

# **Best Practices of handling AML/CFT cases in Criminal Courts**

**Training course for Azerbaijani judges  
OSCE Office in Baku, 9-10 December 2013**

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# 1. Law in Books: Vienna Convention 1988

- Money laundering (Art. 3(1)(b))
  - “Each Party shall... establish as criminal offences under its domestic law, when committed *intentionally*...
  - The *conversion or transfer* of property, *knowing* such property is derived from any [drug offence], or from an act of participation in such offence or offences,
  - for the *purpose of concealing or disguising* the illicit origin of the property

# 1. Law in Books: Vienna Convention 1988

- Money laundering (Art. 3(1)(b)) (cont.)
  - ...or [for the purpose] of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
  - The *concealment or disguise* of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from [a drug offence]...”

# 1. Law in Books: Vienna Convention 1988

- Money laundering (Art. 3(1)(b)) (cont.)
  - “Subject to its constitutional principles and the basic concepts of its legal system:
    - The *acquisition, possession* or use of property, knowing at the time of receipt...
    - Participating in, association or *conspiracy* to commit...”

# 1. Law in Books: Vienna Convention 1988

- Evidence of intentionality (Art. 3(3))
  - “Knowledge, intent or purpose required as an element of [a drug offence or money laundering] may be inferred from *objective factual circumstances*.”
- Confiscation (Art. 5)
  - “Each Party shall adopt... measures... to enable... confiscation of a) Proceeds derived from [a drug offence or money laundering], or property the value of which corresponds to that of such proceeds...”

## 2. Law in Books: Palermo Convention 2001

- Money laundering (Art. 6)
  - The two criminal methods (purpose, knowing) and optional methods (usage, conspiracy) defined as in Vienna Convention
  - “To the widest range of predicate offences”
  - “All serious crimes” → *Max imprisonment at least 4 years*
  - In addition *participation in an organized criminal group, corruption and obstruction of justice*

## 2. Law in Books: Palermo Convention 2001

- Money laundering (Art. 6)
  - “Predicate offences... committed both within and *outside the jurisdiction* of the State Party” if principle of *double criminality* is followed
  - “*If required* by fundamental principles of the domestic law”, *not applied to the offender* to predicate offence
  - Knowledge, intent or purpose “from *objective factual circumstances*.”

## 2. Law in Books: Palermo Convention 2001

- Corporate Criminal Liability (Art. 10)
  - “Each State Party... consistent with its legal principles... in *serious crimes for*” *participation in an organized criminal group, money laundering, corruption and obstruction of justice*
  - Criminal, civil *or* administrative
  - No affect on individual responsibility
  - *Effective, proportionate and dissuasive* sanctions, including monetary sanctions



### 3. Law in Books: Terrorist Financing Convention 1999

- “Directly or indirectly,... provides or collects funds
- With the intention or knowledge “that they *should be used or are to be used*, in full or in part, in order to carry out
- “Offence... in one of the treaties listed in the annex;  
or
- Any other act intended to cause death or serious bodily harm..., when the purpose of the act... is to intimidate the population, or to compel a government or an international organization...”

### 3. Law in Books: Terrorist Financing Convention 1999

- “...it shall *not* be *necessary* that the funds were *actually used*”
- Corporate criminal liability (Art. 5)

## 4. Law in Books: Strasbourg Convention 1999

- Money laundering (Art. 6)
  - The two criminal methods (purpose, knowing) and optional methods (usage, conspiracy) defined as in Vienna Convention
  - No matter whether the predicate offence is subject to jurisdiction
  - Offender of the predicate offence may be excluded
  - Knowledge, intent and purpose from objective circumstances
- Obligation to confiscate and execute (Art. 13-14)

## 4. Law in Books: Strasbourg Convention 1999

- Each Party *may* adopt measures (Art. 6(3))
  - The “offender *ought to have assumed*” that the property was proceeds
  - “Acted for the *purpose of making profit*”
  - “Acted for the purpose of *promoting... further criminal activity*”

## 5. Law in Books: Warsaw Convention 2005

- Money laundering (Art. 9)
  - The two criminal methods (purpose, knowing) and optional methods (usage, conspiracy) defined as in Vienna Convention
  - No matter whether the predicate offence is subject to jurisdiction
  - Offender of the predicate offence may be excluded
  - Knowledge, intent and purpose from objective circumstances
- Corporate criminal liability (Art. 10)

