurisdictions to:

- a) Raise awareness that asset tracing and financial investigations should be a consideration at the commencement of an investigation of a proceeds-generating crime.
- b) Undertake asset tracing and financial investigations, on a systematic basis and at an early stage, in relation to investigations of proceeds-generating crimes.

154. All criminal investigators should be trained on the value of financial evidence to support all criminal investigations. Raising awareness should also apply to street level crimes, in addition to long-term investigations, and this requires changing the dynamic/attitude of investigators and prosecutors regarding the utility of financial investigations. When the police arrest a drug dealer or a robbery suspect, the prosecutor often must focus on obtaining necessary identifications and statements from witnesses, drafting the initial accusatory instrument, preparing a bail argument, ordering and obtaining in timely fashion scientific tests (e.g. fingerprints), and preparing evidence to support formal charges if challenged in preliminary proceedings. Often, all this happens in a short time-frame, and for the typical prosecutor it may be one of many cases he or she is handling at the same time. The same can be said for law enforcement agency's investigators. Any investigative focus usually will be on obtaining/strengthening evidence for trial on the substantive crime (even if that evidence consists of property or financial records), not on expanding the investigation or conducting a separate or parallel investigation into obtaining evidence of money laundering offences or identifying assets for confiscation or restitution. This role could be performed by specialised financial investigation units (described below). However, all public prosecutors and investigators need to understand that effective criminal enforcement as well as justice dictates that, at a minimum, an effort be made to identify assets which could be confiscated.

Parallel investigation

155. Financial investigation should be part of an overall investigative strategy in which asset freezing or seizing is an essential part of all criminal investigations and should be used early in the investigation. Use of financial investigations is most effective in a combination with investigating the ML offence and other predicate crimes and, at the same time, pursuing confiscation objectives. A 'parallel investigation' refers to conducting a financial investigation alongside a predicate offence investigation. 'Following the money' is helpful to not only investigate the ML offence, but also the predicate offence, and is crucial in identifying the proceeds of crime. Financial investigation can therefore be used as a format to conduct the investigation on the proceeds and instrumentalities of crime and the investigation on the predicate offence simultaneously. Investigators may also wish to pursue the ML offence during the parallel investigation.

Mainstream and specialised units

156. Financial investigations should be a part of all law enforcement inquiries into proceeds-generating crimes. In such a way, for instance, it would be possible to freeze assets at an early stage in the investigation, which is critical to ensuring such assets are later available for eventual confiscation. Therefore, mainstreaming financial investigation throughout the law enforcement apparatus is needed. In addition, specialised units are needed within different law enforcement authorities where expert knowledge and expertise is accumulated. These specialised units should have expertise in training and education programmes concerning financial investigation as well as good confiscation practises.

157. In addition, the FATF Best Practice Paper on Confiscation has identified several best practices which point to the establishment of a competent authority at the national level specialised in asset recovery. The BPP on Confiscation states that the following best practices for jurisdictions help to minimise structural impediments to effective asset tracking and financial investigation:

158. Ensure that foreign counterparts can easily identify appropriate points of contact:
- At the domestic level, implement mechanisms to co-ordinate asset tracing and financial investigations with a view to ensuring that such efforts are not impeded by regionalised or fragmented systems, or competing local priorities.
 - Consider establishing specialised units or dedicated personnel with training in specialised financial investigation techniques. Such personnel should be adequately resourced and trained

Training

159. Training and education programmes should be standardised within the law enforcement authorities. Comparable standards of training and accreditation of financial investigators could be developed. These standards would enhance the level of expertise within the law enforcement authorities. Further, these standards would be helpful in creating operational networks between different units. Cooperation would be easier to achieve when all parties have the same basic level of expertise.

Investigative techniques

160. Within the FATF framework there should be a list of ("special") investigative techniques related to financial investigations. This list could be set out as minimum standard countries need in order to be able to use financial investigations effectively. Techniques should include the use of financial information to identify and corroborate criminal activity where the subject has generated money to finance and expand illegal activities and accumulate wealth. Techniques should be similar to those used by financial auditors and include the analysis of financial statements, books, and investigators should develop the ability to interview witnesses on the meaning of records and financial transactions. The analysis of bank records may provide leads on sources of funds, expenditures, hidden assets and personal contacts. Techniques should include indirect methods of proving income such as net worth analysis and the expenditures method. Other traditional investigative techniques such as surveillance, informants, search warrants, monitoring orders, trash (rubbish) collection, and analysis of telephone records should also be employed when conducting a financial investigation.

