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(CDPC)

COMMITTEE OF EXPERTS ON THE EVALUATION OF ANTI-MONEY LAUNDERING MEASURES
(MONEYVAL)

THIRD ROUND DETAILED ASSESSMENT REPORT ON POLAND [1]

ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM

Summary

Memorandum prepared
by the Secretariat

[1] Adopted by MONEYVAL at its 23rd Plenary meeting (Strasbourg, 5-7 June 2007).

1. Background Information

1. This report provides a summary of the AML/CFT measures in place in Poland as at the date of the third on-site visit from 14 to 21 May 2006, or immediately thereafter. It describes and analyses the measures in place, and provides recommendations on how certain aspects of the system could be strengthened. It also sets out Poland's levels of compliance with the FATF 40 + 9 Recommendations (see the attached table on the Ratings of Compliance with the FATF Recommendations).

2. The second evaluation of Poland took place in April 2002. At that time, Poland had only one money laundering conviction. The confiscation/forfeiture regime was very seldom used and there were significant concerns about the effectiveness of the Polish anti money laundering legal framework. Since then, several money laundering convictions have been achieved and overall the system seems to be working. Institutions are reporting, at least in connection with above threshold transactions. Approximately 80 % of money laundering investigations come from notifications received from the Polish FIU (the General Inspector of Financial Information - GIFI).

3. The majority of predicate offences for money laundering are considered to be economic frauds of various kinds (tax fraud, credit fraud), defrauding legal persons by their management, customs smuggling, production, smuggling and drug trafficking and corruption. With regard to economic offences, the largest illegal income is connected with lost customs duties and taxes. Approximately 30 different methods for money laundering have been identified.

4. In 2002 the Polish Government initiated a so-called "Anti-Corruption Strategy" and as a consequence established a Central Anticorruption Bureau (CBA). Poland has taken appropriate steps to combat corruption, corruption in public administration and corruption in corporate activities, but considerable issues remain to be addressed.

5. Overall, certain elements in the Polish AML/CFT framework are missing, like a common understanding by all stakeholders of the obligations under the Act of 16 November 2000 on Counteracting Introduction into Financial Circulation of Property Values derived from Illegal or Undisclosed Sources and on the Counteracting the Financing of Terrorism (hereinafter the AML Act) and a greater emphasis on the recognition, analysis and reporting of suspicious activity by obliged entities. Also more coordination of the main players in the AML system is needed to ensure a consistent approach.

2. Legal Systems and Related Institutional Measures

6. In July 2001, Article 299 of the Penal Code (the money laundering offence) was amended and now provides four offences. Art 299 para 1 is the broad money laundering offence based on an "all-crimes" predicate and - apart from the coverage of all types of activity which amount to terrorist financing - all the minimum categories of offences as referred to in the glossary to the FATF Recommendations are covered. The other three money laundering offences of Article 299 cover breaches of obligations in the preventive law by employees of

various reporting institutions. Since the amendments of July 2001, an increasing number of preparatory proceedings has resulted in indictments and convictions. This refers both to cases conducted upon the notification of the FIU (which are the majority – about 80%) and cases commenced as a result of operational actions of the Police. Cases conducted upon the notification of the FIU in which the money laundering offence has/could not been pursued are said, often to result in an indictment for another offence. From 2003 to 2005, there were 76 convictions under Art 299 para 1 Penal Code.

7. Concerning the physical elements of the money laundering offence, the evaluators are not convinced that possession, acquisition or use of property are covered in all its respects by the Polish legal framework.

8. Though there is only a slight difference between the penalty for the unaggravated form of money laundering (Article 299 para 1) and the penalties for the aggravated offences in Article 299 paragraphs 5 and 6, the sanctions for natural persons appear generally dissuasive. Criminal liability has been extended to legal persons and several types of sanctions can be applied but till now there is no experience with this new provision.

