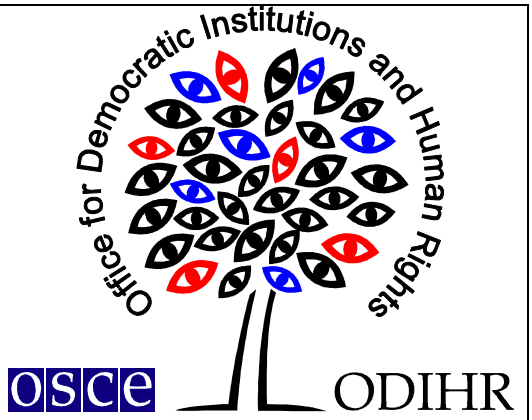
Warsaw, 7 March 2006 Opinion-Nr: TERR – KAZ/050/2006(AC) www.legislationline.org	

Comments
on Draft Legislation on Anti-Money Laundering and Combating the Financing of Terrorism

This report has been prepared on the basis of comments provided by Peter Binning (Corker Binning, London) and is based on an unofficial English translation of the draft provided by the OSCE Centre in Almaty

Aleje Ujazdowskie 19 PL-00-557 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605,

TABLE OF CONTENTS:

1. INTRODUCTION

1. *These comments were drafted upon request of the OSCE Center in Almaty in November 2005.*

2. *An IMF report released in August 2004[1] has identified a number of shortcomings in the laws of the Republic of Kazakhstan on anti-money laundering and combating the financing of terrorism[2]. According to this report, legislation of Kazakhstan as well as, enforcement powers to combat money laundering and the financing of terrorism need strengthening as they do not sufficiently address the exposure to a number of risks identified in the report, although improvements have been initiated. According to this report, the legislative framework "does not yet observe international standards." Furthermore, while the Criminal Code recognized money laundering as a financial crime, "its legal definition does not yet meet recognized international conventions and standards". Also, "the banking secrecy provisions subject anyone disclosing suspicious transactions, even to authorized bodies, to criminal sanctions. A financial intelligence unit (hereafter "FIU") does not yet exist. Although the financing of terrorism has been added to the definition of terrorist activity, which will allow authorities to pursue the financing of terrorism in some circumstances, financing of terrorism is not criminalized per se and therefore this provision does not fully satisfy the*

[1] Republic of Kazakhstan: financial systems stability assessment – Update including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision and Anti-Money laundering and Combating the Financing of Terrorism, IMF country report No.04/268 August 2004.

[2] This report was prepared under the Financial Sector Assessment Program (FSAP), a joint IMF-World Bank initiative to provide member countries with a comprehensive evaluation of their financial systems. The program was launched in 1999 and aims to alert national authorities to likely vulnerabilities in their financial sectors—whether originating from inside the country or from outside sources—and to assist them in the design of measures that would reduce these vulnerabilities. As part of the process, the FSAP provides assessments of observance of various internationally-accepted financial sector standards. All evaluations of financial sector strengths and weaknesses conducted under the Program include an assessment of the jurisdiction's AML/CFT regime. Such assessments, conducted by either the IMF, the World Bank, FATF, or the FSRBs, measure compliance with the FATF 40+9 according to an agreed common methodology, Since June 2002, 89 AML/CFT assessments have been conducted worldwide (for more information, please refer to: http://www.imf.org/ and http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html (last visited 23 February 2006).

requirements on combating the financing of terrorism or on offering international cooperation in financing of terrorism cases."[3]

3. *The proposed legislation examined in this Opinion purports to set the legal framework and principles for counteracting legalization of proceeds obtained by an illicit way and financing of terrorism as well as to determine the rights and obligations of financial monitoring entities, the authorized body and other governmental bodies of the Republic of Kazakhstan in this field*[4].

2. SCOPE OF REVIEW

4. This Opinion provides an analysis of the proposed legislation on anti-money laundering (hereinafter "AML") and combating of the financing of terrorism (hereinafter "CFT") along with recommendations for improving its compliance with the relevant international standards. This Opinion is not intended as a full and comprehensive review, but offers a commentary on the proposed legislation in the light of international standards relating to AML and CFT as set out in the Forty Recommendations of the Financial Action Taskforce (hereinafter "FATF"), its 9 Special Recommendations relating to CFT and other international instruments.

5. The proposed legislation is also considered from the perspective of its compliance with specific international human rights standards, particularly those arising out of treaties, conventions and other instruments having binding force upon the Republic of Kazakhstan with an emphasis on norms and standards pertaining to the right to privacy and data protection issues.

6. The draft laws and regulations which are the subject of this Opinion are as follows: -

   (1) the Draft Law of the Republic of Kazakhstan on Counteracting Legalisation (Laundering of Proceeds) Obtained in Illicit Ways and Financing of Terrorism (hereinafter referred to as the "Draft");

[3] *Id. paragraph 50, page 21.*
[4] Preamble of the Draft Law of the Republic of Kazakhstan on Counteracting Legalisation (Laundering of Proceeds) Obtained by Illicit Ways and Financing of Terrorism.

(2) the Draft Regulations on the Committee for Financial Monitoring of the General Prosecutors Office of the Republic of Kazakhstan (hereinafter referred to as the "Draft Regulations");

(3) the Draft Law of the Republic of Kazakhstan on Changes and Amendments to Certain Legal Acts in the Republic of Kazakhstan Pertaining to Counteracting Legalisation (Laundering) of Proceeds Obtained by an Illicit Way and Financing of Terrorism (hereinafter "the Draft Amendments").

7. This opinion also includes comments affecting the Draft Law on Changes and Amendments on Certain Laws of the Republic of Kazakhstan Pertaining to National Security Issues. Whenever the term "Package of Draft Laws" is used in this opinion reference it shall be understood as referring to all four draft laws and regulations.

8. The OSCE ODIHR would like to mention that the comments provided in this Opinion are without prejudice to any further comments or recommendations that the OSCE ODIHR may wish to make on the Package of Draft Laws under consideration or had previously made in respect of related legislation. The fact that no comment is made on a particular provision of the Package of Draft Laws does not imply that the OSCE ODIHR endorses, or does not endorse their compliance with international standards, but merely that it was not possible within the very narrow time frame available to examine the whole text and all possible ramifications thereof, across the entire legal system of the Republic of Kazakhstan. It is therefore possible that not all aspects of the Package of Draft Laws with regard to AML and CFT are covered by this Opinion. Attention is drawn to previous OSCE ODIHR comments made in respect of other legislation, which is closely linked to the issues under consideration in the Package of Draft Laws examined in the present Opinion[5].