## 6. Law in Books: FATF Recommendations 2012

- FATF = Intergovernmental “policymaking body” to set standards and promote effective implementation for
  - legal,
  - regulatory and
  - operational measures
- For combating
  - ML and confiscation,
  - TF and financing of proliferation, and
  - other related threats

## 6. Law in Books: FATF Recommendations 2012

- *Money laundering* (Rec. 3). Countries should:
  - Follow Vienna and Palermo Conventions
  - Apply the crime of money laundering to all serious offences, with a view to including the “widest range of predicate offences”
  - Derive intentionality from factual circumstances
  - Apply corporate criminal liability

## 6. Law in Books: FATF Recommendations 2012

- *Confiscation* (Rec. 4). Countries should
  - Follow Vienna, Palermo and TF Conventions
  - Property laundered; proceeds from ML; instrumentalities used in or intended for use in ML
  - Proceeds from TF, property used in or intended for use in TF
  - Property of corresponding value, if missing
  - Non-conviction based confiscation
  - Burden of proof to the offender of the lawful origin of the property if consistent with the principles of domestic law



## 6. Law in Books: FATF Recommendations 2012

- *Terrorist financing offence* (Rec. 5): Countries should
  - Follow TF Convention
  - Financing of acts, organizations and individuals
  - Even without a link to a specific terrorist act
  - TF offence should be predicate offence to ML offence

## **7. Law in Books: MONEYVAL Progress Report 2011 on Azerbaijan**

- MONEYVAL = Council of Europe Committee of Experts on the Evaluation of AML Measures and the FT
- Azerbaijan is a Member
- Second Progress report submitted to MONEYVAL 14 December 2011
- Update in two years

## 7. Law in Books: MONEYVAL Progress Report 2011 on Azerbaijan

- All crimes approach adopted → Range of designated categories of predicate offences is now complete
- The financial “threshold” in Art. 194 should be removed → “Significant” or “large” amounts of property in ML, 7000 Manats = 900 EUR?
- Conspiracy should cover agreements to basic ML → A combination of Art. 27, 28 (preparation), 29 (attempt) and 34 (criminal organization) is a functional equivalence

## 7. Law in Books: MONEYVAL Progress Report 2011 on Azerbaijan

- Jurisdiction for ML offence when predicate offence abroad → Art. 12 in CC and Art. 2.2. in AML/CFT Law
- Intentional element should be inferred from objective facts and circumstances → Art. 124 CCP gives “necessary tools”
- Only a number of cases investigated, all self laundering → Stand-alone ML cases in serious proceeds-generating cases other than corruption needed

## **7. Law in Books: MONEYVAL Progress Report 2011 on Azerbaijan**

- Absence of judicial finding of guilt in predicate offence should not preclude ML prosecution → Art. 193-1 is an independent crime definition, but is not used as such
- Shortcomings in TF criminalization have been addressed

## **7. Law in Books: MONEYVAL Progress Report 2011 on Azerbaijan**

- Corporate criminal liability needs progress → 7 March 2012 New Chapters CC 15-1 (Special confiscation) and CC 15-2 (Criminal proceedings against legal entities) have been added and are in force since 1 May 2012
- Need for training in order to create firm jurisprudence and prosecution policy

## 8. CC of Azerbaijan: Money laundering

### Article 193-1. Legalization (laundering) of money and other property acquired in a criminal way

193-1.1. Legalization (laundering) of money and other *property* acquired in a criminal way, that is

193-1.1.1. *in order to hide the actual source* of acquisition of money and other property by being aware of the fact they have been acquired in a criminal way *or to help a person* who has committed a crime to evade responsibility, *converting or transferring* such money or property, conducting financial or other *transactions* by using for the same purposes the money or other property acquired in a criminal way;

## 8. CC of Azerbaijan: Money laundering

### Article 193-1. Legalization (laundering) of money and other property acquired in a criminal way

...

193-1.1.2. *concealing or hiding the true nature, source, place, disposal*, displacement of money or other property *by being aware of the fact* they have been acquired in a criminal way, as well as rights to such money or property or who they belong to – shall be punished by a fine in the amount of two to five thousand manats, or imprisonment for the term of two to five years with or without deprivation of the right to hold certain posts or to engage in certain activities for the term of up to three years, with confiscation of property.