9. The ancillary offences of attempt, aiding and abetting, facilitating and counselling the commission of the money laundering offence appear to be adequately covered, but conspiracy to commit money laundering is not provided in the legislation (though it seems not to be contrary to fundamental principles of domestic law to introduce this offence).

10. Most cases appear to be self laundering and the difficulties of proving the predicate offence is often addressed by prosecuting the money laundering and the predicate in the same indictment. In this context, more emphasis should be placed on autonomous prosecution of money laundering by third parties.

11. Currently, there is no autonomous crime of "terrorist financing" in Poland and such behaviour could only be addressed on the basis of aiding and abetting an "act of terrorism". However, no terrorist financing prosecutions have been undertaken or cases brought before the courts and under current provisions it is difficult to see how funding a terrorist organisation could be prosecuted. Poland has recently initiated a legislative procedure aimed at introducing a separate financing of terrorism offence into the Penal Code.

12. The Polish legal framework covering provisional measures and confiscation has much improved since the second evaluation. Specifically since 2003, the confiscation provisions in Art. 44 and 45 of the Penal Code now provide for reversing the burden of proof in certain cases and in ensuring that title can revert to the Polish authorities in the event of a transaction intended to defeat confiscation (issues specifically identified in the last report). In the absence of statistics, it was unclear how frequently the regime was applied in practice – particularly in respect of indirect proceeds, value orders and orders in relation to third parties. The assessors are also concerned about implementation of the new procedures, especially as they relate to the identification and confiscation of indirect proceeds arising from an offence. Where instrumentalities subject to the regime under Article 44 have been transferred to third parties, it appears that confiscation is not possible.

13. Poland has the ability to freeze funds in accordance with S / RES / 1373 and S / RES / 1267 under European Union legislation though the definition of terrorist funds and other assets in the European Union Regulations do not fully cover the extent of the UN Resolutions especially regarding the notion of control of funds. However, Poland has no clear legal

provisions for implementing action against European Union internals, though the names of European union internals were available to the obliged entities with a view to freezing.

14. GIFI, which is an administrative type FIU, is the central body in the AML/CFT system of Poland. It is located in the Ministry of Finance. The unit employs 49 persons. All employees have higher education and technical employees have legal, economic or information technology education. Continuing training has become common practice.

15. The GIFI is financed from the funds allocated for the activity of the Ministry and the Polish authorities are of the opinion, that the position of the General Inspector as an Under-Secretary of State guarantees full operational independence and autonomy for the Polish FIU.

16. The FIU has a well resourced IT centre. It provides high quality training, which is well received by obliged entities. GIFI has prepared a guidebook for obliged entities. This is widely distributed, is well written and contains many typologies. The private sector confirmed that it is very useful. However, it is not a binding document. The FIU has also put very good efforts into training (including e-learning courses). The overall number of people trained is impressive.

17. The FIU is an active member of the Egmont group, and co-operates with more than 40 countries, though a memorandum of understanding is necessary to be signed in order to share information with Non-EU countries. The number of memoranda of understanding currently totals 33[2].

18. The Polish suspicious transactions reporting regime is rooted in the AML Act. Attempted transactions are not clearly covered in the Law. Also there is no provision explicitly addressing the issue of reporting transactions with a suspicion of the financing of terrorism, but the relevant provisions may be interpreted in the context of the overall purpose of the AML Act that some aspects of the financing of terrorism are covered. This assumption is supported by the fact that the FIU received numerous terrorist-related reports. Overall GIFI processes a large amount of transactions, which are reported above the threshold of 15,000 Euro and a smaller number of received transactions which might indicate money laundering or terrorist financing. GIFI's analytical work in processing cases can be regarded as quite effective: e.g. in 2005, GIFI received and processed 20,921,317 reports concerning transactions above 15,000 Euro as well as 67,087 suspicious transactions reports concerning money laundering and 2,083 suspicious transaction reports related to terrorist financing; out of these, 175 cases have been passed to the public prosecutor with a suspicion of money laundering. However, banks remain by far the largest reporting obliged entities. Further outreach is strongly advised to some parts of the financial sector (particularly exchange houses) and the designated non-financial businesses and professions - DNFBP (particularly casinos) to explain the concept of suspicion in more detail.