[5] OSCE/ODIHR Preliminary Comments on the Draft Law "On Amendments to Some Legislative Acts of the Republic of Kazakhstan on National Security Issues" (18 April 2005); OSCE/ODIHR Comments on the Draft Laws of the Republic of Kazakhstan "On Counteractive Measures Against Extremist Activities" and

9. Furthermore, it must be emphasised that this Opinion is based on the English translations provided to the OSCE which are attached as Annex 1. The original text was not consulted. In addition, it was not possible, within the time available, to consider the Package of Draft Laws in the full context of existing laws of the Republic of Kazakhstan. Where the Package of Draft Laws amends existing legislation it was not possible to review the amendments against the original laws (that is, the full text of the legislation) subject to amendment. The Opinion has been prepared without the benefit of a country visit or interviews with local legislators, law enforcement officials, judges and lawyers. The Opinion is in no sense a substitute for or in any way equivalent to a FATF Assessment or mutual evaluation.

3. EXECUTIVE SUMMARY

10. In recent years, members of the international community have been called upon to take the necessary steps to bring their national systems for combating money laundering and terrorist financing into compliance with a wide range of international instruments. Most of these international instruments emerged recently in response to a higher sophistication of techniques used by criminals to disguise the true ownership and control of illegal proceeds. The purpose of the standards contained in the above-mentioned instruments, particularly the Forty FATF Recommendations and the Nine Special Recommendations, would be undoubtedly defeated if their implementation or interpretation were to serve as a basis for measures placing restrictions on civil liberties. In particular, the right to privacy and the right to liberty and security, would be affected if the level of State interference permissible under international human rights protection systems were to be exceeded.

11. Some of the shortcomings identified in the above mentioned IMF report have been addressed in the Package of Draft Laws. However, the legal framework

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"On Amendments to Several Legislative Acts With Regard to Counteractive Measures Against Extremist Activities" (11 February 2005, Rev. 22.03)

established under the Package of Draft Laws does not contain all elements necessary for ensuring its full compliance with the requirements and minimum standards laid down in international instruments. In particular, the imprecision of the definitions of the criminal offences of money laundering and financing of extremist or terrorist activities raises concerns. Sufficient precision is needed in order to ensure uniform application of the law and to prevent arbitrary interpretation and enforcement. Furthermore, only suspicious transactions should be reported, not any transactions above a specified amount as proposed in the draft legislation; beyond its impracticality, such measure makes it crucial that information disclosed to the FIU is governed by a reliable data protection regime. In the context of Kazakhstan, the choice of having a FIU operating from within the Prosecutor's Office presents disadvantages that outweigh the advantages associated with it. A particular cause of concern is the conjunction of an onerous reporting regime and the extensive powers exercised by the Prosecutor's Office in Kazakhstan.

12. The following comprises a list of recommendations which is intended to serve as guidance for the legislator in bringing the Package of Draft Laws closer to compliance with the relevant international standards:

    a. The definitions of the offences of "money laundering" and of "financing of extremist or terrorist activities" would need to be improved in order to comply with FATF Recommendation 1 and FATF Special Recommendation 2. [14-33]

    b. The definition of "proceeds obtained in an illicit way" in Article 2 of the Draft is recommended to be reconsidered. [34-39]

    c. The system of reporting certain transactions above specified financial limits is recommended to be withdrawn and replaced with a system of reporting only on suspicious transactions above the specified financial limits to ensure compliance with FATF Recommendation 13 in order to make the system more manageable during the initial period of operation.[40-44]

d. It is recommended to consider the need for a data protection regime to ensure confidentiality of information provided to the FIU and imposing additional safeguards for enforcing the duty of confidentiality like a ban for the use of collected information for any other purpose than combating money laundering and terrorist financing [45, 47]

e. Moreover, it is recommended to consider whether the exceptions to secrecy laws are sufficient to enable sharing of information between competent authorities and financial institutions [46-47]

f. It is recommended that the protections of the Draft be reviewed in order to ensure that legal professionals are not required to report their suspicions if the information was obtained in circumstances subject to professional secrecy or legal professional privilege. Such requirements might infringe the delicate lawyer-client relationship and the confidential nature inherent to that relationship. Furthermore, they have the potential to undermine the fundamental right of access to legal counsel, [49-51]

g. It is recommended to reconsider the period of initial suspension for suspicious transactions [55-58]

h. Furthermore, it is recommended that alternative options be considered for the institution within which the Financial Intelligence Unit (FIU) is to be placed. The options considered should take into account all advantages and disadvantages of the different alternatives available. Importantly, whichever option is chosen, the primary goal should be that it ensures the institution and implementation of proper safeguards for the financial reporting mechanism. [59-81]

i. It is recommended that a provision for freezing, seizing and confiscation of proceeds of crime and terrorist financing be inserted in the Draft so as to ensure compliance with FATF Recommendation 3. [90]

j. It is essential that implementation issues of the Package of Draft Laws are considered and sufficient resources are provided to ensure that the new AML/CFT regime is able to be implemented in practice. [91]

4. ANALYSIS AND RECOMMENDATIONS

4.1 The Draft Law of the Republic of Kazakhstan on Countering Legalisation (Laundering) Proceeds Obtained in an Illicit Way and Financing of Terrorism (The Draft)

13. The Draft comprises 13 articles divided into 5 chapters. Chapter 1 deals with general provisions. Chapter 2 concerns preventing of legalisation (laundering) of proceeds obtained in an illicit way and financing of terrorism. Chapter 3 deals with the objectives, functions and powers of the authorised body (hereinafter referred to as, "FIU") and Chapter 4 (marked 5 in the translation) is entitled, Concluding Provisions. The next subsections discuss the issues tackled by these chapters, in detail.

4.1.1 The Offence of Money Laundering

14. **Article 2** of the Draft contains definitions of the basic terms used in the law. It defines money laundering as "*legalization (laundering) of proceeds obtained in an illicit way – legalizing the turnover of money and (or) other property that have been obtained in a knowingly illicit way by financial transactions and other deals, as well as utilizing these funds or other property to carry out business or any other economic activities*." Proceeds obtained in an illicit way are defined as "*money, securities, other property, including titles (hereinafter referred to as "money and other property") obtained through committing a crime or other administrative offence."*

15. Article 193 of the Criminal Code of Kazakhstan sets out the offence of "*legalization of monetary funds or other property obtained illegally*" (that is, money laundering), defining it as "*the commission of financial operations and other transactions with monetary funds or other property obtained illegally, a given guilty party being aware of that fact, as well as the use of indicated funds or other property for the exercise of entrepreneurial or other economic activity*."[6]

16. However, Article 193 of the Criminal Code of Kazakhstan does not comply fully with the applicable international standards as referred to by Recommendation 1 of the FATF 40 Recommendations,[7] according to which "*countries should criminalise money laundering on the basis of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, "the Vienna Convention") and the 2000 United Nations Convention on Transnational Organized Crime (hereinafter, "the Palermo Convention").*"[8]

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[6] Criminal Code, Article 193.