Hiring of experts

161. In order to enhance the level of expertise in relation to financial investigations within law enforcement authorities, they may need to hire experts. Some ML or TF cases are so complex and so time-consuming that the often limited investigative law enforcement resources might need to be supplemented by outside experts. Operational authorities should have adequate funding for such experts, should be able to give such experts full access to the same law enforcement data and intelligence that they have access to, to the extent not inconsistent with domestic law. If needed, and to the extent not inconsistent with domestic law, such experts should also be able to produce admissible evidence or testify. It should be possible to hire experts on a temporary basis or on a permanent basis. Exchange of experts should be possible between different law enforcement authorities. There may be litigation risks to using experts as witnesses. For example, if there are no adequate protections within a nation's privilege laws, experts might be subject to cross-examination on what usually is deemed a privileged matter when in the possession of the operational authorities, but that may lose its privilege once disclosed to the outside expert.

Measuring effectiveness

162. One way of looking at measuring effectiveness in relation to financial investigation is whether financial investigation is part of all criminal cases with significant financial gain. Can a country provide information on the use of financial investigation in relation to ML, TF and confiscation of the proceeds and instrumentalities of crime? In measuring effectiveness, it is important to understand that there are often legitimate reasons for not pursuing a criminal prosecution, for example, in favour of a separate or parallel confiscation action. For instance, assume the evidence developed is not strong enough to meet the evidentiary burden of a criminal conviction and to do so would require testimony not available to law enforcement or require the disclosure of the existence of a confidential source which would jeopardize cases against other more important targets. In such cases, the competent operational authorities may decide to proceed with a non-conviction based confiscation in lieu of a criminal prosecution. An appropriate balance must be taken into account for such cases.

Asset recovery

163. According to the BPP on Confiscation, the following are best practices for jurisdictions to facilitate the development of effective arrangements for co-ordinating freezing, seizure and confiscation proceedings.

- a) Ensure that the authorities coordinating such actions have sufficient expertise and resources.
- b) Designate a competent authority at the national level with responsibility for facilitating asset sharing requests, and liaising with local or regional law enforcement agencies.

164. These best practices could be implemented in the FATF standards by complementing additional element 27.5 (a) and adding the following sentence to Recommendation 27 as an essential criterion: Countries should establish a competent authority or coordinated authorities at the national level specialised in asset recovery.

165. It is best practice for jurisdictions to explore ways to recognise the non-conviction based confiscation orders of other jurisdictions, even if they do not have the same such orders. (see ¶ 18 of BPP) When evaluating a request for mutual legal assistance or international co-operation relating to non-conviction based confiscation, jurisdictions are encouraged to look beyond terminology and labels to the substance of the proceedings with a view to substantively evaluating the request. This ensures that such requests are not unreasonably refused due to confusion caused by the use of different terminology. For example, some countries are able to enforce orders for non-conviction based confiscation provided that the confiscation procedure can be likened to a case of criminal character even in the absence of criminal proceedings. In such cases, a request should not be refused on the basis that the requesting country uses the term "*civil forfeiture*", provided that this precondition is met. (see ¶ 19 of BPP)

Building and maintaining knowledge, expertise and awareness

166. It could be considered to facilitate access of investigative authorities to typologies (from FATF and other sources) which are a collection of ML/TF case studies and trends. A number of jurisdictions have indicated that in some cases 'information' has been turned into 'evidence' on the basis of typologies. Typology work can be useful to help with the identification of ML/TF indicators as well as trends. At the same time, it is not always easy for investigators to have quick access to concrete and relevant parts of the often complex typology documents.

167. In addition, the following elements could be considered in the context of building and maintaining knowledge and expertise and awareness raising.

- a) AML/CFT knowledge could be strengthened by requiring FATF/FSRBs members and international institutions to advise on the training programs they conduct in relation to money laundering and proceeds of crime. A summary of content of each course, together with a draft timetable could be listed on the FATF website under the name of the country/institution.
- b) It could be considered to pay greater attention to those law enforcement agencies with financial expertise that may not have a direct role in combating ML/TF within their jurisdiction (one example would be anti-corruption agencies, where applicable). In addition, greater attention and awareness-raising on SRIF and Trade-Based Money Laundering (TB-ML) could be given to the border authorities who may not have law enforcement powers or authorities.
- c) The use of a centralised database for all financial investigators could be considered, to regularly access comprehensive up to date information on relevant legislation, procedure, case-law, news and continuous professional development exercises.

