

**COMMENTS ON BULGARIAN DRAFT
LAW ON MEASURES AGAINST FINANCING OF TERRORISM**

This commentary was prepared by U.S. Treasury Department Legal Advisors, Bernard Bailor and Carol Kelley, and U.S. Department of Justice Resident Legal Advisor, Karen Kramer. It is a product of our own review of the recently released draft Law on Measures Against Financing of Terrorism (the "Draft Law"). Our comments are based on the standards reflected in the UN International Convention for the Suppression of the Financing of Terrorism (1999) (hereinafter "UN Convention"), which was ratified by Bulgaria in January 2002; UN resolutions related to the prevention and suppression of terrorist financing, particularly UN Security Council Resolution 1373 (2001), which was implemented by Council of Ministers Decree 277 in December 2001; and recent recommendations by the Financial Action Task Force ("FATF") for establishing a basic framework for detecting, preventing and suppressing the financing of terrorism. (FATF documents referenced in this commentary are included as an Appendix.)

We support and commend the Bulgarian commitment to combating terrorism and terrorist financing. We offer these comments with the aim of promoting discussion and further improvements of the Draft Law, which we believe are necessary to ensure its effectiveness and compliance with international legal standards.

Measures Defined by the Law. At present, the Draft Law provides for "blocking funds, financial assets and property of natural persons and legal entities" of, as well as "non-granting of funds, financial assets or other property or non-rendering of financial services" to, certain listed persons. *See* Draft Law, Article 3(1).

Consideration should be given to expanding the measures defined by the Draft Law to include (i) freezing, (ii) seizing, and (iii) confiscating the (i) proceeds, (ii) instrumentalities, and (iii) intended instrumentalities used in terrorism, in terrorist acts and by terrorist organizations. This expansion would be consistent with the recommendations on combating terrorist financing adopted by the Financial Action Task Force (FATF). *See* FATF Special Recommendations on Terrorist Financing (Oct. 2001) (hereinafter "FATF SR"); Guidance Notes for the Special Recommendations on Terrorist Financing and the Self-Assessment Questionnaire, 11, 12 (March 2002) (hereinafter "FATF Guidance"); *see also* UN Convention, Article 8; UN Security Council Resolution 1373, 1(c-d). In addition, consideration should be given to including among the measures defined by the law a prohibition more broadly on commercial dealings with listed persons. At present, some commercial dealings may not strictly qualify as granting funds/assets/property or rendering financial services (*e.g.*, a contract for the exchange of personal services).

As clarified by the FATF, "freezing" is an action or order by a competent government or judicial authority to block or restrain specific funds/assets/property to prevent their movement or disposal. Where funds/assets/property are frozen, property rights remain vested in the original owner who also may continue to manage the property. *See* FATF

Guidance, 14. “Seizure” is an action or order by a competent government or judicial authority to control specific funds/assets/property as well as to permit the authority to take over possession, administration or management of the funds/assets/property. *See* FATF Guidance, 15. “Confiscation” (or “forfeiture”) occurs when a competent government or judicial authority issues an order to transfer ownership of specific funds/assets/property to the State. Confiscation is usually premised on a criminal conviction. *See* FATF Guidance, 16.

The Bulgarian Penal Procedure Code provides for confiscation as a penalty upon criminal conviction. Presumably those provisions would apply where a conviction resulted for terrorism or terrorist financing under the proposed Penal Code Article 108a. Nevertheless, it is advised that those confiscation provisions be closely scrutinized at this time to ensure their applicability and effectiveness.

Otherwise, the Draft Law on terrorist financing appears to provide only for “freezing” and with limitations, as discussed throughout this commentary, that are extremely detrimental to effective blocking and restraint to prevent movement and disposal. As a practical matter, absent an established regime in Bulgaria presently to freeze and seize assets, the mechanics for doing so are completely undefined. For example –

- What steps will be taken to ensure that the funds/assets/property to be frozen/seized are properly identified, and what governmental body(ies) will be responsible for that task?
- Will third parties with interests in the funds/assets/property that are frozen/seized have their own rights of appeal?
- What government body will be responsible for control and maintenance of funds/assets/property that is frozen/seized.

In addition to the legal issues described elsewhere in this commentary, these and other technical questions must be identified and promptly addressed to ensure effective implementation of the Draft Law.

Persons/Acts Liable Under Draft Law. The focus of Article 2(1) of the Draft Law on preventing and detecting actions, not only of natural persons, but also “legal entities” directed at the financing of terrorism is commendable. *See* UN Convention, Article 5. Nevertheless, the scope of the law should also clearly include conspiracy to act and aiding or abetting should also be included in the scope of the law. *See* UN Convention, Article 2, 5; *see also infra* discussion regarding Reporting Obligations.