[7] Recommendation 1:Countries should criminalize money laundering on the basis of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches. Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment. Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences. Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically. Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

[8] As may be inferred from its title, the Palermo Convention deals with the fight against organized crime in general and some of the major activities in which transnational organized crime is commonly involved such as money laundering. The Vienna Convention, in turn, was the first source of international standards applicable to the offence of money laundering, as the concern over money laundering initially began with its early connection to illegal trafficking in narcotic drugs and psychotropic substances. It is noteworthy that ill-gotten gains convert into a wide range of illegal activities – among these terrorist financing, corruption, and illegal sales of weapons – and it is therefore key to adopt a combined approach drawing on the available standards and best practices in all these fields.

17. The main concern with the offence of money laundering as set out in Article 193 of the Criminal Code of Kazakhstan is its lack of clarity and detail. Moreover, the provision is phrased in a very general manner, rather than providing for a catalogue of the types of prohibited conduct (cp. the definition above as derived from the Vienna and Palermo Conventions).

18. One of the most important terms to be defined in the field of anti-money laundering is the term "proceeds of a crime". Article 2 (e) of the Palermo Convention defines proceeds of a crime as any property derived from or obtained directly or indirectly through the commission of an offence. Article 6 (2) a-b of the Palermo Convention and FATF Recommendation 1 determines that countries should apply the crime of money laundering to all serious (criminal) offences, with a view to including the widest range of predicate offences. It also states that predicate offences may be described either by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches. Additionally, according to Article 6 (2) c of the Palermo Convention, predicate offences shall include offences committed both within and outside the jurisdiction of the state.

19. Article 193 of the Criminal Code of Kazakhstan uses the term "monetary funds/other property obtained illegally". The term "illegal" may be interpreted in a very wide manner and it lacks the requisite detail to determine the scope of all relevant predicate (criminal) offences. The term may lead to result in not only criminal offences but all violations of any legal act of the Republic of Kazakhstan including, civil and administrative norms. The principle of legality requires that criminal conduct is defined with sufficient precision in law before an offence can be deemed to have been committed in order to prevent arbitrary and abusive interpretation and enforcement. Furthermore, a broad, abstract and vague definition of the offence may be detrimental to a uniform and coherent application of the law. Article 193 of the Criminal Code of Kazakhstan has also been examined by the 2004 IMF report which recommended the amendment of the provision in order to elaborate the definition of money laundering to meet

international standards ensuring that it can be prosecuted both separately and in parallel with all predicate offences and any offence generating illegal proceeds including offences involving trade or smuggling of illegal drugs and weapons[9].

20. Furthermore, in accordance with the Vienna and Palermo Conventions, the scope of the offence of money laundering should cover the following four acts:

i. the conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offence or offences or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii. 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 an offence or offences or from an act of participation in such an offence or offences, and

iii. the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from an offence or offences or from an act of participation in such offence or offences.

iv. the participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating, counselling the commission of any of the foregoing crimes.

21. Article 193 of the Criminal Code of Kazakhstan criminalises only the commission of financial operations and other transactions as well as the use of "illegally obtained property".

[9] Republic of Kazakhstan: financial systems stability assessment – Update including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision and Anti-Money laundering and Combating the Financing of Terrorism, IMF country report No.04/268 August 2004, Page 35.

22. Moreover, FATF Special Recommendation 6 determines that where possible, corporations themselves and not only their employees should be subject to criminal, administrative or civil liability.

23. **It is, therefore, recommended that Article 193 of the Criminal Code of Kazakhstan be amended so as to include all four sets of offences as laid down by Article 6 (1) a-b of the Palermo Convention and the liability of corporations according to FATF Special Recommendation 6.**

24. The definition of money laundering as a criminal offence in the Criminal Code of Kazakhstan and the definition in the Draft should be consistent to ensure a uniform application of the legislation in this area.

4.1.2 The Offence of Extremist and Terrorist Financing

25. Article 1(1) of the Draft Law on Changes and Amendments to certain laws of the Republic of Kazakhstan Pertaining to National Security Issues provides for a new Article 233-3 of the Criminal Code which creates an offence of financing of extremist or terrorist activities.

4.1.2.1 The Offence of Terrorist Financing

26. According to the proposed new Article 233-3 of the Criminal Code of Kazakhstan, the financing of terrorist activities would be punished by imprisonment for a period of up to five years; a similar act "performed repeatedly" shall be punished by imprisonment from three to eight years.

27. FATF Special Recommendation 2 requires the criminalisation of financing of terrorism, terrorist acts and terrorist organisations and the designation of these offences as money laundering predicate offences. This Special Recommendation (hereinafter, "SR") was developed with the objective of ensuring that States have the legal possibility to prosecute and apply criminal sanctions to persons that finance terrorism. The obligation to include terrorist financing offences as predicate offences for money laundering reflects the close connection between

international terrorism and, *inter alia,* money laundering. According to FATF Special Recommendation 1, the basis for criminalising terrorist financing is the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism (hereinafter "Convention on Terrorist Financing") which was ratified by the Republic of Kazakhstan on 24 February 2003. The offence of financing of terrorism should be criminalised consistent with Article 2 of the Convention on Terrorist Financing. According to this provision, the term "terrorist act" encompasses the so-called "treaty offences" and the so-called "generic offences". The treaty offences are those included in nine international treaties listed in the Annex to the Convention on Terrorist Financing[10]. The generic offence is defined by Article 2 (1) b of the Convention itself as "any … act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing an act".

28. The new Article 233-3 of the Criminal Code of Kazakhstan does not contain a definition of the term "terrorist act". Article 233 of the Criminal Code of Kazakhstan criminalises terrorism on the basis of a general description of the offence. However, it is not clear whether the term "terrorist act" in the new Article 233-3 (1) of the Criminal Code of Kazakhstan is to be interpreted only as acts criminalised under Article 233 of the Criminal Code of Kazakhstan or whether it has a broader meaning and includes other offences as well. There is no reference to the so-called treaty offences under Article 2 of the Convention on

[10] The treaty offences include the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages, the Convention on the Physical Protection of Nuclear Material, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the Protocol for the Suppression of Unlawful Acts against the Safety fo Fixed Platforms located on the Continental Shelf and the International Convention for the Suppression of Terrorist Bombings. Kazakhstan is a state party to all these treaties with the exception of the Convention on the Physical Protection of Nuclear Material.

Terrorist Financing. Moreover, the definition of the term "similar acts" in the new Article 233-3 (2) of the Criminal Code of Kazakhstan is too broad and too vague, thus, raises concerns with regard to the principle of legality. All these observations converge on the conclusion that Article 233-3 of the Criminal Code of Kazakhstan does not appear to satisfy the essential criteria for compliance with FATF Special Recommendation 2.

29. It is noteworthy that Article 2 (3) of the Convention on Terrorist Financing states that act may constitute an offence under the Convention, even if the funds are not actually used to commit one of the defined offences. The offence of terrorist financing should also apply regardless of whether the person alleged to have committed the offence is in the same country or a different country from the one in which the terrorist/terrorist organisation is located or where the terrorist act occurred or was intended to occur[11]. This standard is not reflected in the proposed new Article 233 or elsewhere in the Package of Draft Laws .

