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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)

FOLLOW UP REPORT OF THE CONFERENCE OF THE PARTIES TO CETS No.198 ON MALTA¹

**Memorandum prepared
by the Secretariat**

¹Examined and adopted by the Conference of the Parties to CETS 198 at its 10th meeting (Strasbourg, 30-31 October 2018)

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 (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 Malta at its sixth meeting (Strasbourg, 29 September-1 October 2014). In application of the Conference of the Parties' rules of procedure, the report and subsequent comments made by Malta to the report 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 of this process, Malta submitted an update of its progress in meeting the recommendations and/or other issues identified in the adopted report, based on a reporting template prepared by the Secretariat. This report was received on 4 May 2018. The scope of the review is focused on the implementation of the recommendations formulated by the Conference of the Parties in the assessment report of Malta. Notwithstanding the adoption of Rule 19*bis* during the COP's 9th meeting, establishing a Thematic monitoring review, Malta decided to undergo the initial follow-up procedure.
4. Portugal 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 was satisfied with the information provided in the follow-up report and progress made by Malta in meeting certain Conference of the Parties recommendations. Pursuant to Rule No. 19 (39f), the Conference of the Parties adopted the replies to the questionnaire and the analysis prepared by the Secretariat.

Review of implementation of selected articles of CETS no. 198 by Malta and progress made since October 2016

6. The following review of Malta's implementation of the CETS no. 198 has been prepared by the Secretariat pursuant to Rule 19 (par. 33) of the Rules of Procedure, based on the information and statistics provided by the Party, the additional information and clarifications received from the Maltese authorities and a review of other relevant evaluation reports of Malta.
7. This report analyses the progress made by Malta to meet the deficiencies and to implement the recommendations and/or issues identified for follow-up by the Conference of the Parties. When assessing progress made, effectiveness was taken into account to the extent possible in a paper based desk review, on the basis of the information and statistics provided by the Party. The report also sets out an appraisal of the level 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.
8. The sections below set out the main findings on issues pertaining to the implementation of selected provision 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.

Chapter III - Measures to be taken at national level

Section 1 – General provisions

A. Confiscation measures – Article 3, paragraphs 1, 2, 3, 4

9. The Conference of the Parties made three recommendations to the Maltese authorities on the issue of confiscation of instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

To consider amending the legislation as necessary to provide law enforcement authorities with more appropriate legal instruments to freeze assets at an early stage of an investigation without putting them under disproportionate pressures to finalise investigations.

10. Amendments to the Prevention of Money Laundering Act ("PMLA"), particularly on Article 4(11), allow an attachment order to remain in force for 45 days, as opposed to the previous 30 days, which may be extended by another 45 days upon the request of the Attorney General on sufficient grounds. Moreover, the possibility to issue a new attachment order when new substantial information comes to light has been retained.
11. Amendments to Article 4(9) of the PMLA have rendered the attachment process more expeditious. Act XXVIII of 2017 introduced the possibility of service of the attachment order on the garnishee to take place by means of electronic mail, subject to the garnishee acknowledging receipt by electronic mail no later than one working day.
12. The Maltese authorities reported on numbers of the attachment orders between 1 January 2015 and October 2018: 4 of them were issued in 2015, 4 in 2016, 1 in 2017 and 10 in 2018. Even though the rise in the year 2018 in comparison to the three previous years has been noted,

according to the COP assessment report the number of attachment orders issued between 2011 and 2013 was still higher: 8 (2011), 6 (2012) and 15 (2013).

13. The rapporteurs in the 2014 COP assessment report raised concerns with regard to the scheduled increase of the maximum term of validity of the attachment order; it was doubted whether such change would have a significant impact on the results in domestic confiscation. The rapporteurs instead commented that law enforcement should be provided appropriate tools to initiate more seizures in domestic cases at an early stage of the investigation, before assets are dissipated.
14. No information has been provided by the Maltese authorities concerning legal instruments provided to the law enforcement authorities to freeze assets at an early stage of an investigation. Moreover, from the statistics provided, the amendments to the law have not demonstrated any notable impact on the results in domestic confiscation. The statistics are the following: no confiscation cases were noted in 2014 and 2015. In 2016 there was one case for a predicate offence (illicit trafficking in narcotic drugs and psychotropic substances) which led to confiscation, while in 2017 there was one case for the offence of fraud which led to confiscation of property of the value of EUR 12.656. From 1 January until 20 April 2018, no confiscation on ML or its predicate offences has been ordered.
15. It is concluded that this recommendation has been partially implemented.