Time Frame for Freezing. The Draft Law provides for particular transactions/deals and funds/assets/property to be frozen, initially for no more than three days, with the possibility of an extension to no more than 20 days upon the request by the prosecutor to the court. These time frames are far too short to gather evidence and investigate an allegation of a link to terrorist activity. For example, under U.S. law, the government has sixty days, and the right to request an additional sixty days, before giving notice of the basis for the seizure. Realistic time frames must be established, which take into

consideration, among other things, time to consult and coordinate with international authorities.

Categories of Listed Persons. At present, Article 5(2) applies the measures of the Draft Law against the following persons:

1. Persons, listed by the UN Security Council as associated with terrorism and sanctioned by force of the UN Resolution, as well as persons identified by competent authorities in compliance with international treaties to which Bulgaria is a party in case such listing is provided.
2. Persons sentenced for terrorism, threats or manifest inducement to commit terrorist activity, within the meaning of the Penal Code.
3. Individuals under preliminary investigation for terrorism, threat or manifest inducement to commit terrorist activity, within the meaning of the Penal Code.

The objective of laws and regulations aimed at terrorist financing is to cutoff the lifeblood of terrorists and their organizations. Quick action is an absolute prerequisite. As presently defined by the Draft Law, the three categories preclude it, however. By the time a person qualifies for any one of those categories, that person will be on notice that terrorist activity is suspected. Consequently, they likely will have transferred or otherwise disposed of their funds/assets/property at issue. A better alternative would be to provide flexibility in listing persons (*see infra* discussion regarding Listed Persons and International Cooperation), while at the same time ensuring that safeguards – such as the right to appeal – exist and are expedient.

In addition, Article 10 of the Draft Law may require further clarification. At present, it seems to suggest that measures against a person whose name is removed from the list will only cease where that person has requested they cease. Not only is it unclear to whom such a request is to be made, the better course may be to have the measures cease effective immediately upon de-listing.

Listed Persons and International Cooperation. Except where there is overlap with the categories in Article 5(2), the Draft Law does not address application of measures where terrorists are identified by foreign states; convictions for terrorism are rendered by foreign states; and/or investigations for terrorism are carried out by a foreign state. The FATF broadly calls on each country to “afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations.” FATF SR V; *see also* UN Convention, Articles 12 and 18, 3; UN Security Council Resolution 1373, 2(f), 3(a-c). “Mutual legal assistance” similarly is interpreted broadly to mean “the power to provide a full range of both non-coercive legal assistance, including the taking of evidence, the production of documents for investigation as evidence, the search and seizure of documents or things relevant to criminal proceedings or to a criminal investigation, *and the ability to enforce a foreign restraint, seizure, forfeiture or confiscation order in a*

criminal matter.” See FATF Guidance, ¶ 24 (emphasis added). Consideration should be given to expanding the categories in Article 5(2) to facilitate international cooperation in this manner.

Appeal Provisions. The Draft Law provides for appeals of the following:

1. ***Inclusion by the Council of Ministers on terrorist list.*** The appeal is to the Supreme Administrative Court and its pendency does not stop the actions of the Council of Ministers. See Draft Law, Article 5(4)
2. ***Refusal by the Minister of Finance to grant authorization for payments or expenditures of blocked fund/assets/property.*** The Appeal is to the Supreme Administrative Court. See Draft Law, Article 6(6).
3. ***Extension by Prosecutor for up to 20 days following the three-day freeze initially ordered Minister of the Interior.*** The appeal is to a court in compliance with the requirements of the Penal Procedure Code.

None of the provisions themselves establish which party bears the burden of proof on appeal and what grounds can be cited as the basis for appeal. Furthermore, it is expected that any such appeals would necessarily implicate intelligence and/or state-secret information, including from a foreign state. The law should clarify the legal significance of such information; the conditions upon which it would or would not be disclosed; and how it would be protected. Finally, consideration should be given to whether appeals under this law should be subject to expedited appeal provisions, similar to what is provided by Article 126a-h of the Civil Procedure Code.

Reporting Obligations. Article 8 of the Draft Law, which establishes a reporting regime for suspicion related to terrorist financing also raises a number of issues.