30. Similarly, there is no reference to whether the intentional element of the terrorist financing offence may be inferred from objective factual circumstances as recommended by FATF Special Recommendation 2.

31. Article 5 of the Convention on Terrorist Financing as well as Recommendation 2 of the 40 FATF Recommendations set the requirement for States parties to take the necessary measures to enable legal entities located in their territory or organized under their laws to be held liable when a person responsible for the management or control of the entity has committed an offence set forth in the Convention on Terrorist Financing, when he or she was acting in the managerial or controlling capacity. Such liability can be criminal, civil or administrative. These requirements are not reflected in the legislation proposed and are thus recommended to be considered.

32. **It is recommended to amend Art.1 (1) of the Draft Law on Changes and Amendments to certain laws of the Republic of Kazakhstan Pertaining to**

[11] Interpretative Note to Special Recommendation II: Criminalising the financing of terrorism and associated money laundering, paragraphs 9 and 10.

National Security Issues to ensure compliance with Special Recommendation 2 and Recommendation 2 of the 40 FATF Recommendations.

4.1.2.2 The Offence of Extremist Financing

33. The term "extremist" poses difficulties that have been described in detail in previous OSCE ODIHR comments on the draft law against extremism, which was eventually signed into law by the President of Kazakhstan on 19 February 2005[12]. A key argument against the use of this term in a legal document[13] is that the behaviour, beliefs or activities that may fall within the definition of "extremism" can not be objectively identified. The term "extremism" may only be defined by including a wide range of purposes for the listed activities and insufficiently accurate descriptions of the categories of conduct associated with such activities. The principle of legality requires that criminal conduct be defined in law before an offence can be committed, and with sufficient precision so as to ensure uniform application of the law and prevent arbitrary interpretation and enforcement. All the elements of the offence should thus be identified and defined as precisely as possible in order to avoid misinterpretation and arbitrariness in enforcement. The term "extremism" can not be defined as precisely as required to secure legal certainty and foreseeability in the application of the law. **Therefore, it is recommended that the term "extremist" be removed from Article 1(1) of the Draft Law on Changes and Amendments to certain laws of the Republic of Kazakhstan Pertaining to National Security Issues.**

[12] OSCE/ODIHR Comments on the Draft Laws of the Republic of Kazakhstan "On Counteractive Measures Against Extremist Activities" and "On Amendments to Several Legislative Acts With Regard to Counteractive Measures Against Extremist Activities". The recommendations contained in those comments were not taken into consideration.

[13] The term "extremism" is used in other than legal documents, which is not objectionable *per se* as long it is not inferred from such documents that the term has legal implications.

4.1.3 The Definition of "Legalisation of Proceeds Obtained in an Illicit Way"

34. Article 2 of the Draft contains the definitions of the basic terms used in the law. It provides that the basic term "proceeds obtained in an illicit way" means "money, securities, other property, including titles (hereinafter referred to as "money and other property") obtained through committing a crime or other administrative offence".

35. This definition appears to be sufficiently wide to encompass property derived from crimes committed in Republic of Kazakhstan through violation of its laws. The reference to "or other administrative offence" appears to include property which might be derived from a wide range of conduct which may not necessarily be criminal. **Further consideration ought to be given to this definition to ensure that it does not cover property derived from conduct which is not intended to be the subject of AML/CFT crimes.**

36. Whilst the definition referred to above, is in that sense potentially too wide because it includes the proceeds of conduct which may not be criminal, it is too narrow to include property derived from criminal conduct that takes place outside the Republic of Kazakhstan. **The legislators ought to consider whether or not to widen the definition of proceeds to include the proceeds of criminal conduct outside the Republic of Kazakhstan so that it is possible to prosecute criminals who choose to launder the proceeds of overseas crimes in the Republic of Kazakhstan. This would ensure that the law is compliant with FATF Recommendation 2 and Article 6 of the Palermo Convention.** Article 193 of the Criminal Code of the Republic of Kazakhstan read together with the Draft does not appear to satisfy these standards.

37. Article 2 of the Draft defines "legalisation (laundering) of proceeds obtained in an illicit way as "legalising the turnover of money and (or) other property that have been obtained by a knowingly illicit way by financial transactions and other deals, as well as utilising these funds or other property to carry out business or any other economic activities." The definition provides that money laundering can only be committed if a person engages in relevant conduct "knowingly". This

requirement does not appear to comply with FATF Recommendation 2 and Article 6 of the Palermo Convention which state that the intentional element of the crime of money laundering should be permitted to be inferred from objective factual circumstances.

38. Furthermore, it is not entirely clear from the Draft Law whether or not intangible assets would be covered under the wide category of "property."[14]

39. In addition, the Draft Law is silent on whether or not prohibited conduct with regard to **indirectly** obtained illicit proceeds (or otherwise traceable to illicit proceeds, even if registered in other's name so long as the owner is not an a *bona fide* purchaser for value) would likewise fall within the scope of the crime of money laundering.

4.1.4 Transactions/Other Property Subject to Financial Monitoring

40. Article 3 of the Draft provides a list of financial monitoring entities, being those entities which are required by Article 5 of the Draft, to keep records of particular transactions. The list of entities subject to financial monitoring generally appears to comply with FATF standards in that it includes financial institutions and designated non financial businesses and professions. However, contrary to FATF Recommendation 12, it does not include real estate agents[15].

41. Article 5 (1) of the Draft appears to require financial monitoring entities not just to keep records of transactions, but also to submit those records to the FIU no later than one day following the transaction in question. FATF Recommendation 13 provides that a financial institution should be required to report promptly where it *"suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity or are related to terrorist financing"* (emphasis added). Article 5(1) does not appear to include a requirement for the financial

[14] Although it may be implied from a vague reference to "titles" in Article 2 (which defines "proceeds obtained in an illicit way" as "money, securities, other property, including titles (hereinafter referred to as "money and other property") obtained through committing a crime or other administrative offence") that at least some intangible assets may be covered.
[15] See FATF Recommendation 12.

monitoring entity to consider individual transactions to be suspicious before a report has to be made.

42. The reporting of suspicious transactions became an international standard in 1996. Before that time, States with money laundering prevention systems relied on the analysis of large transactions to detect criminal activity. In some jurisdictions, large action reports are still used as an additional source of data that can yield intelligence or as a means of reconstructing "the money trail" when suspicious activity is detected and criminal investigations are undertaken. FATF Recommendation 19 states that States should consider the feasibility and utility of a system where banks, financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount to a national central agency with a computerised data base, available to competent authorities for use in countering money laundering and terrorist financing cases, subject to strict safeguards to ensure proper use of information. Many States have implemented such a system, for example, the United States of America, Canada, Australia, etc. However, it should be noted that in such systems a large number of reports is produced which requires sophisticated computer equipment in order to be administered effectively. For instance, in the United States of America 12 million reports were produced in the year 2002. Furthermore, it should be noted that in such systems the laws also provide for exemptions for certain financial institutions, governmental agencies and businesses that handle large amounts of cash in the usual course of their work.