3. Preventive Measures – financial institutions

19. The legal framework for AML/CFT preventive measures is – nearly exclusively – covered in two regulations, namely the AML Act and the "Regulation of 21 September 2001 on

[2] as of 10 November 2006: 36.

establishing the form of a register of transaction, the way of keeping the register and the procedure of conveying the registry data to the General Inspector of Financial Information". The AML Act is very detailed and covers a large number of financial institutions as "obligated institutions". The AML Act requires maintenance of register and subsequent reporting of transactions above the threshold of € 15,000 (also when a transaction is executed involving more than a single operation, if circumstances suggest that these operations are linked together) and suspicious transaction reporting. Identification of customers who perform above threshold and suspicious transactions is regulated in detail and includes a list of required information, both for physical persons and legal entities.

20. Due to a rather formalistic approach to financial business, it seems that in practice the identification of customers is generally in line with FATF standards. However, the major difficulty is that several key elements of the customer due diligence (CDD) process as set out in the FATF Recommendations are insufficiently embedded in the Law or Regulation. Particularly, there are no explicit legal requirements on the financial institutions to implement CDD measures when:
    - establishing business relationship;
    - carrying out occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note to SR VII;
    - financial institutions have doubts about the veracity or adequacy of previously obtained identification data.

21. Neither the AML Act nor other laws (Banking Act, Insurance Act and Securities Act) require explicitly the verification of identification when starting a business relationship (though done in practice). Also other elements, such as risk analysis; identifying suspicion; the steps to take when the customer data is doubtful, enhanced due diligence in higher risk situations such as non face to face relationships, legal persons such as companies on bearer shares, non-resident customers, private banking and PEPs are missing.

22. Although there are regulations in respect of proxies, a definition of "beneficial owner" within the meaning of the FATF Recommendations is not in the AML Act nor in any other Polish normative act. As a consequence, there are no legal requirements to take reasonable measures to determine the natural persons who ultimately own or control the customer or the person on whose behalf transactions or services are provided by financial institutions. Supervisors as well as financial institutions do not see an obligation to go further than asking for possible powers of attorney, or other forms of proxy, and did not interpret the relevant provisions as an obligation going as far as the FATF standards require.

23. There is no provision in the Act or any other law requiring financial institutions to consider making a suspicious transaction report when it is unable to complete CDD. The same applies for situations where a financial institution has already commenced a business relationship. There is also no requirement to terminate an existing business relationship when CDD is not completed.

24. Currently, Poland has not implemented any AML/CFT measures regarding the establishment of cross-border correspondent banking relationships, but it seems that in practice, banks carefully select the respondent institutions before establishing new correspondent relationship is obtained. Inspections also show that if there is no customer data on the money transfer from abroad, the banks request their correspondent financial institutions to supply the information on the customer's identity.

25. There is no specific requirement in the law which requires financial institutions to give special attention to business relationships and transactions with persons from or in countries which do not, or insufficiently apply, the FATF Recommendations. Only a manual issued by GIFI (entitled "Counteracting money laundering") contains a list of countries and geographical areas to which obliged institutions should pay attention in the area of suspicious transaction reporting.

26. Polish legislation does not provide a prohibition on financial institutions to enter or continue correspondent banking relationship with shell banks. Financial institutions are also not obliged to satisfy themselves that a respondent financial institution in a foreign country is not permitting its accounts to be used by shell banks. However, it seems that financial institutions follow these standards voluntarily and the inspections have not discovered any evidence for the cooperation of any bank with a shell bank.

27. The sanctioning regime in the AML Act is a criminal one and its penalties are fairly strict, including imprisonment. As a result the examiners consider there is a risk that it will not be applied in other than in particularly egregious cases. Polish authorities should consider an additional regime of complementary administrative sanctions, such as fines to enhance the AML/CFT compliance, especially in the non financial sector.

