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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures
(PC-R-EV)

FIRST MUTUAL EVALUATION REPORT ON POLAND

SUMMARY

Views expressed do not represent official views of the Commission of the European Communities.

1. A PC-R-EV team of examiners, accompanied by colleagues from the Financial Action Task Force (FATF) visited Poland between 18-21 May 1999.

2. The Republic of Poland is one of the largest countries in Central Europe. Its northern frontier on the Baltic Sea gives it easy access to Scandinavian and North Sea ports.

3. Crime, and organised crime in particular, is considered to be a major problem. In recent years Poland is thought to have become a transit country for the smuggling of drugs to Western Europe. International organised crime groups are known to be active within its borders, some of which are believed to include foreign elements. Many of these criminal groups are thought to engage in money laundering in Poland, specifically of proceeds of crime committed outside Poland. The Polish authorities recognise that Poland is also vulnerable to the laundering of domestic proceeds. The banking sector is considered vulnerable at the placement stage, as are the 3,500 bureaux de change ("Kantors") which currently operate in Poland, and the 34 casinos. Equally at the layering stage illicit proceeds are thought to be invested in property and/or on the capital market. Actual and potential sources of criminal proceeds include: the illicit production and trafficking of drugs; vehicle theft; extortion; smuggling of stolen cars, alcohol and cigarettes; and counterfeiting.

4. The Polish authorities recognised the money laundering threat at an early stage. They have engaged with the issue since 1992. Various Regulations and legislative instruments have been introduced at different times. A number of important steps have been taken towards building an anti-money laundering regime which meets international standards. None-the-less the examiners considered that overall the system had developed incoherently and slowly. At the time of the on-site visit only banks and brokerage houses had legal obligations on them to report suspicious transactions and supervisory regimes which involved some inspections of anti-money laundering issues. Other non-bank financial institutions are not only unsupervised but also beyond the scope of the anti-money laundering legislation. Reports of suspicious transactions for banks and brokers currently go to the Public Prosecutor.

5. Since 1996 there have been legislative proposals emanating from the Ministry of Finance to create a financial intelligence entity (FIE) in the structure of the Ministry of Finance. The first draft bill was withdrawn and the current draft bill (dated 1.3.99) was due to be presented to the Parliament in 1999. It significantly widens the scope of institutions subject to identity verification, record keeping and suspicious transaction reporting (STR) obligations – and includes casinos, insurance companies, bureaux de change and notaries. This is a positive step but the Polish authorities should consider further extending the coverage in the draft law to other relevant undertakings in both the financial and non-financial sectors, including appropriate professional persons such as lawyers involved in financial business and accountants. The range of coverage needs urgent attention and the speedy passage of the draft law is critical.

6. The National Criminal Information Centre (NCIC) had been established by a decree of the Minister of the Interior at the time of the on-site visit. NCIC's mission is to co-ordinate the national fight against organised crime. Part of its objectives includes monitoring the usage of financial information referring to money laundering. It plans to become a formal counterpart of foreign institutions and agencies engaged in combating crime such as Europol, the FBI in the United States and NCIS in the United Kingdom. The establishment of an operational NCIC should provide Poland with an analytical and strategic capability, which it currently

lacks. However the Polish authorities will want to guard against overlaps of responsibilities and ensure that the FIE and the NCIC work co-operatively with each other. In particular it should be resolved which single body will be responsible for international co-operation in anti-money laundering matters at the FIU/law enforcement level.

7. Poland signed and ratified the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) on 30.11.94 and signed the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Council of Europe Convention) on 10.11.98 but has not yet ratified it.

