

## Part IV

# Money Laundering and Terrorism Financing Offences

## Section 36 Money Laundering Offences

(1) The following definitions apply in this Part:

**Offence**, except when the reference is to the specific offence established by subsection (2), (3), (4), (5) or (6), means:

**Drafting note:** FATF Recommendation 3 provides for the criminalisation of money laundering, consistent with the Vienna and Palermo Conventions. In essence, money laundering is defined as the conversion, transfer, concealment, disguising, acquisition, possession or use of proceeds of crime. The term ‘proceeds of crime’ as set out under Section 3 covers any property or funds derived from or obtained as a result of or in connection with an ‘offence’. Funds or assets are ‘proceeds of crime’ and thus fall under the scope of the money laundering provision only if they are proceeds of an ‘offence’. To define the scope of the money laundering offence, drafting authorities must thus choose an approach to defining the term ‘offence’. Variants 1 (a), 2 (a) and 3 (a) below provide a number of alternatives for drafting authorities to consider. Variant 1 covers all offences under domestic law, variant 2 covers only those offence with a particular serious sanction and variant 3 covers only offences specifically listed in a schedule.

Whichever approach is adopted, each country should specify a minimum range of offences within each of the designated categories of offences that appear in the glossary to the FATF 40 Recommendations, namely participation in an organised criminal group and racketeering; terrorism, including terrorism financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder or grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling (including in relation to customs and excise duties and taxes); tax crimes (related to direct taxes and indirect taxes); extortion; forgery; piracy; and insider trading and market manipulation.

The interpretive note to Recommendation 3 provides that ‘countries should apply the crime of money laundering to all serious offences, with a view to

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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 that are punishable by a maximum penalty of more than one year's imprisonment or, in the case of those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months' imprisonment.<sup>7</sup>

Under the FATF standard, it is also required that the money laundering offence can be applied not only to proceeds generated domestically but also to proceeds that were generated abroad but are laundered in domestically. It is thus important the term 'offence' is defined to cover *both* items (a) and (b).

Countries have two options for expanding the money laundering offence to include all foreign-generated proceeds as reflected under items 1(b), 2(b) and 3(b): They can either draft the offence so that it applies to 'any act committed abroad that constitutes an offence under the laws of the foreign state and would have constituted an offence under domestic law, had the act occurred here' (see item (b) option in brackets), or they can adopt a slightly wider approach and apply the money laundering offence to 'any act that occurred abroad but that would have constituted an offence domestically, had the act occurred here' (see item (b) option without the language in brackets). The second approach is broader as it is not relevant whether the foreign act is criminalised abroad, as long as it would have been a criminal offence under domestic law. From a practical perspective the latter approach makes the application of the money laundering offence to foreign conduct easier, as it is no longer required to analyse foreign legal systems to determine whether or not a specific act is criminalised abroad.

### Variant 1

- (a) any offence under the laws of [insert name of State]; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

### Variant 2

- (a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is death, life imprisonment or other deprivation of liberty of more than one year and;

- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

### *Variant 3*

**Drafting note:** If this variant is adopted, a schedule of offences will need to be included. As a minimum, the offences listed in the glossary to the FATF Recommendations should be included in any such schedule.

- (a) offences defined in Schedule [1] to this Act; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

**Drafting note: Types of property and coverage of foreign offences.** Money laundering offences should extend to any type of property regardless of value that directly or indirectly represents criminal proceeds. The definitions section applicable to the money laundering offence sets out a broad definition of property which covers any kind of assets, and a definition of proceeds that covers property or economic advantage obtained directly or indirectly through the commission of an offence.

**Self-laundering.** As the section refers to ‘any person,’ this includes both the person who committed the predicate offence and third-party launderers. Although generally not an issue in states with a common law tradition, there can be a question whether the offence should be extended to the person who also committed the predicate offence. The Vienna and Palermo Conventions contain language providing for an exception to the general principle that both the predicate offender and third parties should be liable for money laundering where fundamental principles of domestic law so require. In practice, however, evaluators in numerous assessment reports have successfully argued that the elements of the money laundering offence go beyond those of the predicate offence and that in the case of self-laundering the principle of double jeopardy would not apply and would thus not preclude the criminalisation of self-laundering. Jurisdictions should thus be very careful in considering whether it is indeed the case that constitutional principles prohibit a statutory provision that would allow for the prosecution of the same person for both money laundering and a predicate offence.