28. The financial sector supervisors (Banking Supervision Commission, Securities and Exchange Commission, Commission for Insurance and Pension Funds Supervision) seem to be experienced, well managed and to know the supervised entities well, inspect them regularly and provide a generally good framework of supervision, information, regulation and control. However, their engagement in AML/CFT supervision seems overly formal and very narrow, as they only see their role in inspecting on site based on a formalistic list of criteria. The onsite inspections are conducted as a formal check of the obligations mentioned in the law, without a material engagement into the less formal requirements of the Polish AML/CFT system, such as risk analysis, enhanced due diligence, ongoing monitoring of customers, monitoring of unusual and complex behaviour, and detection of suspicion. GIFI itself does not have the resources in personnel to effectively supervise the whole financial sector. This causes an important gap.

29. Neither the AML Act nor any other law covers the registering and/or licensing of natural and legal persons that perform money or value transfer services. The Polish authorities explained this is due to the fact that Western Union and Moneygram, the companies active in Poland, act exclusively through banks as their agents. Money transfer services are also provided by the Polish Post which is an obliged institution according to the AML Act. However, private sector representatives confirmed that *bureaux de change* are also contracting with Western Union. There seems also to be an important gap in this area with regard to the awareness of the authorities, which means that this internationally well known high risk area is not adequately addressed in the Polish system.

4. Preventive Measures – Designated Non-Financial Businesses and Professions

30. The coverage of DNFBP in the AML Act is very complete and in line with both international standards and the EU Directives. It comprises casinos, notaries public, legal advisers, statutory auditors, tax advisers, auction houses, antique shops, precious metals and stones traders, commission sales business, pawnshops, real estate agents. Additionally, the Polish Post and foundations, which are not required by international norms, have been included. The CDD requirements, so far as they go, (if and when) applicable to DNFBP are more or less the same as those applicable to financial institutions, since the core obligations for both DNFBP and financial institutions are based on the same law (scil. AML Act). However, the evaluators were concerned that CDD requirements do not apply to accountants; also real estate agents, counsel, legal advisers and foreign lawyers are only partially covered, as they have to register only suspicious transactions (but not above threshold transactions).

31. The support and understanding of DNFBP for the AML/CFT regime is very uneven; e.g. casinos are quite unconcerned about ML/FT risks in their field and lawyers, tax advisers and auditors remain unhappy with their obligations. As a consequence, the number of STR received from this DNFBP sector is quite small. The supervision of DNFBP is done by GIFI, the Minister responsible for public finances (concerning entities organizing and operating games of chance, mutual betting, automatic machine games and automatic machines games with low prizes) and the Presidents of Appeal Courts (concerning notaries public). The GIFI seems to have made a strong effort to inform associations or representatives of DNFBP when they became obliged entities under the AML Act, but the private sector does not perceive continued follow up by GIFI. A few onsite inspections have been made.

32. As with financial institutions, the sanction regime of the AML Act for DNFBP is disproportionate for minor cases (only criminal sanctions are provided for) which carries the risk that it is not applied and reduces its effectiveness. This might also be a reason that only few sanctions have been imposed as yet. In addition, the competences of the sanctioning authorities are at least unclear and should be clarified to avoid double or no sanctioning.

5. Legal Persons and Arrangements & Non-Profit Organisations

33. Polish legislation covers profit oriented entities, non-profit companies and foundations.

34. According to Polish laws only the following types of profit oriented entities can be established: registered partnerships, professional partnerships, limited partnerships, limited joint-stock partnerships, limited liability companies and joint-stock companies.

35. Non-profit companies may be established for serving public purposes and interests as non-governmental organisations. The NPO sector comprises corporate and non-corporate entities not forming part of the public finance sector, not operating for profit, and formed against relevant legislative provisions, including foundations and associations, religious organisations and unions and also local authority unions.