43. The purpose of a record keeping regime within a financial monitoring system which includes a requirement to report suspicious transactions to an FIU is to ensure that the FIU is provided with information about transactions which give rise to suspicion. If every transaction above the designated threshold[16] for a particular type of transaction has to be reported, the operation of the new FIU is likely to require very significant resources in order to function properly.

[16] See FATF Recommendation 5 and 12 and Interpretive Notes.

Otherwise, the obligations of financial monitoring entities may become overwhelming and the system will be quickly overloaded.

44. The proposed new reporting regime may be too onerous for a country seeking to establish a financial monitoring system for the first time. It also goes beyond what is required to comply with FATF Recommendation 12. Greater benefits would be obtained by concentrating initially on ensuring that financial monitoring entities establish sound systems for reporting *suspicious* transactions[17] rather than reporting every transaction of a particular kind over a certain value. For example, article 5 requires a financial monitoring entity, such as a bank, to report the receipt or granting of assets under financial leasing agreements exceeds the equivalent of $30,000. This would mean that every such transaction, whether suspicious or not, would have to be reported to the FIU. Unless the systems, training and resources to be applied to this new system are adequate to support it, there is a real danger that it will fail to achieve its objectives. **It is therefore recommended not to be brought into force in its current form. Article 4 of the Draft is proposed to be amended to ensure that only suspicious transactions require reporting in compliance with FATF Recommendation 13. The Draft should, however, still provide for financial institutions to keep records of transactions.**

45. There are serious concerns arising from the obligation to report large numbers of transactions in the absence of suspicion. Such transactions are normally subject to banking or commercial confidentiality. The Draft does not provide any measures to ensure that information disclosed to the FIU is governed by a reliable data protection regime. No provision is made for controls over what use can be made of information disclosed. **Without prejudice to specific legislation that**

[17] Generally, suspicion is a conclusion to which a reporting institution arrives after consideration of all relevant factors. It is important to provide a definition of suspicion in the clearest terms possible since complex and expensive systems have to be put in place to implement the reporting obligation. The FATF Recommendations give each country the discretion to decide on the exact nature of the suspicion necessary to trigger the reporting mechanism. Recommendation 13 of the FATF Recommendations only refers to a financial institution that either "suspects" or "has reasonable grounds to suspect" that funds are related to criminal activity. Countries have adopted different approaches with regard to the use of terms and definitions serving as the basis for triggering the reporting obligation, for more detailed information see IMF/World Bank, Financial Intelligence Units: An Overview, p.43-46.

may be applicable to these matters and would subject such transactions to an appropriate system of safeguards for enforcing the duty of confidentiality, it may be advisable to consider imposing an additional safeguard within the scope of the AML/CFT legislation in the form of a ban on the use of the collected information for any purpose other than combating money laundering and terrorist financing.

4.1.5 Financial Institutions Secrecy Laws

46. FATF Recommendation 4 provides as an essential criterion that countries should ensure that financial institutions secrecy laws do not inhibit implementation of the FATF recommendations. This may be of particular concern with regard to the ability of competent authorities to access information they require to properly perform their functions in combating ML or FT, and the sharing of information between competent authorities, either domestically or internationally as well as the sharing of information between financial institutions where this is required by other FATF Recommendations.[18]

47. The Draft does provide for exceptions to financial institution secrecy laws to enable appropriate reports to be made to the FIU. It is not clear whether or not the exceptions to secrecy laws are sufficient to enable the sharing of information between competent authorities internationally and the sharing of information between financial institutions. **This aspect of the Draft ought to be reviewed in conjunction with the need for a data protection regime to ensure that information is not disclosed for improper purposes or to unauthorised people. The Draft needs to balance the important work of financial intelligence gathering and law enforcement with the protection of individual rights.**

48. The Package of Draft Laws does go some way towards providing a framework for compliance with FATF recommendations 5 – 12. However, as noted above, the

[18] FATF Methodology recommendation 4, page 11.

requirement for the reporting of all transactions of specified kinds above certain financial limits is not necessary and is likely to cause a significant overload for a new system of reporting of financial transactions.

4.1.6 Obligations of Financial Monitoring Entities

49. Article3 (8) of the Draft provides that persons providing certain legal services in relation to property should be financial monitoring entities. Although the inclusion of such legal services is in line with FATF Recommendations, there is no reference to the protection of information subject to legal professional privilege. FATF Recommendation 16 provides for qualifications to the financial reporting requirements in FATF Recommendation 13 – 15 and 21. These qualifications refer to lawyers, notaries, other independent legal professionals and accountants; dealers in precious metals and precious stones and trust and company service providers. The recommendation provides that legal professional privilege or professional secrecy ought normally be preserved so that relevant legal professionals are not required to report suspicions to the FIU.

50. According to FATF Recommendation 12 (d) and 16 (a), lawyers, notaries and other independent legal professionals and accountants are required to report suspicious transactions only when they engage in a financial transaction in relation to "particularly vulnerable lines of businesses" such as purchase and sale of real estate, managing of clients' funds, securities or other assets, management of bank, savings or securities accounts, organisation of contributions for the creation, operation and management of companies and creation, operation or management of legal persons or arrangements and purchase and sale of business entities.

51. Under the Draft, lawyers will be under an obligation to report details of all transactions falling within the categories referred to in Article 4 even if there is

nothing suspicious about the transaction. For example, in accordance with Article 4(1) and (17), lawyers will have to report *all* deals valued at over USD 30,000 (regardless of whether there are any grounds for suspicion) relating to the delivery of services including contracting, shipping operations, freight forwarding, commission and asset management. The Package of Draft Laws does not mention the protection of legal professional privilege. Where independent members of professions (which professions are recognised by law) provide legal advice and in performance of their duties they ascertain the legal position of a client, or represent a client in legal proceedings, those legal professionals should not be subject to the obligation to report suspicion of money laundering or terrorist financing. **There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client.** Legal advice should remain subject to the obligation of professional secrecy unless the legal counsellor him or herself takes part in money laundering or terrorist financing, or the legal advice is provided for money laundering or terrorist financing purposes, or the lawyer knows that the client is seeking legal advice for money laundering or terrorist financing purposes. Directly comparable services need to be treated in the same manner.

52. Article 6 of the Draft deals with internal controls carried out by financial monitoring entities. This article requires financial monitoring entities to establish internal AML/CFT measures including the appointment of compliance officers and the maintaining of identification records for a minimum of five years. The requirements generally appear to accord with FATF Recommendation 10.

53. Furthermore, Article 6 contains a prohibition on financial monitoring entities notifying their customers about reports made to the FIU. They are also prevented from notifying related third parties. This appears to accord with FATF Recommendation 14 subject to the comments above regarding the excessive width of the reporting requirements.