- d) Internships and secondments between agencies in order to stimulate dissemination of knowledge across agencies could be promoted. As well, training amongst AML/CFT authorities could be reinforced through multi-agency training on AML/CFT.
- e) Awareness raising seminars and workshops should continue between operational authorities and the private sector to exchange knowledge and expertise.

ANNEX III. CONFISCATION & MANAGEMENT OF FROZEN/SEIZED PROPERTY

168. This Annex briefly addresses specific parts of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ('the CoE convention')³⁸. The project team has noted the recent FATF Best Practices Paper on Confiscation and does not aim to reopen any of the discussions that have taken place in the context of that important work. Nevertheless, a number of issues have surfaced during the discussions on impediments to operational effectiveness, which in the view of the project team merit specific attention.

169. This annex does not relate directly to the wording of Recommendations 27 and 28, but it still is considered relevant in the context of this project, given the close connection with the legal powers and instruments of the competent authorities. The issues identified here, as summarised in paragraph 175, can therefore be seen as auxiliary output of the operational project, and are forwarded to WGEI for their consideration³⁹.

Mandatory confiscation in serious proceeds generating cases

170. The project team noted that Article 3(3) of the CoE convention permits⁴⁰ parties to provide for mandatory confiscation in respect of offences which are subject to the confiscation regime (particularly serious proceeds generating cases). This reflects the fact that in many jurisdictions judges have discretion to issue confiscation orders, and may only do so once prosecutors make the necessary applications. The question whether or not a more prescriptive approach through the FATF standards would be called for or not, might have some relevance.

Legal arrangements relating to confiscation (Ree.criterion 3.7)

171. In the context of effective implementation of confiscation measures, the project team noted that no work is presently being undertaken to raise the issues in Recommendation 3.7 from additional criteria to essential criteria. The Project Team noted the advances made in CETS 198 with respect to the requirement in Article 3(4) to provide the possibility for the burden of proof to be reversed (or shared) regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences after conviction for those serious offences. While it is possible in the CoE Convention for countries to make declarations in respect of this Article, the Article is in mandatory terms, unlike the current FATF standard. The project team considers that somewhere in preparation for the 4th round of mutual evaluations, this issue could be looked at again in FATF.

Proper management of frozen or seized property prior to confiscation

³⁸ See text of relevant articles in Annex IV.2.

³⁹ The project team notes that some of these issues are already on the agenda of the EGB or have already been discussed. It is not the aim of the project team to reopen those discussions and it is left to the discretion of WGEI how to proceed with these issues.

⁴⁰ It is also noted that this is not a mandatory provision in the Convention.

172. Article 6 of the CoE Convention requires Parties to adopt legislative or other measures as may be necessary to ensure the proper management of frozen or seized property. While Parties remain free to determine the best way of ensuring an adequate management of the assets, the principle is established, and it could be considered to replicate this in the FATF standards at an appropriate point.

International cooperation in relation to civil recovery

173. Article 23(5) provides that Parties shall cooperate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions. Currently the FATF standards provide no global impetus to enforce civil confiscation orders or non-conviction based confiscation orders. The project team noted the advance made in this area in CETS 198, and considers that in the review of the international cooperation Recommendations, the ability to provide international cooperation in relation to civil recovery could be given more weight.

International investigative assistance

174. The introduction of the above measures at a national level should also enable investigative assistance to be carried out in instances of international cooperation. This would likely impact the wording of Recommendation 40.