36. Polish law requires 16 different types of entities to be registered (meaning both profit-making companies as well as NPOs; e.g. limited liability companies, joint stock companies, European

companies cooperatives, state enterprises, branches of foreign enterprises etc.). The Register is kept in electronic form by district courts (Commercial Courts of Law). It is divided into sub-registers which separately cover entrepreneurs, non-profit companies, and foundations. Everyone has the right to access data of the Register through the Central Information and also to receive certified copies, excerpts and certificates on data included in the Register.

37. Polish Law contains no clear legal provisions to register the beneficial ownership of companies as it is defined in the Glossary to the FATF Recommendations (i.e. those who ultimately own or have effective control). Beneficial ownership information is also not available in relation to foreign companies which are registered in Poland. In some cases, information on beneficial ownership may be available in the company's books at the registered office. Though Polish authorities can in practice rely on investigative and other powers of law enforcement to produce from company records the immediate owners of companies, it would be a lengthy and difficult process for the investigative authorities to gather such information (and in some cases not even possible if the competent authorities have to investigate up the chain of legal persons).

38. Though there are procedures in place to ensure some financial transparency, it appears there has been no special analysis of the risks in the NPO sector to be abused for financing of terrorism. Afterwards Polish authorities should review the adequacy of the current legal framework relating to this sector.

6. National and International Co-operation

39. The AML Act is the legal basis for cooperation between the entities involved in counteracting money laundering. It defines the obligations on state and local administration authorities and other state organisational units to cooperate within the scope of their competence with the GIFI. Poland established in February 2006 a "horizontal working group for international sanctions". Its main responsibility is focused on legal aspects of implementation of international sanctions. However, it seems that at the national level the existing coordination measures are not completely effective; e.g. the GIFI does not provide information directly to the police, which must obtain such financial data through the public prosecutor. It would be helpful to have more coordination of the main AML/CFT players to ensure a consistent approach.

40. Mutual legal assistance is regulated by Chapter 62 of the Code of Criminal Procedure. Poland has ratified *inter alia* the Vienna Convention and the Palermo Convention. In addition, Poland has ratified the European Convention on Mutual Assistance in Criminal Matters (ETS 030) and its two Additional Protocols (ETS 99 and ETS 182). Also several bilateral agreements/treaties have been concluded under which mutual legal assistance may be afforded. Due to provisions of the Code of Criminal Procedure, courts and prosecutors shall refuse assistance if the requested action conflicts with "the legal order" of Poland or constitutes "an infringement of its sovereignty." Dual criminality as well as a lack of reciprocity are reasons to deny assistance. However, the assessors were assured that this discretionary provision was rarely applied in practice.

41. Poland does have appropriate laws and procedures to seize, freeze and forfeit objects, instrumentalities, direct and indirect proceeds on behalf of foreign countries. Additionally, as a European Union member state, Poland has implemented the European Union framework

decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

42. Poland is a party to numerous multi- and bi-lateral agreements dealing with Extradition, notably the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union (1995 EU Extradition Convention) and the European Union Convention of 27 September 1996 relating to extradition between the Member States of the European Union (1996 EU Extradition Convention). Poland has implemented the European Arrest Warrant, which introduced a legal basis that – in principle - Polish nationals can be returned within the European Union for money laundering and terrorist financing without a strict application of the dual criminality principle. However, as the Polish Constitutional Tribunal stated that the relevant provision of the Criminal Procedure Code, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution, it is questionable if it is possible to extradite Polish nationals[3]. Aside from this uncertain situation concerning the extradition of Polish nationals, money laundering is an extraditable offence. The lack of an autonomous Terrorist Financing offence would make extraditions for all relevant conduct at least difficult. Notwithstanding this, the team was assured, that mutual legal assistance in respect of Terrorist Financing could be rendered more flexibly as the dual criminality requirements are optional rather than mandatory.

[3] Polish authorities informed that the Constitution was amended on 8 September 2006 (entering into force on 7 November 2006) and that this shortcoming no longer applies.