54. Article 6 of the Draft also provides that reports submitted to the FIU shall not be considered to be a breach of professional, banking or other commercial confidence and provides for an exception for liability for breach of contract as a result of such disclosures. This appears to accord with FATF Recommendation 14.

55. Article 7 of the Draft deals with the blocking and suspension of transactions in money and (or) other property. Financial monitoring entities are required to block transactions where the required by Article 5 of the Draft, is insufficient. Suspicious transactions must be suspended for a period of up to three business days and the financial monitoring entity must notify the FIU within 24 hours from the moment of suspension of the transaction. In cases of suspected terrorism, the financial monitoring entity must immediately suspend the transaction if one of the parties to it is a terrorist organisation or is charged with terrorist activities. The financial monitoring entity must then notify the FIU within 24 hours of the transaction being suspended.

56. The FIU is required, within three business days of suspension, either to issue a resolution further suspending the transaction for a period of up to 5 calendar days or to send notification that no further suspension is necessary. Such a resolution is to be signed by a senior manager of the FIU.

57. In the event that the financial monitoring entity does not receive a resolution from the FIU to suspend a transaction or a notification that suspension is not necessary, the transaction may be carried out if it appears to be otherwise in conformity with the law. Article 7 of the Draft provides for protection of financial monitoring entities from civil liability as a result of such suspensions.

58. **The period of initial suspension of three business days is very short and will not give the FIU very much time to respond effectively to such reports. A period of five or seven working days is suggested as being more realistic.**

4.1.7 The Establishment of the Committee for Financial Monitoring in the General Prosecutor's Office of the Republic of Kazakhstan

59. The 2004 IMF Report identified the creation of a Financial Intelligence Unit (FIU) in Kazakhstan as a priority so that the details of transactions suspected to result from criminal activity can be forwarded to a body capable of analysing the data and submitting the information about transactions for further investigation and prosecution to pertinent law enforcement authorities[19].

60. Article 2 of the Draft defines the authority for financial monitoring as a government agency designated by the President of the Republic of Kazakhstan that conducts financial monitoring and takes other measures to counteract legalisation (laundering) proceeds obtained in an illicit way and financing of terrorism. This appears to be the provision which constitutes the basis for the establishment of a Financial Intelligence Unit (FIU) in the Republic of Kazakhstan.

61. The constitution, governance and supervision of the FIU has not been placed within an adequate framework where sensitive confidential information about private citizens would be safeguarded and controlled so that it is used only for appropriate law enforcement purposes. The shortcomings of the arrangements for the new FIU are discussed in more detail in the next sections.

4.1.7.1 Mandate of the Authorised Body/FIU

62. Article 8 of the Draft sets out the "objectives" of the authorised body or FIU. One of the primary tasks is the creation of a uniform information system and national database on AML/CFT. As noted above, the proposed new reporting regime will require adequate resources and training to ensure that it meets the objective and purpose of the Draft. Any newly established database will need to be governed by a data protection regime to prevent misuse of the information stored in it. As

[19] Republic of Kazakhstan: financial systems stability assessment – Update including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision and Anti-Money laundering and Combating the Financing of Terrorism, IMF country report No.04/268 August 2004, paragraph 12, page 32.

required by the Egmont Group Statement of Purpose[20], "*all information exchanged by FIUs must be subject to strict controls and safeguards to ensure that the information is used only in an authorised manner, consistent with national provisions on privacy and data protection*"[21]. As they currently stand, the New Draft Laws do not provide for a "gateway" system by which the disclosure and use of information held by the FIU may be controlled. There is also no reference to any national data protection regime that may be applicable to these matters.

63. The FIU is also charged with conducting liaison and information exchange with competent authorities of foreign countries in the field of AML/CFT in accordance with international treaties to which the Republic of Kazakhstan is signatory. This provision may not be sufficient to ensure that the Republic of Kazakhstan can provide the full measure of assistance to foreign countries. Legislators should consider whether there ought to be more detailed provisions in the Package of Draft Laws to govern this form of mutual assistance in order to comply with FATF Recommendations 35-40[22]. In particular, the circumstances in which information can be disclosed to other agencies in Kazakhstan and to overseas authorities ought to be clearly specified in regulations or a code of conduct which should be made publicly available. In this regard, it is worth recalling FATF Recommendation 40, which calls on countries to "*establish controls and safeguards to ensure that information exchanged by competent authorities is used*

[20] Interpretative Note to FATF Recommendation 26 recommends that "*where a country has created an FIU, it should consider applying for membership in the Egmont Group.*"
[21] Para 13 "Confidentiality – Protection of Privacy".
[22] FATF recommendations 35 – 40 deal with international co-operation including mutual legal assistance and extradition and other forms of co-operation. Recommendation 35 deals specifically with implementation of the Vienna and Palermo Conventions and the Convention for the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions such as the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of proceeds from crime and the 2002 Inter-American Convention against terrorism. The Republic of Kazakhstan has signed the Palermo Convention but has not yet ratified it. It acceded to the Vienna Convention in 1997 and in 2003 it ratified the Convention for the Suppression of Financing of Terrorism. The new Draft Laws do not provide for any additional measures to improve mutual legal assistance and extradition although there is some reference to other forms of co-operation permitting officials from the FIU to co-operate with their foreign counterparts.

only in an authorised manner, consistent with their obligations concerning privacy and data protection."

4.1.7.2 Specific Functions of the Authorised Body

64. Article 9 of the Draft describes the functions of the authorised body or FIU. Apart from its responsibilities to collect, process, review and analyse information provided to it, the FIU is also responsible for submitting information to the Prosecutor's Office or other law enforcement authorities in order for them to "make a procedural decision".

65. Article 9 (10) of the Draft requires the FIU to take measures "to bring legal entities and their officials to responsibility" for violations of the provisions stipulated by the laws of the Republic of Kazakhstan in the field of counteracting legalization of proceeds obtained in an illicit way. New offences for this purpose are created under Article 168-3 of the Criminal Code as amended (see below). Article 9 (11) of the Draft appears to delegate to the FIU the responsibility of drafting and taking measures to prevent violations of AML/CFT laws in Kazakhstan. It would be preferable for such measures to be part of the Draft at the time it is brought into force.

4.1.7.3 Rights and Obligations of the Authorised Body/FIU

66. Article 10 of the Draft deals with the rights and obligations of the authorised body which includes the exchange of information, either upon request or independently, with an FIU in a foreign country. The way in which such exchanges of information might take place is unclear and there is no provision governing the use to which such information will be put. The Article also does not tackle the issue of data protection. It is therefore recommended for legislators to ensure that

provision is made for information held by the FIU to be made subject to an effective data protection regime[23].