8. Article 5 of the Act on Protection of Economic Turnover (APET), dated 12.10.94, established money laundering as a separate crime. It contained a closed list of predicate offences based on organised crime activities. It covered "own proceeds" laundering. It has now been repealed. The current criminal provisions are found in A. 299 of the Criminal Code. The requirement that predicate offences should be related to organised crime has been removed. The range of predicate offences has been enlarged. It was not clear, however, whether Article 299 covers all the offences which currently generate criminal proceeds. The Polish authorities consider the new list in Article 299(1) is completely open-ended but the evaluators are not equally certain of this. In enumerating offences against property there is an additional reference to "other offences against property of considerable value". This limitation may make it more difficult to extend the list of predicate offences beyond property offences. Though the list approach meets the basic requirements of the Vienna and Council of Europe Conventions, the Polish authorities should consider, when ratifying the Council of Europe Convention, the "all crimes" approach without any specification, which would provide clarity and certainty that all serious offences are covered. The law has not, as yet, been tested.

9. There have been no convictions for any money laundering offence in the 5 years since money laundering was criminalised. This may partly be explained by the lack of clarity there appears to be about the level of proof required for the predicate offence. Poland urgently needs some successful prosecutions (and deterrent sentences) to help break any developing mindset among law enforcement officers and prosecutors that they are powerless. Interdepartmental consideration needs therefore to be given to the level of proof that is required for the money laundering offence. Prosecutors should be clearly advised on the minimum evidential requirements thought to be necessary for launching criminal proceedings. In such a review the level of proof required for the mental element would also bear reconsideration. The evidential burden is high as the offence in A. 299(1) is based on an intent or guilty knowledge standard. A lower standard may be desirable for the Article 299(1) offence (such as justifiable suspicion). Equally consideration should be given to the concept of negligent money laundering, as envisaged by the Council of Europe Convention, for all the offences in A. 299.

10. The exclusion of "own proceeds" laundering in A. 299 is a retrograde step and should, in the examiners' view, be reconsidered. They would also encourage the Polish authorities to consider carefully the possibility of introducing the concept of corporate criminal liability.

11. The Penal Code of 1997 uses the term "forfeiture" instead of confiscation. Forfeiture is provided for in general terms in Articles 44-45 of the Penal Code. There are also special measures on forfeiture contained in the Special Part of the Penal Code dealing with particular criminal offences. There is a special forfeiture provision under A. 299(7) in the case of money laundering offences under A. 299(1) and (2). This allows for the mandatory forfeiture of items

derived directly or indirectly. This has not been tested in the courts as yet, but appears to provide for the removal from the perpetrator of the proceeds of crime. However it would assist this objective if "proceeds" were defined as in the Council of Europe Convention. It needs to be clarified that this provision covers value orders. By contrast, the general forfeiture regime under A. 44(1) of the Penal Code is mandatory only so far as it relates to items directly derived. In order to bring their law in line with the broad policy objective of the Council of Europe Convention the Polish authorities should introduce a general confiscatory power so far as proceeds or property the value of which corresponds to proceeds is concerned which is, at least, applicable to all serious criminality and offences which generate huge profits, and which strengthens the mandatory elements of the existing regime. It is suggested that such a power is based on the wide meaning of proceeds in the Council of Europe Convention. In the course of ratifying the Council of Europe Convention, the Polish authorities should review their provisional measures regime to ensure that a comprehensive range of effective provisional measures is available to support the wider confiscatory power.

12. Poland, as well as ratifying the Vienna Convention and signing the Council of Europe Convention, has also ratified the European Convention on Extradition and its Protocols and the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. It is a positive sign that Poland is able to provide legal assistance in this field, which in some aspects goes beyond their own domestic provisions. They can provide general legal assistance in cases in which the money laundering offence is based on a "should have known" or "negligence" standard or if the predicate offence is not a predicate offence in Poland. Legal assistance can also be provided in cases of "own proceeds" laundering where the individual is charged with money laundering, and where an individual is charged with the predicate offence and money laundering. The major weakness in international co-operation, however, is that parts of Polish legislation currently prevent any interference, on behalf of a foreign state, with the proceeds of a suspect in Poland (freezing, seizing, etc.) and the prohibition on the execution of judgements of a foreign court. It was unclear when the ratification process of the Council of Europe Convention will be completed. The Polish authorities are urged to give a high priority to the ratification process in a manner which will permit the granting and receiving of effective and timely co-operation in all areas, especially in relation to the tracing, seizure, freezing and confiscation of the proceeds of crime.