To undertake measures targeted to improve the effectiveness of the provisional measures and of the confiscation system.

16. The authorities indicated that legislative actions have been taken to strengthen the seizure and confiscation system, by streamlining the various procedures under the Criminal Code, the Dangerous Drugs Ordinance and the PMLA. The most relevant measures adopted are outlined hereunder.

Freezing orders

17. The ACT III of 2015 provided that courts may refuse a request to issue a freezing order, requested under the terms of Article 5(1) of the PMLA. After such refusal, a temporary freezing order shall be issued, which remains in force until the final determination of the proceeding or the execution of the sentence. This procedure was yet applied in terms of the Criminal Code and the Dangerous Drugs Ordinance. Moreover, an express provision was introduced in the PMLA to align the Registrar of the Court's power with those under the Criminal Code and the Dangerous Drugs Ordinance, allowing the Registrar of the Court "to conduct inquiries to trace and ascertain the whereabouts of any moneys or other property, due or pertaining to or under the control of the person charged or accused or convicted, as the case may be".

Forfeiture (confiscation)

18. Amendments to the Criminal Code, through Act VIII of 2015, now allow the court to order forfeiture if "the court can reasonably presume that it is substantially more probable, that the property in question has been obtained from the criminal activity of that person rather than from other activities" (Article 23C(1)), as well as to order the confiscation of instrumentalities in case of illness or absconding of the accused (Article 23C(3)). A sub-article (4) to Article 23C of the

Criminal Code was introduced to complement the ability of the courts to order the forfeiture of an offender's property, which may have been transferred to a third party or whose ownership is shared or held by a third party.

19. From the statistics provided on ML and its predicate offences and the number of cases between 2014 and 2018, in which property was frozen, confiscated or effectively recovered, it appears that the effectiveness of the confiscation system has not improved. The number of cases in which property was confiscated is significantly lower than the number of cases in which property was frozen.

20. Although the effectiveness of the confiscation system remains low, the legislative amendments do implement the specific recommendation.

To make efforts in order to structure the statistics on frozen and confiscated property on yearly bases and on categories of offences covered by the Appendix to the Convention.

21. The Maltese authorities provided statistics on the property frozen, confiscated and effectively recovered of ML or its predicate offences. The statistics are also categorised per year and per offence.

22. This recommendation has been implemented.

B. Management of frozen and seized property – Article 6

23. The Conference of the Parties made one recommendation concerning the challenges of the management of seized assets in practice. It was noted in the COP assessment report that a legal basis for the existing Unit within the Court Registry to manage frozen and confiscated assets was unclear, and that law enforcement received only little support from this Unit. The rapporteurs advised to establish a specialised national agency for the management of frozen and seized assets.

To consider introducing more detailed provisions that would allow an adequate management of the frozen and seized assets. Consideration might be given to the efficient use, for special purposes, of the forfeited assets, or the advantage of establishing the duty of the person in charge of their management to increase, where possible, the value of the assets. It is also worth recalling recommendations of the MONEYVAL 4th assessment report (2012) on the need for a more effective asset recovery strategy for proceeds.

24. A newly-established Asset Recovery Bureau (Legal Notice 357 of 2015, introducing the Asset Recovery Bureau Regulations into Maltese law as secondary legislation enacted under the Criminal Code), is authorised for the management of frozen and seized property. It is, *inter alia*, “entrusted with the proper and efficient tracing, collection, storage, preservation, management and disposal, either in whole or in part, of instrumentalities and proceeds of crime or property the value of which corresponds to such instrumentalities or proceeds, in favour of government”, as well as set to “administer, sell, transfer, exchange, dispose of in whatever manner and deposit in the consolidated fund any money the value whereof corresponds to such instrumentalities and property recovered from proceeds of crime”. The Asset Recovery Bureau Regulations has been operative since 20 August 2018.