175. Below is a summary of the issues identified in this annex.

Issues for consideration WGEI (10)

- *mandatory confiscation in serious proceeds generating cases*
- *legal arrangements relating to confiscation (Ree-criterion 3.7)*
- *proper management of frozen or seized property prior to confiscation*
- *international cooperation in relation to civil recovery*
- *investigative assistance which would have to be carried out in instances of international cooperation in relation to civil recovery*

ANNEX IV. REFERENCE TEXTS

4.1.a *Text of Recommendations 27 and 28, Incl. Interpretative note and Assessment Criteria*

Recommendation 27: *Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques. Countries are also encouraged to use other effective mechanisms such as the use of permanent or temporary groups specialised in asset investigation, and co-operative investigations with appropriate competent authorities in other countries.*

Interpretative Note for Recommendation 27: *Countries should consider taking measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering. Without such measures the use of procedures such as controlled deliveries and undercover operations are precluded.*

Assessment Methodology for Rec.27:Essential criteria

27.1 *There should be designated law enforcement authorities that have responsibility for ensuring that ML and FT offences are properly investigated.*

27.2 *Countries should consider taking measures, whether legislative or otherwise, that allow competent authorities investigating ML cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering.*

Additional elements

27.3 *Are measures in place, whether legislative or otherwise, that provide law enforcement or prosecution authorities with an adequate legal basis for the use of a wide range of special investigative techniques when conducting investigations of ML or FT (e.g. controlled delivery of the proceeds of crime or funds intended for use in terrorism, undercover operations, etc)?*

27.4 *Where special investigative techniques are permitted, are such techniques used when conducting investigations of ML, FT, and underlying predicate offences, and to what extent?*

27.5 *In addition to special investigative techniques, are the following effective mechanisms used?*

(a) *Permanent or temporary groups specialised in investigating the proceeds of crime (financial investigators)? An important component of the work of such groups or bodies would be focused on the investigation, seizure, freezing and confiscation of the proceeds of crime.*

(b) *Co-operative investigations with appropriate competent authorities in other countries, including the use of special investigative techniques, provided that adequate safeguards are in place?*

27.6 *Are ML and FT methods, techniques and trends reviewed by law enforcement authorities, the FIU and other competent authorities (as appropriate) on a regular, interagency basis? Are the resulting information, analyses or studies disseminated to law enforcement and FIU staff, as well as staff of other competent authorities?*

Recommendation 28:

When conducting investigations of money laundering and underlying predicate offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

Assessment Methodology for Rec.28:

Essential criteria

- 28.1 Competent authorities responsible for conducting investigations of ML, FT and other underlying predicate offences should have the powers to be able to:
- Compel production of,
 - Search persons or premises for, and
 - Seize and obtain transaction records, identification data obtained through the CDD process, account files and business correspondence, and other records, documents or information, held or maintained by financial institutions and other businesses or persons. Such powers should be exercised through lawful process (for example, subpoenas, summonses, search and seizure warrants, or court orders) and be available for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions e.g. actions to freeze and confiscate the proceeds of crime.
- 28.2 The competent authorities referred to above should have the powers to be able to take witnesses' statements for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions.

4.2.a Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism - Selected articles

Article 3 – Confiscation measures

- 1 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.
- 2 Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention, each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies
 - a. only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, each Party may make a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or
 - b. only to a list of specified offences.
- 3 Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.
- 4 Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of

alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

Article 6 – Management of frozen or seized property

Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.

Article 7 – Investigative powers and techniques

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.
- 2 Without prejudice to paragraph 1, each Party shall adopt such legislative and other measures as may be necessary to enable it to:
 - a determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;
 - b obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;
 - c monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts; and,
 - d ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out.

Parties shall consider extending this provision to accounts held in non-bank financial institutions.
- 3 Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto, such as observation, interception of telecommunications, access to computer systems and order to produce specific documents.

Article 23 – Obligation to confiscate

- 1 A Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:
 - a. enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or
 - b. submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.
- 2 For the purposes of applying paragraph 1.b of this article, any Party shall whenever necessary have competence to institute confiscation proceedings under its own law.

- 3 The provisions of paragraph 1 of this article shall also apply to confiscation consisting in a requirement to pay a sum of money corresponding to the value of proceeds, if property on which the confiscation can be enforced is located in the requested Party. In such cases, when enforcing confiscation pursuant to paragraph 1, the requested Party shall, if payment is not obtained, realise the claim on any property available for that purpose.
- 4 If a request for confiscation concerns a specific item of property, the Parties may agree that the requested Party may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of the property.
- 5 The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.