As an initial matter, the Draft Law parallels aspects of the regime already established by the Law Against Money Laundering (“LMML”). A better approach might be, not to create a separate but parallel regime directed at terrorist financing, but to incorporate the regime to combat terrorist financing into the existing regime to combat money laundering. Such an approach would be more efficient and expedient, in that it would take advantage of a pre-existing arrangements for reporting and analyzing indicators of criminally-related financial transactions. Expected enhancements to the anti-money laundering regime – to include early and more meaningful involvement of Ministry of the Interior representatives in the analyses conducted by the BFI – would make this approach all the more viable. Such an approach also is consistent with the approach advocated by the FATF. For example, the FATF interprets “competent authority,” for purposes of reporting suspicious transactions related to terrorism as “either the jurisdictions financial intelligence until (FIU) or another central authority that has been designated by the jurisdiction for receiving disclosures related to money laundering.” See FATF Guidance, 20. In Bulgaria, the “competent authority” is the BFI. In contrast, the Draft Law establishes the Ministry of the Interior as the centralized receiving entity for such reports.

Article 8, Subpart (1) of the Draft Law obliges “[a]ny person who suspects that a financial deal or transaction is aimed at terrorist financing [to] immediately notify the Minister of the Interior.” Subpart (2) requires the “Director of the Bureau of Financial Intelligence Agency (BFI) [to] notify immediately the Minister of the Interior should a suspicion arise that a financial deal or transaction is aimed at terrorist financing.” Unlike, the LMML, which obligates specific reporting entities, the Draft Law obligates “any person,” which is overly broad. Indeed, the FATF envisions reporting by “financial institutions, or other businesses or entities subjected to anti-money laundering obligations” *See* FATF Guidance, 19 (discussing FATF SR IV); *see also* UN Convention Article 18, 1(b) (focusing on reporting by “financial institutions”). Also, the terms “suspects” and “suspicion” as used in Article 8 should be clarified to include not only objective standards, but the subjective standard of a “reasonable ground to suspect/have a suspicion.” *See* FATF Guidance, 21.

Attention also should be given to alternative remittance schemes known to be used by terrorists, including for example “hawala” banking. Relevant Bulgarian laws should require persons or legal entities providing money/value transmission services, including through informal systems or networks to be (i) licensed and registered; (ii) in compliance with the LMML; and (iii) subject to sanctions for licensing, registration and LMML compliance violations. *See* FATF SR VI; FATF Guidance, 28-33; *see also* UN Convention, Article 18, 2(b). Attention also should be given to regulatory oversight of organizations which claim charitable, social or cultural goals, but which may also be engaged in unlawful activities for the purposes of funding terrorist activities. *See* UN Convention, Preamble. As a general matter, consideration should be given to equipping relevant government representatives with the authority to order reporting when certain types of transactions or transactions by specific individuals or companies are thought to possibly be linked to terrorism, in terrorist acts and by terrorist organizations. Such authority would be useful when the government possesses information about persons or organizations that is insufficient to commence a preliminary investigation, but nevertheless warrants further monitoring.

Lastly, Article 8, Subpart (4) provides that “disclosure of information under Article 8, Sections (1) and (2) shall not lead to liability for infringement of other laws.” This provision should be clarified to reflect that such disclosure must be in good faith and for proper purposes to benefit from such protections. In addition, the question should be addressed of whether related provisions (*e.g.*, bank, tax, commercial, official secrecy) also must be amended concurrently to include this exception.

Administrative-Penal Provisions. As presently written, it is unclear which authority makes the determination that someone has violated the requirements of the Draft Law to take measures to prevent terrorist financing and to report suspicions of terrorist financing. Does Article 12 of the Draft Law vest that authority with the Ministry of Finance? If so, does the establishment of the Ministry of Interior as the centralized receiving entity for reports of suspicions of terrorist financing complicate that function? Does the Bulgarian National Bank or other supervisory authorities have a role? How long does the process

for imposition of sanctions take? Can – and if so, how can – government authorities step in to act where an order to freeze is ignored?

Additional Transitional Provisions. Several provisions of the Draft Law require future actions to give effect to the law, including:

- **Article 2(2)**, requiring that the “Minister of Interior and Minister of Finance shall create the necessary organization to attain the aim of the law.”
- **Article 6(5)**, requiring that the “Council of Ministers shall determine the conditions and procedures for applying the provisions under Article 6, Section (4)” [permitting authorization of payments/expenditures under certain circumstances].
- **Article 8(3)**, requiring that the “Director of the BFI shall draft criteria identifying transactions, deals or persons suspected to relate to terrorist financing, which criteria is subject to approval by the Minister of the Interior.”

It is advised that a provision be included in the Draft Law to provide for a specific time period following the entry into force of the Draft Law that those actions are to be taken.