In the case of any doubts on this point, and to ensure that those who launder their own proceeds are covered by the scope of the offence, a more explicit provision may be added along the lines of ‘[t]he offences set forth in Sections

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3(2)–(5) shall also apply to the person who has committed the offence(s) that generated the proceeds of crime.’

**Kinds of offences:** As the UN’s *Legislative Guide to the Palermo Convention* and *Legislative Guide for the Implementation of the United Nations Convention against Corruption* make clear, there are four kinds of conduct that should be criminalised as money laundering:

**1. Conversion or transfer of proceeds of crime.** This includes instances in which financial assets are converted from one form or type to another, for example by using illicitly generated cash to purchase precious metals or real estate or by the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another (see, for example, paragraph 231 in the *Legislative Guide for the Implementation of the Merida Convention*).

Regarding the mental element, the conversion or transfer must be intentional, that is the accused should have knowledge or suspicion at the time of conversion or transfer that the assets are criminal proceeds. Consideration might be given to including a provision that the money laundering act must be committed for one of two stated purposes – concealing or disguising criminal origin or helping any person (whether one’s self or another) to evade criminal liability for the crime that generated the proceeds.

**2. Concealment or disguise of proceeds of crime.** The provision allows for concealment or disguise in respect of almost any activity or property, or information about the same, so this section is broad. The concealment or disguise must be intentional and the accused must have knowledge or suspicion that the property constitutes proceeds of crime at the time of the act. This provision deals with the deception of others. This will include the intentional deception of law enforcement authorities as to the true nature of the property, having been derived from criminal activity. Origin may be the physical origin, or its origin in criminality. For this second offence, it is important to note that, in contrast to the ‘transfer or concealment’ offence, there should be no requirement of proof for the ‘concealment or disguise’ offence that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin, although as a general matter this will be the purpose of the concealing or disguising. The applicable UN Conventions require that this criminalisation is not dependent on proving such purpose.

**3. Acquisition, possession or use of proceeds.** This section imposes liability on recipients who acquire, possess or use property knowing or suspecting that the property has an illicit origin. It contrasts with the earlier provisions that deal with liability for those who make illicit proceeds available as the accused must have knowledge or suspicion at the time of acquisition or receipt that the property was criminal proceeds.

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**4. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling.** There are varying degrees of complicity or participation other than physical commission of the offence: assistance (aiding and abetting, facilitating) and encouragement (counselling). In addition, attempts should be criminalised. This section includes conspiracy, a common law concept, or, as an alternative, an association of persons working together to commit an offence.

**5. Knowledge [*mens rea*].** The variants suggested are, first, the basic one of 'knowing' that the property is the proceeds of crime (which knowledge may be inferred from objective factual circumstances); and, secondly a more flexible standard of 'knowing or suspecting' that property is proceeds of crime.

The second variant, which includes 'suspecting', relaxes the required proof by allowing for the situation that the evidence suggests that the person suspected that the property was proceeds. Some states also use, as an alternative standard in criminal money laundering provision, a further variant that the person had 'reasonable grounds to believe' that the property constituted proceeds.

Drafters could consider adding to 'knowing', in each of the subsections, the term 'or believing.' This would provide for liability where persons believe that what they have taken or converted is proceeds even though it is not. It would apply, for instance, where property was provided by a law enforcement officer as part of an undercover operation or controlled delivery.

A less demanding 'negligence' standard may also be considered. It is also an option in these provisions (Section 36(5)). States adopting this standard may choose to provide for lesser penalties for negligent money laundering.

In choosing a standard, drafters will wish to consider the relevant domestic standards relating to the concept of criminal 'knowledge'. In some states, for instance, the concept might include wilful blindness or recklessness.