## **8. CC of Azerbaijan: Money laundering**

### **Article 193-1. Legalization (laundering) of money and other property acquired in a criminal way**

193-1.2. The same acts if they are committed:

193-1.2.1. by a group of persons who have conspired beforehand;

193-1.2.2. repeatedly;

193-1.2.3. by a person through the use of his official capacity;  
shall be punished by imprisonment for the term of five to eight years with or without deprivation of the right to hold certain posts or to engage in certain activities for the term of up to three years, with confiscation of property.

## **8. CC of Azerbaijan: Money laundering**

### **Article 193-1. Legalization (laundering) of money and other property acquired in a criminal way**

193-1.3. The acts specified in 193-1.1 or 193-1.2 of the present Code if they are committed

193-1.3.1. by an organized group or criminal community (criminal organization);

193-1.3.2. in a large amount –

shall be punished by imprisonment for the term of seven to twelve years with or without deprivation of the right to hold certain posts or to engage in certain activities for the term of up to three years, with confiscation of property.

NOTE: “Large amount” as used in Article 193-1.3.2 of the present Code shall mean the amount of over forty five thousand manats.

## 8. CC of Azerbaijan: Money laundering

**Article 194. Acquisition, possession, use or disposal of money and other property being aware that they have been obtained in a criminal way**

194.1. Without having promised beforehand, *acquisition, possession, or use* or of money and other property *in a significant size* being aware that they have been obtained in a criminal way, or disposal of them without hiding the true source of their acquisition –

shall be punished by a fine in the amount of one to three thousand manats, or restraint of liberty for the term of up to three years, or imprisonment for the term of up to four years with confiscation of property.

## 8. CC of Azerbaijan: Money laundering

**Article 194. Acquisition, possession, use or disposal of money and other property being aware that they have been obtained in a criminal way**

194.2. The acts specified in article 194.1 of the present Code, if they are committed:

194.2.1. by a group of persons who have conspired beforehand or organized group;

194.2.2. by an official through the use of his official capacity;

194.2.3. by a person who has previously been convicted of that crime;

194.2.4. in a large amount-

shall be punished by imprisonment for the term of three to seven years with or without confiscation of property.

# 9. AML/CFT Law of Azerbaijan

## Article 1. Basic definitions

The definitions used in this Law shall have the following meanings:

**1.0.1. *criminally obtained funds or other property*** – funds of every kind, property,... obtained directly or indirectly through the commission of an offence...;

**1.0.2. *legalization of funds or other property, knowing that such funds or other property is the proceeds of crime*** – conversion or transfer of... property, ..., for the purpose of concealing or disguising the illicit origin... or of helping any person who is involved... to evade the legal consequences ...; or the concealment or disguise of the true nature, source, location, disposition, movement...;

# 9. AML/CFT Law of Azerbaijan

## Article 1. Basic definitions

**1.0.3. *transactions with funds or other property*** – transactions aimed at acquisition, exercising, change or termination of civil rights to the funds or other property as a result of transactions with them;

## Article 2. Scope of application of this Law

**2.1.** For the purposes to detect and prevent the acts targeted to the legalization of criminally obtained funds or other property and the financing of terrorism, this Law regulates the relations of the citizens of the Republic of Azerbaijan, foreigners, stateless persons, legal persons carrying out transactions...

# **9. AML/CFT Law of Azerbaijan**

## **Article 2. Scope of application of this Law**

**2.2.** This Law shall apply to the activities related to legalization of the criminally obtained funds or other property and the financing of terrorism outside the jurisdiction of the Republic of Azerbaijan in accordance with the international instruments to which the Republic of Azerbaijan is a party.

# **10. CC of Azerbaijan: Terrorism financing**

## **Article 214-1. Terrorism financing**

Irrespective of the source of acquisition, intentional collection or provision of funds or other property being aware that the funds or other property will be entirely or partially, directly or indirectly used for financing the arrangement, organization or commission of the acts specified in articles 102, 214, 215, 219, 219-1, 277, 278, 279, 280 and 282 of the present Code by a person or a group (community, organization) or supplying a person for the purpose of commission of the above mentioned crimes or a group (community, organization) created for the same purpose – shall be punished by imprisonment for the term of eight to twelve years with confiscation of property.



