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## **CONFERENCE OF THE PARTIES**

**Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)**

### **UPDATED FOLLOW UP REPORT OF THE CONFERENCE OF THE PARTIES TO CETS No°198 ON POLAND<sup>1</sup>**

Memorandum prepared  
by the Secretariat

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<sup>1</sup>Adopted by the Conference of the Parties to CETS 198 at its 8<sup>th</sup> meeting, (Strasbourg, 25-26 October 2016)

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## **I. Introduction**

1. Article 48 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (hereinafter: CETS no. 198) establishes a Conference of the Parties with the mandate to, inter alia, monitor the proper implementation of the Convention.
2. The Conference of the Parties adopted the assessment report on Poland at its fifth meeting (Strasbourg, 12-14 June 2013). In application of the Conference of the Parties' Rules of Procedure, the report and subsequent comments made by Poland were made public within four weeks of adoption.
3. At its fourth meeting, held in Strasbourg in June 2012, the Conference of the Parties decided to include in its Rules of Procedure a follow-up mechanism (Rule 19, paragraphs 30-36), based on a questionnaire completed by the assessed Party, assisted by a rapporteur country and a draft analysis prepared by the Secretariat of the Conference of the Parties. As a result, Poland submitted an update of its progress on 4 September 2015. The review is focused on implementation of the recommendations formulated by the Conference of the Parties in the assessment report of Poland.
4. Albania was appointed as Rapporteur Country, being responsible for reviewing the replies to the questionnaire and for raising any questions to assist the Conference of the Parties in assessing whether the information supplied is sufficient to demonstrate satisfactory progress by the Party assessed.
5. The Conference of the Parties (hereinafter: COP), at its 7<sup>th</sup> meeting, examined the draft follow-up report on Poland and decided to adopt the analysis of the Secretariat, as amended in the light of discussions held in the Plenary, and the replies to the Questionnaire submitted by Poland.
6. Given the concerns expressed by several delegations, including the Rapporteur country, Poland was invited to present an updated follow-up report at the next meeting of the COP in 2016, on the basis of a tailor-made questionnaire prepared by the Secretariat.

## **II. Review of implementation of selected articles of CETS no. 198 by Poland and progress made since June 2013**

7. The following review of Poland's implementation of the CETS no.198 has been prepared by the Secretariat pursuant to Rule 19(33) of the Rules of Procedure, based on the information and statistics provided by the Party, the additional information and clarifications received from the Polish authorities and a review of other relevant evaluation reports, including the 2013 MONEYVAL 4<sup>th</sup> round Mutual Evaluation Report on Poland<sup>2</sup>.

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<sup>2</sup> [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL\(2013\)2\\_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL(2013)2_en.pdf)

8. This review analyses the progress made by Poland to meet the deficiencies and to implement the recommendations and/or issues identified for follow-up process by the Conference of the Parties. When assessing the progress made, effectiveness was taken into account to the extent possible for a desk review, which was based on information and statistics provided by the Party. The report also sets out an appraisal of progress in meeting the recommendations and/or issues identified in the adopted report, in order to assist the Conference of the Parties in its analysis and decision-making process.
9. The sections below set out the main findings on issues pertaining to the implementation of selected provisions of CETS no. 198. They reflect the detailed article by article findings covering provisions of the Convention and recommendations for improvement made in the assessment report.

### **1. Laundering offences - Article 9**

10. The Conference of the Parties, in its follow up report, addressed 2 recommendations to Poland regarding the implementation of Article 9 of the Convention.

*Clearly cover all elements provided in Article 9 paragraph 1 of the CETS N° 198, mainly:*

- *Conversion or transfer of property for the purposes of concealing or disguising the proceeds' illicit origin, or,*
- *Converting or transferring such property for the purpose of assisting any person who is involved in the commission of a criminal offence,*
- *Concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds and, subject to its constitutional principles and the basic concepts of its legal system,*
- *The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.*

11. The amendments to the Criminal Code were adopted by Parliament on 27 October 2015 and following the President's signature, entered into force on 13 February 2016. The amendments include changes introduced to the ML offence.