**6. Stating elements and penalties for offences.** It will be observed that different methods are used for stating the elements of an offence in the model provisions. The prohibited conduct may be stated first, or it may follow the mental state that must be proved to make that conduct criminal. That stylistic difference may be dictated by the need to explain or offer variants of either the conduct or the intent definition. Similarly, the penalty for prohibited conduct may be included in each subsection establishing the elements of an offence, or provided for in a separate subsection, or it could even be grouped with other offences and penalties in a separate part for prominence and ease of reference. These variations in approach reflect the variety of drafting styles found in different national legislation.

(2) Any person who converts or transfers property:

*Variant 1:* knowing [*or believing*] that it is the proceeds of crime

*Variant 2:* knowing [*believing*] or suspecting that it is the proceeds of crime for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of an offence to evade the legal consequences of his action, commits an offence.

(3) Any person who conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to property

*Variant 1:* knowing [*or believing*] that such property is the proceeds of crime commits an offence.

*Variant 2:* knowing [*or believing*] or suspecting that such property is the proceeds of crime commits an offence.

(4) Any person who acquires, uses or possesses property:

*Variant 1:* knowing at the time of receipt that such property is the proceeds of crime commits an offence.

*Variant 2:* knowing or suspecting at the time of receipt that such property is the proceeds of crime commits an offence.

(5) [*option: Any person who performs any of the acts described in subsections (2), (3) or (4) having reasonable grounds to know or suspect that the property is proceeds of crime, commits an offence.*]

**Drafting note:** Subsection 36(5) provides for liability under a negligence standard for the three kinds of money laundering offences as a result of which a person is liable when he or she ought reasonably to have known or suspected that property constituted proceeds of crime.

(6) An attempt to commit any offence pursuant to Section 36(2)–(5), aiding, abetting, facilitating or counselling the commission of any such offence, or participation, association with or conspiracy to commit such offence shall be punishable in accordance with subsection (12).

(7) Knowledge, suspicion, intent or purpose required as elements of an offence in subsections (2), (3), (4), (5) and (6) may be inferred from objective factual circumstances.

(8) No conviction for the offence that has generated the proceeds shall be necessary to prove that property is directly or indirectly the proceeds of crime. [*option: or that there be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence.*]

**Drafting note:** Knowledge, intent and purpose as states of mind cannot generally be proven directly as a fact and are usually only to be inferred from proven facts. Direct proof is difficult. People engaged in such criminal conduct will necessarily carry out this conduct carefully and secretively, and inferences from primary facts are necessarily an important element of proof.

Inferences are specifically provided for in Article 3.3 of the Vienna Convention, Article 6.2.f of the Palermo Convention; and Article 28 of the United Nations Convention against Corruption. It does not alter the intent standard, and objective factual circumstances referenced can be used, for instance, to establish that a person suspected, or knew, that property was the proceeds of crime under Section 36(4). It may also be used to prove a person *should* have known that property was the proceeds of crime under Section 36(5).

Even if objective factual circumstances establish that a reasonable person should have known that property was proceeds, if the fact finder is convinced that the accused was only *negligent* and did not subjectively realise the illegality of the property, the liability then could be grounded only under the *negligent* money laundering offence set forth in Section 36(5).

The general principles of criminal law in many states recognise the intentional element of any criminal offence as something that may be inferred from objective factual circumstances. However, even in such situations, there may be varying levels of acceptance and willingness by the courts regarding the drawing of inferences from objective factual circumstances. Section 36(7) makes it explicit that, for the money laundering offence, these states of mind may be inferred from objective factual circumstances.

Prosecutors have to establish that the property involved in the allegation of money laundering is the proceeds of a criminal offence. If the required proof is set too high, a money laundering offence will be successfully prosecuted only if the predicate activity was prosecuted and a conviction obtained. As is recognised (see FATF Recommendation 3), this would defeat the purpose of the provision.

In addition, drafters are advised to include the language provided under subsection (8) above. In many jurisdictions, law enforcement authorities, prosecutors and judges still struggle with the notion that money laundering is an autonomous offence that can be investigated and adjudicated independently from and in the absence of an investigation of an associated predicate offence. The suggested language provides specifically that to establish that property is proceeds of crime, the prosecutor does not need to provide evidence of the specific offence that generated the proceeds, or the specific perpetrator of the predicate offence. Rather the prosecutor need only establish that property is the result of some kind of criminal activity. It confirms that a conviction for money

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laundering may be achieved even in cases where no case has been investigated or adjudicated for the predicate offence.