OPERATIONAL ISSUES: RECOMMENDATIONS 27 & 28

1. Proposal for new wording of Recommendation 27

New Recommendation 27:

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of a national AML/CFT strategy. At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active parallel financial investigation when pursuing money laundering and terrorist financing offences and underlying predicate offences. This should include cases where the underlying predicate offence occurs outside of their jurisdictions. Countries should ensure that competent authorities have responsibility for, without delay, identifying, tracing and initiating freezing and seizing property that is, or may become subject to confiscation or is suspected of being the proceeds of crime. Countries should be able to make use of permanent or temporary multi-disciplinary groups specialised in financial or asset investigations and that co-operative investigations with appropriate competent authorities in other countries are taking place.

Assessment Methodology for Recommendation 27:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 27 as well as Recommendations 3, 26, 30, 31 and 40 (Note to assessors: where there are deficiencies in the essential criteria 1.5, 3.4, 30.1, 30.2, 30.3¹, 30.4, 31.1², 40.4 and 40.5, such deficiencies should also be noted in Rec. 27 and be taken into account in the assessment of the rating for Rec. 27).

Essential criteria

- 27.1 There should be designated law enforcement authorities that have responsibility for ensuring that all types of ML and FT offences are properly and pro-actively pursued and investigated.
- 27.2 There should be a national AML/CFT strategy which guides the designated law enforcement authorities.
- 27.3 At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active parallel simultaneous financial investigation when pursuing the ML and TF offences and underlying predicate offences. This includes cases where predicate offences occurred abroad, consistent with Recommendation 1.
- 27.4 Countries should be able to make use of permanent or temporary multidisciplinary groups specialised in investigating all financial aspects of crime, to include direct and indirect criminal proceeds. An important component of the work of such groups or bodies would be focused on the investigation, freezing, seizure and confiscation of the proceeds of crime.
- 27.5 Competent authorities should be legally permitted to enter into co-operative investigations with appropriate competent authorities in other countries, including the use of investigative techniques, provided that adequate safeguards are in place.
- 27.6 Countries should ensure that Criteria 3.4 (in R.3) is fully met and that law enforcement agencies, the FIU or other competent authorities are specifically designated to, without delay, identify, trace and initiate freezing and seizing of property that is, or may become subject to confiscation or is suspected of being the proceeds of crime.
- 27.7 ML and FT methods, techniques and trends should be reviewed by law enforcement authorities, the FIU and other competent authorities (as appropriate) on a regular, interagency basis. The resulting information, analyses and studies, as well as FATF typologies, should be disseminated to law enforcement and FIU staff, as well as staff of other relevant authorities.

Additional elements

- 27.8 Is there a national committee or alternative arrangement(s) which ensures AML/CFT policy coordination, sharing of typologies and best practices?
- 27.9 Is there a "joint investigation" approach where law enforcement agencies share and join their experiences and knowledge to ensure that all investigative skills, techniques and disciplines are utilised when conducting financial investigations including ML/TF investigations?

¹ Note to assessors: "adequate and relevant training" (as per criterion 30.3) could be considered to include training on how to conduct asset investigations, parallel investigations, forensic accounting and net worth analysis. In addition, such training should be available to all designated authorities per criteria 27.1 and 27.6.

² Note to assessors: designated authorities as per Rec. 27 should have proper protocols in place that allow effective exchange of information with the FIU.

2. Proposal for new wording of Recommendation 28

Recommendation 28:

When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence. Countries should ensure that competent authorities are able to use a wide range of investigative techniques suitable for the investigation of money laundering and terrorist financing. These investigative techniques include at a minimum undercover operations, intercepting communications, accessing computer systems and controlled delivery. In addition, countries should have effective mechanisms in place to identify in a timely manner whether natural or legal persons hold or control accounts, such as central registers of bank accounts or other less centralised systems. They should also have mechanisms to ensure that competent authorities have a lawful process to identify assets without prior notification of the owner. When conducting investigations of money laundering, terrorist financing and underlying predicate offences, competent authorities should be able to ask for all relevant information held by the FIU.

Assessment Methodology for Recommendation 28:

The essential criteria and additional elements listed below should be read in conjunction with the text of Recommendation 28.

Essential criteria

28.1 *Competent authorities responsible for conducting investigations of ML, FT and underlying predicate offences should have the powers to be able to:*

- *Compel production of,*
- *Search persons or premises for, and*
- *Seize and obtain*

transaction records, identification data obtained through the CDD process, account files and business correspondence, and other records, documents or information, held or maintained by financial institutions and other businesses or persons. Such powers should be exercised through lawful process (for example, subpoenas, summonses, search and seizure warrants, or court orders) and be available for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions e.g. actions to freeze and confiscate the proceeds of crime.