4.1.7.4 Interaction of the FIU with Similar Agencies of Foreign Countries

67. Article 11 of the Draft deals with interaction of the FIU with government agencies and competent agencies of foreign countries. This article deals initially with the exchange of information between the FIU and other government agencies of Kazakhstan. There is reference to "*procedures established by the government of the Republic of Kazakhstan*" for this purpose however, it is not clear what these procedures are and what safeguards are in place to ensure that this information is not used for improper purposes.

68. Article 11 (2) of the Draft deals with the provision to the FIU of lists of terrorist organisations and entities charged with terrorists activities. However, it is not clear which government agency is responsible for providing this information to the FIU.

69. Article 11 (3) of the Draft makes it clear that government agencies in Kazakhstan may make their own Suspicious Transaction Reports (hereafter "STR") to the FIU and that such reports disclosing the transactions, will not be considered to be a breach of banking, official or commercial confidence.

70. Article 11 (4) of the Draft provides for co-operation of the FIU and other government agencies of Kazakhstan with competent authorities of foreign countries in the field of prevention, identification, suppression and investigation of money laundering and the financing of terrorism as well as confiscation of such proceeds "*in accordance with the laws of international treaties which the Republic of Kazakhstan is a signatory to*." This provision does not provide directly for the restraint or freezing of assets prior to criminal conviction; neither does it provide for any form of seizure or detention procedure for cash or other property to be seized without the requirement of a criminal conviction.

[23] See paragraphs 37 and 52.

71. The activities of the Committee for Financial Monitoring of the General Prosecutors Office of the Republic of Kazakhstan established by the Draft are specified in more detail by the Draft Regulations. The Draft Regulations are to some extent repetitive of the provisions of the Draft itself and the same comments made above apply, as appropriate.

4.1.8 Types of Financial Intelligence Units

72. Generally, as far as the establishment and function of FIUs or the improvement of the effectiveness of existing FIUs are concerned, the authorities of a State have a number of choices. There exists no international document which would specify within which State organ or institution FIUs should be established. FATF Recommendations 13 and 26 require only that FIUs be established and that they should serve "*as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing*". Furthermore, Recommendation 26 stipulates that "*the FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.*"[24].

73. Over the years, four general models of FIUs have evolved in different States. Each of the models depends on the adopted administrative arrangements which may result in: administrative, law-enforcement, judicial or prosecutorial and mixed/hybrid FIUs[25]. Such diversity of models is attributed to the variety of national legal and institutional systems as well as the lack of any internationally accepted model ever since the first FIUs were established in the early nineties. Pragmatism should prevail, however it is crucial to ensure that the performance of the functions of the FIUs are not affected by their internal status, regardless of

[24] See also Article 18 (b) ii of the Convention of the Suppression of the Financing of Terrorism, Article 7 (1) a,b of the UN Convention Against Trans-national Organized Crime and Article 14 (1) a, 58 of the UN Convention Against Corruption.
[25] This classification is not exhaustive and does not preclude the establishment of other classifications.

whether they are administrative, law enforcement or judicial, or a combination of these models.

74. An administrative FIU is characterized by being part of or under the supervision of an administrative organ or agency other than a law-enforcement or judicial authority. Most frequently, administrative FIUs are established within the Ministry of Finance, the central bank or a regulatory agency. The reason behind the existence of an administrative FIU is the establishment of a "buffer" between the financial institutions conducting the financial monitoring and the law-enforcement organs in charge of financial crime investigations and prosecutions. This "buffer" has been developed because very often financial institutions dealing with a problematic transaction do not have absolute certainty that the transaction involves criminal activity, and, therefore, will be reluctant to disclose the transaction directly to a law enforcement organ as the disclosure might lead to an accusation against the financial institution that is disclosed confidential information based on a wrong interpretation of the facts.

75. The law enforcement model of an FIU is established as a part of a law enforcement agency so that it has the appropriate law-enforcement powers without the enormous workload of designing a completely new entity with the respective new legal and administrative framework. The law enforcement FIU would be in a position to react quicker to indications of money laundering and other serious crimes due to its law enforcement powers. Furthermore, it would facilitate the exchange of information with other law enforcement agencies.

76. The judicial or prosecutorial type of FIUs is established either within the judicial branch of the State or under the jurisdiction of the Prosecutor's Office. For example, within the OSCE region, Cyprus and Luxembourg have FIUs that have wider than purely administrative powers and are located in the prosecutor's office.[26] Judicial or prosecutorial FIUs are usually established in countries where banking secrecy laws are the most stringent or rigid, and, therefore, a direct link

[26] IMF, Financial Intelligence Units: An Overview, p.16. It is also noteworthy that the role and powers of the prosecutor's office in Kazakhstan is not congruent to that of the countries listed. This issue is further discussed under 4.1.9 "FIU Powers in the Prosecutor's Office."

with the judicial/prosecutorial authorities is needed to ensure the cooperation of financial institutions. The general advantages of this type of FIU is that the disclosed information is passed by the financial sector directly to an agency authorised to investigate or prosecute and possessing judicial powers such as seizing funds, freezing accounts, conducting interrogations, conducting searches, and detention, all of which may be immediately be used[27]. The general disadvantage of such FIUs is that they tend to be more focused on investigations rather than on preventive measures. Furthermore, the judicial/prosecutorial agencies are not natural interlocutors for financial institutions and may lack the financial expertise required to conduct dialogue based on mutual trust. Moreover, it should be taken into account that reporting institutions may be reluctant to disclose information to the FIU knowing that it could be used in the investigation of a crime. Lastly, access to additional data from the financial institution besides the reported transaction usually requires the launching of a formal investigation.

77. "Hybrid" FIUs combine different elements of the above mentioned types of FIUs with a view to combining advantages of each of the models. In some countries, hybrid FIUs came into existence as a result of the merger of two agencies that had previously been involved in combating money laundering. Examples of countries with such hybrid FIUs are Denmark and Norway[28].

4.1.9 Establishment of an FIU within the Prosecutor's Office

78. According to the Package of Draft Amendments, the FIU in Kazakhstan, namely the Committee for Financial Monitoring, would be located within the General Prosecutor's Office of the Republic of Kazakhstan. As noted above[29], international standards do not provide any guidance on the State organ or institution within which the FIU should be established. This matter is at the discretion of States, depending on the peculiarities of their legal and institutional system. While considering the options available to them, State authorities should

[27] See IMF, Financial Intelligence Units: An Overview, p.9.
[28] IMF, Financial Intelligence Units: An Overview, p.17.
[29] Cf. para 61.

bear in mind the need to ensure that the internal status of the FIU allows it to perform its functions as diligently and efficiently as possible, regardless of which model is chosen. In particular, "*the FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR*."[30]. These criteria as well as others listed under the Egmont Group Statement of Purpose and its Principles for Information Exchange between Financial Intelligence Units for Money Laundering, must be taken into account when States consider which status shall be assigned to the FIU. It is crucial that the FIU possesses the relevant capacity and expertise in financial operations. Moreover, the relationship between the FIU and the financial industry in the domestic context should be considered as well as the question of whether the institution within which the FIU is based, possesses a culture conducive to protecting the confidentiality of financial information and to mitigating potential harm to individual privacy.