12. With regard to the points raised under this recommendation, the Secretariat analysis is provided below:

#### **“Conversion or transfer of property for the purposes of concealing or disguising the proceeds' illicit origin”**

13. ML offence is fully in line with international requirements since the offence now covers conversion, concealment, acquisition, possession, transfer or use of property except the disguise.

14. Nevertheless, MONEYVAL follow up report from April 2016 states that “the authorities have indicated that the word “concealment” in Polish also extends to “disguise”. Given the limitation of a desk based review, this aspect could only be verified with practitioners in the context of the on-site visit.’

**“Converting or transferring such property for the purpose of assisting any person who is involved in the commission of a criminal offence”**

15. The amended Article 299 of the Criminal Code seems to adequately address this issue (*‘.....Whoever acquires, possesses, uses, sends or takes abroad, conceals, transfers or converts, helps to transfer the ownership or possession of means of payment, financial instruments, securities, foreign currency, property rights or other movable or immovable property derived from the proceeds ...’*).

16. The authorities also referred to the Article 239 paragraph 1 of the Criminal Code which concerns the obstruction of justice (*“whoever obstructs or frustrates criminal proceedings by assisting a perpetrator of a crime .... Especially by harboring the perpetrator, obliterating evidence of the crime...”* However, these are general provisions in this matter, and for the desk based review, in situation if no case law on this matter exist, it is impossible to judge whether or not this criterion has been fulfilled.

**“Concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds and, subject to its constitutional principles and the basic concepts of its legal system”**

17. The authorities have indicated that the word “*ukrywa*” encompasses the meaning of both concealment and disguise. This, however, has not been verified with the case law; therefore the analysis cannot confirm that such definition of the ML offence is fully in line with this criterion.

**The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.**

18. The amended ML offence now includes the action of acquires, possesses, uses, sends, conceals and converts, against the property derived from the proceeds. Therefore, this material element of the offence is covered with the new legislation.

*Maintain comprehensive statistics including the predicate offences as an important tool for assessing the effectiveness of Polish Anti Money Laundering (hereinafter: AML) legal system.*

19. The Polish authorities reported that they were currently working on a new model of statistics, which is also aimed at implementing the requirements of the Directive 2014/42/ European Parliament and of the Council of April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. The

statistics provided for the purposes of the follow up report concern the types of predicate offences and the value of confiscated assets. From the figures provided, it can be concluded that most of the predicate offences are related to tax or fiscal crimes.

20. Therefore, the overall conclusion is that these two recommendations have been partly implemented.

## **2. Corporate liability - Article 10**

21. The Conference of the Parties, in its follow up report, addressed 1 recommendation to Poland regarding the implementation of Article 10 of the Convention.

*Conduct a review as to what are the potential obstacles to the use of corporate liability mechanisms in respect of legal entities by judicial authorities in money laundering and terrorist financing cases, (including the possible elimination of the pre-condition of establishing the liability of a natural person before holding a legal person liable) and to take appropriate steps to remove them.*

22. In the 2015 follow-up report, Poland indicated that the Ministry of Justice, in cooperation with the Criminal Law Codification Commission (an advisory body to the Minister of Justice), carried out a study on obstacles to implement the corporate liability.
23. As a result of this study, Polish authorities informed the Secretariat that the Ministry of Justice prepared and presented the draft law amending the *Act of 28 October 2002 on the liability of corporate entities for punishable acts*. The law is expected to be adopted and to enter into force by the end of 2016.
24. Thus it could be concluded that preparatory steps to address this recommendation have been taken, but its implementation is still underway.

## **3. Confiscation measures – Article 3 paragraphs 1, 2, 3 and 4**

25. The follow up report from 2015, addressed 2 recommendations to Poland with regard to Article 3 of the Convention.

- 1. Consider extending the scope of mandatory confiscation to the instrumentalities used in or intended for use in the commission of a money laundering offence.*
- 2. Improve the quality and scope of statistics (so as to assess the actual effectiveness of confiscation measures in ML, Terrorist Financing (hereinafter: TF) and all predicate offences) and to ensure that the provisions on confiscation and provisional measures are properly and effectively applied.*