Drafting authorities may also consider adding language to Section 36(8) that proof that the proceeds of crime can be inferred from the objective circumstances surrounding the way in which property was handled. With this, it would be clear that evidence regarding the circumstances in which the property is handled may give rise to a strong inference that such property could only have been derived from crime.

- (9) *For the purposes of this Section, 'proceeds of crime' includes proceeds of an offence committed outside [State] provided that the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within [insert name of State adopting the law], or if the conduct was not an offence in the other state, whilst contravening the law of [State].*

**Drafting note:** See drafting note on the definition of 'offence' above. It is essential that it be very clear that the money laundering offence applies also to proceeds generated abroad (paragraph 5 of the interpretive note to FATF Recommendation 3). This can be done either by adopting item (b) under the definition of the term 'offence', as explained below, or by including the language suggested under subsection (9).

- (10) The offences in Sections 36(2), 36(3) and 36(4) shall be punishable, in the case of natural persons, by imprisonment of up to [insert number] years and a fine of no more than [insert amount], or both, and in the case of legal persons by a fine of no more than [insert amount].
- (11) [*option: and a fine of up to \_ times the amount of the laundered sum.*]
- (12) The offences in Sections 36(5) and 36(6) shall be punishable, in the case of natural persons, by imprisonment of up to [insert number] of years and a fine of up to [insert amount] or both, and in the case of legal persons by a fine of up to [insert amount].

**Drafting note:** States may want to set a lesser penalty for an offence under a negligence standard.

## Section 37 Terrorism Financing Offences

- (1) In this Section, the following definitions apply:

**Funds** means assets of every kind as defined in Section 3.

**Terrorist** means any natural person who:

- (a) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
- (b) participates as an accomplice in terrorist acts;
- (c) organises or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

**Drafting note:** The definition of ‘terrorist’ is the same as that in the glossary to the FATF 40 Recommendations (page 121).

**Terrorist act** means:

- (a) **variant 1:** an act that constitutes an offence within the scope of, and as defined in, any one of the treaties listed in the annex to the 1999 International Convention for the Suppression of the Financing of Terrorism; and  
  
**variant 2:** an act that constitutes an offence within the scope of, and as defined in, any one of the following treaties: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1980), 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 (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988), the International Convention for the Suppression of Terrorist Bombings (1997), the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Protocol Supplementary to the Convention for the Suppression of the Unlawful Seizure of Aircraft; and
- (b) any other act that is intended to cause death or serious bodily injury to a civilian, or to any other person not taking any active part in 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 organisation to do or to abstain from doing any act.

**Drafting note:** Variants 1 and 2 of paragraph (a) are different ways of stating the offences required to be criminalised by Article 2.1(a) of the Terrorism Financing Convention. Whichever variant is used for subsection (a), it is essential that it be followed by paragraph (b), thereby implementing Article 2.1(b) of the Convention. It is also important to note that the intent element under subsection (b) may not apply to the offences under subsection (a), as the latter constitute very specific and serious types of conducts that may but do not in all circumstances require a specific intent.

**Terrorist organisation** means any group that:

- (a) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
- (b) participates as an accomplice in terrorist acts;
- (c) organises or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

**Drafting note:** The definition of ‘terrorist organisation’ is the same as appears in the glossary to the FATF 40 Recommendations (page 121).

**‘Wilfully’.** Article 2.1 of the Terrorism Financing Convention in defining the minimum elements for an offence that states should adopt includes the terms ‘unlawfully and wilfully’ before ‘provides or collects funds.’ This draft provision does not include ‘unlawfully’ as it appears superfluous. The purpose of defining elements of conduct that constitute a criminal offence is to make that conduct unlawful.

The term ‘wilfully’ may also be unnecessary if, as used in a state’s legal system, it means ‘intentionally and knowingly’ providing or collecting the funds. In such circumstances, the inclusion of ‘wilfully’ does not add anything to the *mental element* required for the commission of this offence.