# 10. CC of Azerbaijan: Terrorism financing

## Article 214-1. Terrorism financing

...

NOTE: 1. That the funds or other property have not been actually used in the commission of a terrorist act or attempted terrorist act or have no relation to a particular terrorist act does not exempt from criminal liability for the act.

2. The person who has committed the act specified in article 214-1 of the present Code shall be released from criminal liability if he/she has assisted with the prevention of a terrorist act by warning authorities in time or in another way and there are not any elements of another crime in his/her act.

# 11. AML/CFT Law of Azerbaijan

## Article 1. Basic definitions

**1.0.4. *financing of terrorism*** – willful provision or collection funds or other property by any means, in full or in part, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used in order to finance the preparation, organization or carrying out by a person or by a group (organization, community) of persons of an act which constitutes a crime within the scope and as defined in the articles 102, 214, 215, 219, 219-1, 277, 278, 279, 280, 282 of the Criminal Code of the Republic of Azerbaijan, or by an individual terrorist or by a terrorist organization; - - -

# 11. AML/CFT Law of Azerbaijan

## Article 1. Basic definitions

**1.0.3. *transactions with funds or other property*** – transactions aimed at acquisition, exercising, change or termination of civil rights to the funds or other property as a result of transactions with them;

## Article 2. Scope of application of this Law

**2.1.** For the purposes to detect and prevent the acts targeted to the legalization of criminally obtained funds or other property and the financing of terrorism, this Law regulates the relations of the citizens of the Republic of Azerbaijan, foreigners, stateless persons, legal persons carrying out transactions...

# **11. AML/CFT Law of Azerbaijan**

## **Article 2. Scope of application of this Law**

**2.2.** This Law shall apply to the activities related to legalization of the criminally obtained funds or other property and the financing of terrorism outside the jurisdiction of the Republic of Azerbaijan in accordance with the international instruments to which the Republic of Azerbaijan is a party.

## **12. Law on Combating Terrorism of Azerbaijan**

**Article 1 Funds or other property** – means assets of every kind, from a legitimate or illegitimate source, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders.

## **13. Autonomous national ML and FT crimes**

- Shift of focus from corruption and drug offences as predicate offences to independent ML crimes
- Applies not only to corruption and drug offences as predicate crimes but also to, e.g., tax crimes, bankruptcy crimes, frauds, embezzlement, extortions, usury, and all types of economic criminality
- Complicity see Art. 28 (preparation), Art. 31 (accomplice) and Art. 34 (criminal organization)

## 13. Autonomous national ML and FT crimes

- Laundering one's own illicit funds
  - Self incriminating effect?
  - Does the protective interest of ML law cover?
  - Ne bis in idem?
- The requirement of predicate offence
  - ML → A “crime” required, but not establishment of guilt, not even the crime in details, not the offender prosecuted
  - FT → Uncompleted and even not started terrorist offences; the funds must not have been used at all

## 13. Autonomous national ML and FT crimes

- Jurisdiction issues
  - If there is not yet a judicial finding of guilt of the predicate offence in Azerbaijan or abroad
  - If the predicate offence is committed abroad by a foreigner
- Definitions
  - “Property” etc.
  - “The purpose of concealing or disguising the true nature...”



# 14. Intentionality

## **CC, Article 25. Crime, accomplished deliberately**

25.1. Crime accomplished deliberately, shall be acts (action or inaction), accomplished with direct or indirect intention admits.

25.2. The crime shall be admitted as committed with direct intention, if the person realized public danger of the acts (action or inaction), expected their publicly dangerous consequences and wished their approach.

25.3. The crime shall be admitted as committed with indirect intention, if the person realized public danger of the acts (action or inaction), expected their socially dangerous consequences, did not wish, but meaningfully supposed these consequences.

# 14. Intentionality

## **CCP: Article 124. Concept and types of evidence**

124.2. The following shall be accepted as evidence in criminal proceedings:

124.2.1. statements by the suspect, the accused, the victim and witnesses;

124.2.2. the expert's opinion;

124.2.3. material evidence;

124.2.4. records of investigative and court procedures;

124.2.5. other documents.