26. The Polish authorities indicated (in the follow up report of 2015) that they had not implemented the recommendation concerning the mandatory confiscation of the instrumentalities. For purposes of the current follow up procedure, the authorities provided article 44 of the Criminal Code which permits the forfeiture (confiscation) of the instrumentalities for judicial authorities but on a discretionary basis.
27. Statistics, which were made available to the Secretariat, are not detailed and are not indicating the types of crimes involved, the nature of property seized and confiscated, and related provisional measures which ended up with confiscation.
28. The authorities also indicated that the Ministry of Justice prepared and presented the draft law introducing further confiscation provisions into the Criminal Code. This could be considered as a step forward in developing the confiscation regime; hence it remains unknown if the amendments will remedy the issues related to the recommendations set by COP.
29. The Conference of the Parties concludes that although some preparatory steps have been undertaken, the recommendations concerned have not been fully implemented.

#### **4. Management of frozen or seized property – Article 6**

30. The follow up report from 2015, addressed 2 recommendations to Poland with regard to Article 6 of the Convention. One of them had not been implemented.

*Introduce a clear procedure for managing seized assets and in this respect to comply with requirements of Article 6 of CETS No. 198.*

31. The follow up report from 2015 stated that Poland had not taken any measures to implement a clear procedure for managing seized assets and that this had still been developing including the proper statistics in this matter.
32. For purposes of this analysis, the authorities provided the legislation that has already been in place when the assessment and the 2015 follow up reports were prepared.
33. Therefore, it could be concluded that this recommendation has not yet been implemented.

#### **5. Investigative powers and techniques - Article 7**

34. The Conference of the Parties, in the 2015 follow up report, addressed 1 recommendation to Poland with regard to the implementation of Article 7 of the Convention.

*Take the necessary measures to fully implement Article 7 of the Convention CETS N°198, in particular to ensure that a) prosecutorial or law enforcement bodies have adequate access to information (especially non-bank financial information not related to a direct suspect) for the purposes of tracing, identifying, confiscating and securing criminal assets; b) monitoring of accounts is introduced as a special investigative technique; c) adequate provisions prevent financial institutions from informing their customers and third persons of any investigative step or enquiry.*

35. The same report noted that Poland intended to take into account the recommendation after October 2015.

**a) Prosecutorial or law enforcement bodies have adequate and timely access to information (especially non-bank financial information not related to a direct suspect)**

36. Similarly as for the Article 6, the authorities provided the existing provisions which were in place when the assessment and follow up reports were adopted. In view of that, this analysis cannot provide a conclusion different than the one already set in the assessment report.

**b) Monitoring of accounts is introduced as a special investigative technique**

37. Poland indicated that the Polish legal system does not provide for special investigative techniques which involve monitoring of operations of bank accounts

**c) Adequate provisions prevent financial institutions from informing their customers and third persons of any investigative step or enquiry are taken**

38. Again, no new provisions versus those provided for the previous reports were made available by the Polish authorities.

39. Therefore, the conclusion is that this recommendation has not been implemented.

## **6. International co-operation**

### **6.1. Obligation to confiscate - Article 23; Confiscated property - Article 25**

40. The Conference of the Parties, in the 2015 follow up report, addressed 2 recommendations to Poland with regard to implementation of Article 23 and 25 of the Convention.

41. The Conference of the Parties, in its follow up report, noted that these two recommendations will be considered during the legislative procedure.



*1. Establish a mechanism for execution of measures equivalent to confiscation of property, which are not criminal sanctions, in relation to a criminal offence as part of international cooperation.*

*2. Consider concluding agreements or arrangements on sharing with other Parties, on a regular or case-by-case basis, confiscated property, in accordance with its domestic law or administrative procedures.*

42. With regard to the first recommendation, the authorities reported that the draft law had been prepared, introducing forfeiture of instrumentalities if the criminal proceedings are discontinued due to failure to identify the perpetrator, their death or insanity or the statute of limitations and also in instances that the proceedings are suspended because of to the perpetrator's inability to participate due to severe illness.

43. For the second recommendation, the authorities indicated that the situation has remained unchanged versus the times when the assessment and follow up reports were adopted.

44. Thus it could be concluded that these recommendations have not been implemented.

**6.2. Requests for information on bank accounts – Article 17 paragraphs 1, 4, 6; Requests for information on banking transactions - Article 18; Requests for the monitoring of banking transactions - Article 19**

45. The Conference of the Parties, in the 2015 follow up report, addressed 1 recommendation to Poland with regard to implementation of Article 19 of the Convention.