28.2 *Competent authorities responsible for conducting investigations of ML, FT and underlying predicate offences should be able to use a wide range of investigative techniques, including undercover operations, intercepting communications and accessing computer systems and controlled delivery. Countries should ensure that measures are in place, whether legislative or otherwise, that enable and regulate the use of these techniques when conducting investigations of ML or FT.*

28.3 *Countries should have effective mechanisms in place to identify in a timely manner whether persons hold or control accounts, such as central registers of bank accounts or other less centralised systems. They should also have mechanisms to ensure that competent authorities have a lawful process to identify assets without prior notification of the owner.*

28.4 *Countries should ensure that designated competent authorities are able to ask for all relevant information held by the FIU.*

28.5 *Competent authorities referred to above should have the powers to be able to take witnesses' statements for use in investigations and prosecutions of ML, FT, and other underlying predicate offences, or in related actions.*

28.6 *Countries should consider taking measures, whether legislative or otherwise, that allow competent authorities investigating ML and FT cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering.*

Additional elements

28.7 *Are measures in place that allow prospective (future) monitoring of accounts by financial institutions for investigative purposes?*

28.8 *Do competent authorities have access to a minimum set of data bases that contain commercial or public data that they can use to assist in their investigations?*

3. Policy proposals

Recommendation 35

Consider including the Council of Europe Convention on Cybercrime (ETS 185) in Recommendation 35

Methodology for Recommendation 30

Consider raising current criterion 30.4 from additional element to essential criterion. This would include a rewording from a question into a requirement:

30.4 Special training or educational programmes should be offered to judges and courts concerning ML and FT offences, and the seizure, freezing and confiscation of property that is the proceeds of crime or is to be used to finance terrorism.

4. Further work for WGTYP

- Develop Guidance on "Financial Investigation" on the basis of the elements set out in Annex II of the draft report [FATF/WGTY(2010)23/REV1].
- Continue to work on the Operational Issues, including R.26.
- Develop an Interpretative Note for R.27 on the designation of law enforcement authorities for money laundering and terrorist financing investigation:

In the proposed text for Recommendation 27 countries will be required to designate law enforcement authorities that will have the responsibility for pursuing ML and TF investigations and for identifying, tracing, initiating the freezing and seizing of property that is, or may become subject to confiscation or is suspected of being the proceeds of crime. Countries should also ensure that when assigning the responsibility to pursue ML and TF investigations that this does not preclude other authorities which may not be primarily responsible for investigating ML and TF offences from doing the same.

The WGTYP suggests that an "Interpretative Note" be developed to provide further clarity to the new obligations contained in Recommendation 27. For instance, the note could make clear that anti-corruption enforcement authorities may investigate ML and TF offences arising from or related to the corruption offences. This would include the authority to identify, trace and initiate the freezing and seizing of property that is, or may become subject to confiscation or is suspected of being the proceeds of those offences.

5. Other issues

5.1 Issue for consideration WGEI/WGTYP – see section 3.4

- Consider doing further work, in close cooperation between WGTYP and WGEI, on the nature, role and use of STRs in AML/CFT regimes, including using STR-related statistics as a basis for measuring effectiveness.

5.2 Issues for consideration WGEI/WGTM - see section 4.4

- Consider incorporating (some of) the questions of paragraph 109 into the assessment framework in order to assess the competent authorities' endeavours to combat the threat of corruption to the effective functioning of their organisations. In addition, further work on this issue, in close cooperation with WGTM, could be considered.

5.3 Issues for consideration WGEI

Section 3.4:

- Consider the issue of consistency between the requirements under the new Rec. 28 and those in Rec. 36 (36.1) and Rec. 40.
- Consider addressing in the context of work on Recommendation 3 the explicit need for swift and early provisional measures in order to increase effectiveness of these measures.

Annex III (issues related to CoE conventions):

- mandatory confiscation in serious proceeds generating cases
- legal arrangements relating to confiscation (Rec. 3.7)
- proper management of frozen or seized property prior to confiscation
- international cooperation in relation to civil recovery
- investigative assistance which would have to be carried out in instances of international cooperation in relation to civil recovery