79. The choice made in Kazakhstan of having the FIU operating from within the General Prosecutor's Office presents obvious advantages as described above[31]. However, it is noteworthy that in the Republic of Kazakhstan the Prosecutor's Office combines functions and roles carried out in most OSCE countries by separate institutions such as the public prosecutor, investigating magistrates and pre-trial judges of the investigation. In a political and legal system based on the rule of law, this poses serious difficulties when it comes to, for instance, the powers of the Prosecutor's Office to sanction measures which interfere with constitutionally protected rights. Such measures include, detention, bugging, wiretapping, searches of private property and seizure of objects therein, etc.[32]

[30] FATF Recommendation 26.
[31] Para. 65.
[32] The Republic of Kazakhstan has recently ratified without reservation the International Covenant of Civil and Political Rights (ICCPR) according to which a prior judicial decision is required for detention measures while it is not specifically required with regard to such measures as wiretapping, bugging and searches of private property. However, it is noteworthy that the European Court of Human Rights has held that the search for and seizure of business records in private houses and business in the absence of a legal requirement of a judicial warrant is a violation of Article 8 ECHR [Funke v. France (25.2.93); Miahile v. France (25.2.93) Crémieux v. France (25.2.93)]. The Court held that the "officer, authorised by law to carry

80. Therefore, the placement of the FIU within a Prosecutor's Office exercising such extensive powers is a serious challenge in itself and a potential obstacle to efficient functioning of the FIU, as there would not be a credible system of safeguards for the financial reporting mechanism and more particularly the use of the information collected, analysed and processed by the FIU. The current regime includes a far-reaching obligation to report all transactions above a specific amount directly to the FIU. The transaction need not be suspicious and no proper safeguards exist that would ensure that before the information on the transaction is passed on to the prosecuting authorities, any initial suspicion of financial institutions, should it arise, is first confirmed by a separate authority with sufficient expertise in financial operations.

81. **It is, therefore, recommended that alternatives to the option provided in the Package of Draft Laws be explored so as to ensure that the above mentioned safeguards are in place.**

4.2 Draft Law on Changes and Amendments to Certain Legal Acts of the Republic of Kazakhstan Pertaining to Counteracting Legalisation (Laundering) of Proceeds Obtained in an Illicit Way and Financing of Terrorism.

82. The Draft Law on Amendments comprises of two articles. Article 1 of the Draft Law on Amendments introduces changes and amendments into a large number of other laws of Kazakhstan. Article 2 of the Draft Law on Amendments deals with the procedure for bringing the law into force.

83. As noted in the scope of this review at paragraph 2 above, it has not been possible to examine the amendments to the money laundering laws of Kazakhstan within

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out judicial power" must be independent of the executive and the parties and considered his independence and impartiality open to doubt if it appears at the time the decision on detention is taken that the officer may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority. Furthermore, the Court held that the mere fact that the prosecutors act under the applicable laws also as guardians of the public interest, does not confer on them a judicial status.

the context of other relevant legislation. Therefore, only limited comments can be made about the amendments introduced.

84. Article 1(1) Draft Law on Amendments provides that a number of provisions of the Civil Code of Kazakhstan shall be amended to allow for disclosures to be made to the FIU. Article 1(3) of the Draft Law on Amendments provides for offences relating to violations of the new Kazakhstan legislation on money laundering. The offences all attract fines in varying amounts calculated by reference to a monthly index. It has not been possible to ascertain the value of such fines by reference to, for example, the US dollar, but a number of comments can be made. The lowest fine of 140-150 monthly calculation indices is applied to the offence of communicating information submitted to the FIU to clients of financial monitoring entities. A repeated offence within one year of an administrative sanction being imposed will cause the fine to be increased to 380-400 monthly calculation indices for an official and 1800-2000 monthly calculation indices for a legal entity coupled with suspension of its licence for up to six months. The level of the fine and the requirement for a repeat offence before the suspension of a licence is possible, does not appear to be a serious enough penalty for conduct which may amount to tipping off a person who is the subject of an investigation or prejudicing a law enforcement AML/CFT investigation. By way of comparison, the offence of tipping off and the offence of prejudicing an investigation in similar circumstances are punishable in the United Kingdom with a maximum penalty of 5 years imprisonment. [33]

85. Article 571-2 is added to the Code of the Republic of Kazakhstan on administrative offences dated 30 January 2001, which provides that the FIU is entitled to impose penalties for administrative offences committed by financial monitoring entities. It is not clear what right of appeal is available for those against whom such penalties are imposed. The legislators ought to ensure that the system of administrative offences complies with the principles of fairness.

[33] Proceeds of Crime Act 2002 – Sections 333 and 342.

86. Article 1(10) of the Draft Law on Amendments provides for amendments to the Law of the Republic of Kazakhstan dated 20 June 1997, on the pension system in the Republic of Kazakhstan. Provision is made for Article 42 of that law to be amended and there is a reference to a requirement for "systematic (three and more times during 12 calendar months) violation of the requirements stipulated by the Laws and Regulations of the Republic of Kazakhstan pertaining to counteracting legalisation (laundering) of proceeds obtained in an illicit way and financing of terrorism". This requirement of systematic violations is also included in the amendment relating to the law on notaries. The requirement for a systematic violation in excess of three occasions during a 12 month period appears to be unrealistic to implement. There is a danger that the system could quickly become overburdened and that the effective pursuit of AML/CFT will be prejudiced.

87. Article 1(16) of the Draft Law on Amendments provides for amendments to the Law on Combating Terrorism by inserting a new Article 12-1 entitled "Record of Terrorist Organisations and Entities Charged with Terrorist Acts". The new law provides for the keeping of a list of terrorist organisations and entities charged with terrorist activities. This list is to be provided to the FIU.

88. As noted above, it is not clear which government agency is responsible for gathering and maintaining the statistics. Furthermore, it is not clear whether or not the relevant government agency will compile this list from local records in Kazakhstan or whether, it will additionally take into account organisations which are deemed "terrorist organisations" (at an international level) by the United Nations. Legislators ought to ensure that the system for identification of terrorist organisations is clear and that it includes terrorist organisations identified as such by the United Nations. In particular, there is reference to the requirement for a court decision before a terrorist organisation may be recognised as such.

89. The other provisions of Article 1 of the Draft Law on Amendments are difficult to comment upon without revision of the relevant laws to which they refer.

4.3 Additional Comments

90. **It is recommended that a provision for freezing, seizing and confiscation of proceeds of crime and terrorist financing be inserted in the Draft so as to ensure compliance with FATF Recommendation 3.**

91. **It is recommended that implementation issues of the Package of Draft Laws are considered and sufficient resources are provided to ensure the new AML/CFT regime is operational and thus, able to be effectively implemented.**

[end of text]