*Take legislative measures to determine the ability to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request*

46. Poland indicated that the situation has remained unchanged. Therefore, it is thus concluded that this recommendation has not been implemented.

### **III. Procedural and other general rules**

#### **1. Direct Communication - Article 34**

47. The Conference of the Parties, in the 2015 follow up report, addressed 1 recommendation to Poland with regard to implementation of Article 34 of the Convention.

*The Polish authorities should ensure that they are in position to provide comprehensive statistical information on the practice of international information and direct communication between judicial authorities of the Parties.*

48. Poland indicated that the statistics kept by the National Prosecutor's Office did not include relevant information on the application of provisions of the CETS No. 198 with regard to exchange of information in ML cases in 2015.

49. Therefore, this recommendation has not been implemented.

### **IV. Co-operation between Financial Intelligence Units**

#### **1. Co-operations between FIUs - Article 46**

50. The Conference of the Parties, in the 2015 follow up report, addressed 2 recommendations to Poland with regard to implementation of Article 46 of the Convention.

*1. Take the necessary steps so as to ensure that the requirements of paragraphs 6, 7, 8, 9 and 12 are fully reflected in the domestic law so they are clearly applicable to the FIU*

*2. Maintain comprehensive statistics on FIU to FIU cooperation so as to be able to evaluate the effectiveness of the system*

51. The Conference of the Parties, in the 2015 follow up report concluded that no measures had been taken with regard to the recommendation of the assessment report concerning paragraphs 6, 7, 8, 9 and 12 of the Article 46. These provisions were not considered as self-executive at the time the assessment report was adopted, thus they required specific measures in order to be adequately implemented in the context of cooperation with foreign FIUs.

#### **Recommendation 1**

52. Polish authorities indicated that the relevant paragraphs of the Article 46 were introduced as a part of the MoUs signed. So far, 86 MoUs have been signed by the

Polish FIU. In last 5 years (including 2016) 42 requests for assistance were refused due to absence of the MoU with the requesting FIU.

53. The authorities are in process of amending the legislation as to, inter alia, meet the requirements of the 4th EU AML Directive. The amendments shall include provisions of the Article 46 of the Convention although it is yet unknown if the amendments will cover all parties of just the EU member states. The expected enter into force date for this draft law will be the autumn 2016.

54. The analysis concludes that limited progress has occurred with regard to implementation of this recommendation.

## **Recommendation 2**

55. As for the statistics, from the information provided by the authorities it can be concluded that FIU to FIU cooperation has been intensive and therefore satisfactory with a view of recommendation set in the assessment report.

56. Thus it could be concluded that this recommendation has been partly implemented.

### **2. Co-operation for postponement of transactions on behalf of foreign FIUs - Article 47**

57. The Conference of the Parties, in the 2015 follow up report, addressed 1 recommendation to Poland with regard to implementation of Article 47 of the Convention.

*Maintain extensive statistics regarding the orders for suspension, and also, in order to have a complete view, how many were prolonged by the prosecutor and also how many reports on suspension of transactions sent to the prosecutor resulted in indictments*

58. Poland reported that it received a number of requests for suspension from foreign FIUs per year. As for the execution of these requests, in more than 90% of the cases there were no assets on the accounts or the accounts were blocked by the bank on the basis of the *Act on banking law*. Since no precise figures were indicated in the statistical data, it is impossible from the desk based review to measure progress in this matter.

59. Therefore it could be concluded that this recommendation has not been implemented.

## **V. Conclusions**

60. The Conference of the Parties notes that Poland has taken steps to adapt its national legal framework and implement the recommendations set out in the assessment

report in order to meet the Convention's requirements. However, on the basis of the updated information received and as provided above, it appears that Poland has not made sufficient progress, with the exception of the partial implementation of recommendations made under Articles 9 and 46 of the Convention.

61. Overall, the deficiencies remain mostly as they were in November 2015. Therefore the COP might wish to consider inviting Poland to submit an updated follow-up report at its next plenary meeting in 2017.

*The Secretariat*