If under the general criminal law principles, the addition of ‘wilfully’ adds to the *mental element* that the conduct is forbidden by law because there is a purpose to disobey or disregard the law, then it would have a more restrictive effect. It would limit liability to circumstances in which the provider or collector of the funds knew or should suspect that the conduct is forbidden by law and intentionally or recklessly acts in disregard of such law. In any event, the Convention provides only a minimum standard, and there is no requirement that this limitation be adopted.

- (2) Any person who by any means, directly or indirectly, [*wilfully*] provides or collects funds, or attempts to do so, with the intention that they should be used or in the knowledge that they are to be used in whole or in part:
- (a) in order to carry out a terrorist act; or
  - (b) by a terrorist; or
  - (c) by a terrorist organisation
- commits an offence.
- (3) An offence under subsection (2) is committed:
- (a) even if a terrorist act referred to in subsection (2) does not occur or is not attempted;
  - (b) even if the funds were not actually used to commit or attempt a terrorist act referred to in subsection (2); and
  - (c) regardless of the State or territory in which the terrorist act is intended to or does occur.
- (4) It shall also be an offence to:
- (a) participate as an accomplice in an offence within the meaning of subsection (2);
  - (b) organise or direct others to commit an offence within the meaning of subsection (2) or;
  - (c) intentionally contribute to the commission of an offence under subsection (2) by a group of persons acting with a common purpose, where the contribution is to further the criminal activity or purpose of the group that includes the commission of an offence under subsection (2) or where the contribution is made knowing that the intention of the group is to commit an offence under subsection (2).
- (5) The offences in subsections (2) and (4) shall be punishable in the case of a natural person by imprisonment of up to [insert number] years and a fine of up to [insert amount], or both, and in the case of a legal person by a fine of up to [insert amount].

**Drafting note:** The criminal offences defined in Section 37 are based on the requirements of the Terrorism Financing Convention and FATF Recommendation 5 and its interpretive note.

The Terrorism Financing Convention requires the criminalisation of the provision and collection of ‘funds’ for the purpose of committing terrorist acts, with ‘funds’ having the same meaning as ‘property’ used in Section 3 in connection with money laundering offences. FATF Recommendation 5 goes further and requires the criminalisation of the same conduct for the purpose of generally

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collecting or providing funds for the purpose of supporting an individual terrorist or a terrorist organisation. This section is drafted not only to implement the Terrorism Financing Convention criminalisation obligation but also to cover the additional criminalisation scope of Recommendation 5 (ante).

Both the FATF standard and the Terrorism Financing Convention also require jurisdictions to provide for the freezing/seizing and confiscation of the instrumentalities and proceeds of such financing offence. This requirement is accomplished by the coverage of the terrorism financing offence under Part V (confiscation orders and preventive measures).

Drafting authorities may also want to provide for the dissolution of a legal entity as a possible penalty.

In the case of a terrorist group, Section 37(1) fully conforms to the interpretive notes by criminalising any provision or collection of funds with the intention or in the knowledge that they are to be used in full or in part by a terrorist organisation.

Section 37, by criminalising the financing of a terrorist organisation as well as of terrorist acts, makes the property of terrorist organisations subject to freezing/seizure and confiscation both as an instrument and as the proceeds of such financing offence, unless the property was provided or collected prior to the effective date of the law. The confiscation and preventive measures provisions found in Parts II and V of the model provisions will apply in the case of these assets since the provisions apply to all offences (as defined).

If both Parts II and V are adopted, this will assist states in meeting the second part of FATF Recommendation 4, which provides that countries should have measures to permit them to seize and confiscate proceeds, instrumentalities and intended instrumentalities for financing terrorism, terrorist acts or terrorist organisations.

**Definition of funds.** The definition of funds is found in Section 37(1). This definition contains all the elements of the definition of funds found in the Terrorism Financing Convention, with the addition of the examples 'currency' and 'deposits and other financial resources' so as to remove any doubt that those items are included, and of language providing that the definition applies wherever the property is located. This definition of funds differs from the definition of 'funds or other assets' found in Section 3, Part II on Preventive Measures, 'Funds or other assets' in Section 3 includes income or value derived from assets but does not provide that the definition applies wherever the property is located. See also definitions in the glossary to the FATF Recommendations.