13. Perhaps as important as any of these issues for Poland's international co-operation capability is the urgent need to establish an FIE which can begin to exchange financial information both spontaneously and on request with other FIUs and enter into Memoranda of Understanding with other FIUs.

14. On the financial side, basic identification and record keeping requirements are in place for banks. Identification requirements under the laws and regulations for banks relate to cash transactions and exchanges of currency above 10,000 Ecu and to all suspicious transactions (cash and non-cash). It would be prudent to clarify that these requirements apply also to the National Bank of Poland. A particular concern is the absence of any customer identification requirements for banks in the case of non-cash transactions of a size envisaged by the EC Directive. These should be covered. Brokerage houses must identify the owner of a securities account, and all securities transactions (cash and non-cash) with a value of 20,000 Zloty[1] or more must be the subject of identification procedures. Brokerage houses, however, may assume that the named owner of the account is also the beneficial owner. This is

[1] 4,800 Euro.

unsatisfactory. Moreover, it was not entirely clear how far beneficial owners were identified in the banking sector. It was indicated that further guidance on the "know your customer" issue is to be given in the new law. Clear guidance needs now to be given to all credit and financial institutions that they should be legally obliged, in the event of doubt as to whether customers are acting on their own behalf, to take reasonable measures to obtain information as to the real identity of the persons on whose behalf customers are acting, as envisaged in the FATF Recommendation 11 and the EC Directive.

15. The existing Polish supervisory authorities need to develop their own guidance material (on which training can be based) drawn from the local Polish experience on warning signs and indicators of money laundering in each of their sectors. Similar guidance needs to be developed for each relevant sector as anti-money laundering reporting obligations are extended regardless of whether a supervisory body is put in place. The FIU, when it is created, should take a leading role in ensuring the production of co-ordinated guidance.

16. The Commission for Banking Supervision, which has already begun work in anti-money laundering supervision, should now institute regular examinations which thoroughly monitor and assess the level of banks' actual compliance with their anti-money laundering obligations. The Securities and Exchange Commission should also include in its programme regular inspections which go beyond the formal compliance issues presently covered and begin assessing the level of compliance of brokerage houses with their anti-money laundering obligations.

17. On the operational side reliable statistics on STRs were difficult to obtain. The Prosecutor's office did not appear to have a real overview of this. It was indicated that STRs were not currently analysed operationally to determine, for example, which banks may be underreporting. It is critical that full analysis of STRs begins as soon as possible and this should not await the creation of the FIU. Equally there was some uncertainty about the precise number of money laundering investigations. Concern was also expressed by law enforcement officers that databases are insufficiently shared. These concerns need examining and unnecessary obstacles should be removed. Concern was also expressed by the police that in police initiated enquiries they cannot follow the flows of potentially laundered money without access to banking information at an earlier stage than is possible at present. Again, this concern should be identified precisely, and unnecessary obstacles removed. The provision of meaningful feedback also needs addressing to help to build greater co-operation between law enforcement and the financial sector.

18. At present therefore all the indicators are that the system overall is currently both inadequate in its coverage and not performing well. Urgent action is required if Poland is to develop an effective operational anti-money laundering system that meets international standards. Much can be achieved by the early creation of an FIU, the passage of the draft law and the ratification of the Council of Europe Convention. The examiners would advise also that the Polish authorities need to nominate a lead department at a working level to be the moving force on the money laundering issue, which can focus and co-ordinate disparate activity. Beyond this, there is a real need for co-ordination of thinking at a strategic level about the shared money laundering threat across all the sectors. A discrete anti-money laundering co-ordination body drawn from actors in the anti-money laundering regime at suitably senior levels would assist. Such a body could draw up an inter agency action plan of what needs to be done in all sectors, drive through changes, and periodically review how the system as a whole is operating.