## 14. Intentionality

- Knowledge of predicate crime “inferred from *objective factual circumstances*”
  - Drug offences, bankruptcy offences and corruption → Knowledge of the offender’s unexplained incomes and property and insolvency otherwise
  - Repeated criminality → Knowledge of criminal history
  - All crimes → Unusual or artificial business arrangements
  - In trade transactions e.g. the amount , payment and share of credit of the sales price, the formal buyer and seller are not the ones making the agreement, the right of the seller to buy the object back
  - Usually the motive (payment or fear) decides

## 14. Intentionality

- The *purpose of concealing or disguising* the illicit origin of the property “inferred from *objective factual circumstances*”
  - Simulated transaction = transaction where the form of the legal act does not correspond to the will of either of the parties
  - Straw man acts on behalf of someone else
  - Artificial financial transactions require a total evaluation of the circumstances
  - Ownership without lawful owner’s rights and obligations
  - Who acts as the owner of the property, e.g. real estate?

# 14. Intentionality

- Who carries the responsibilities of the owner of, e.g., a vehicle or apartment?
- Who uses the property as a pledge or mortgage?
- Who pays for the maintenance of the property?
- Is the buyer liable to render accounts to the seller?
- Does the seller have the right to give orders?
- Is the arrangement meant to be temporary?
- Does the buyer get remuneration?
- Is the transaction a normal part of the buyers and sellers business activities?
- Etc.

## 15. Punishments

- “Legal persons... shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (Warsaw Convention, Art. 10(4))
  - Civil sanctions
  - Criminal sanctions
  - Administrative sanctions
  - Monetary corporate fines
  - Others: Dissolution of the corporal entity, prohibition of activities, subsidies or tender procedures, publication of the judgment, etc.

## 16. Confiscation, freezing and seizing of proceeds of crime

- Confiscation of direct and indirect proceeds of ML crime is mandatory according to CC Art. 144-1 and 234 in respect of human and drug trafficking
- The burden of proof can be reversed when
  - Confiscation order is given against someone close to the offender
  - Lawful origin of property in the hands of the convicted person is questioned
  - Presumption of innocence directly affects criminal sanctions and only indirectly other consequences of a crime

## 17. Case law from German Supreme Court

- 2 StR 225/05: Money laundering of ransom money
  - Accomplice and complicity
  - Criminal organization and conspiracy
  - Transactions as separate acts or as a combination of activity?
  - The responsibility of the court to clarify the case
  - Laundering one's own illicit funds



## 17. Case law from German Supreme Court

- 2 StR 146/03: Heroin trafficking and money laundering Turkey – The Netherlands – Germany
  - Accomplice and complicity
  - Criminal organization and conspiracy
  - Objective evidence of the mental element
  - Confiscation to legal persons abroad
  - Burden of proof of confiscation
  - Proving property is the proceeds of a crime
  - Conviction on predicate crime
  - Extraterritorially committed predicate offences

## 17. Case law from German Supreme Court

- 2 StR 513/03: Advocate laundering money in his lawyer's remuneration
  - Interpretation of Criminal Code definitions in conjunction with the Conventions behind them
  - Teleological interpretation
  - Relationship with ECHR Art. 6
  - Freedom of practice of profession
  - The right to defense counsel
  - Trust relationship between the client and the defense

## 17. Case law from German Supreme Court

- 3 StR 552/08: Insurance fraud profits to finance Al Qaeda
  - Surveillance methods of the suspects
  - Nullum crimen sine lege and the determination of terrorist organizations
  - Member, supporter or financer
  - Attempted fraud or completed fraud
  - Uncompleted and not even started terrorist offences

## **18. Concluding remarks on ML**

- The scope of predicate offences
- Proving property is the proceeds of crime
- Inference and evidence of the mental element
- Laundering one's own illicit funds
- Ancillary offences
- Extraterritorially committed predicate offences
- Exceptions to the principle of double criminality
- Liability of natural persons and corporate criminal liability

## 19. Concluding remarks on TF

- The scope of criminalization – significant financing only?
- Problems with uncompleted or not even started terrorist offences
- Definitions of “terrorist organization” and “support”
- Intentionality concerning the nature of the organization
- Corporate criminal liability

**Thank you!**  
**Təşəkkür edirik!**