25. The Conference of the Parties concludes that this recommendation is implemented, although the effectiveness of the new provisions establishing the Asset Recovery Bureau is not yet taken into account given that the Bureau has been established too recently.

C. Investigative powers and techniques required at the national level – Article 7, paragraphs 1, 2a, 2b, 2c, 2d

26. The Conference of the Parties in the COP assessment report noted that Malta had implemented most of the requirements of the Convention under Article 7. However, from the statistics provided it appeared that the powers provided for in the Convention were not used regularly in investigations of proceeds-generating crimes, nor that monitoring orders had been issued by courts. The Conference of the Parties therefore made one recommendation.

To further raise awareness of the law enforcement agencies on possibilities to apply in practice the powers provided in Article 7 of the Convention. These powers could be used regularly in investigations of proceeds-generating crimes.

27. The Maltese authorities provided updated statistics on the number of attachment orders issued over the period 1 January 2015 to 30 October 2018. As noted under “A. Confiscation measures” (para. 12) above, the number of the issued orders remains low.

28. Moreover, the authorities indicated that over the period 2015-2018 no monitoring orders were issued. The Maltese authorities also submitted that law enforcement received training on how to use this instrument.

29. The Conference of the Parties therefore concludes that this recommendation has been partially implemented.

D. Criminalisation of money laundering – Article 9, paragraphs 3, 4, 5, 6

30. The Conference of the Parties made one recommendation on the effectiveness of the system of criminalisation of money laundering.

To raise the awareness among prosecutors and judges of the elements of the money laundering offence (with emphasis on autonomous ML), as interpreted by the courts.

31. The authorities of Malta have supported a number of trainings for prosecutors and judges to raise awareness on the nature and elements of the ML offence. As such, members of the judiciary and officers of the Office of the Attorney General participated in a joint FATF/MONEYVAL workshop in March 2018, and in a workshop organised by the Malta Financial Services Authority in January 2018. A seminar was also held for members of the judiciary on AML/CFT, as organised by the Judicial Studies Committee in 2018.

32. It is therefore concluded that this recommendation is implemented.

E. Corporate liability – Article 10, paragraphs 1 and 2

33. The Conference of the Parties made four recommendations regarding the system of corporate criminal liability in Malta.

To review the system of corporate criminal liability and identify any legal or practical obstacles that impedes obtaining convictions against legal persons, including in money laundering cases.

34. The Maltese authorities noted no action to report. They however maintained that corporate liability was in principle possible, citing a pending case in which a limited liability company charged with human trafficking and related ML (in which an attachment order was issued). As noted, the case is still on-going and thus had not yet led to a conviction against that legal person.

35. This recommendation has not been implemented.

To reconsider if a conviction against a natural person is a pre-condition for criminal liability of a legal entity in money laundering cases.

36. The Maltese authorities consider that a conviction against a natural person is not a pre-condition for criminal liability of legal entity ('body corporate' as referred in the PMLA Act) in ML cases. As discussed at length in the COP evaluation report of Malta of September 2014 (paras. 22-34), the criminal liability of legal persons is laid down in Article 3(1) of the PMLA which, in its wording, neither excludes nor requires the conviction against a natural person.

37. It is concluded that, while this recommendation has strictly speaking not yet been implemented, the legal situation has become meanwhile sufficiently clear.

To clarify the corporate liability regime, by aligning the penalties provided by both Article 3(1) and 3(4) of PMLA.

38. Article 3(4) of the PMLA is amended by way of Act VIII of 2015, which introduced that a legal body corporate "shall be liable to the punishment laid down in sub-article (1)". The authorities have thus changed the wording in such a way that it aligns adequately with the wording of Article 3(1), which also uses the word 'body corporate'.

39. This recommendation has therefore been implemented.

To draw up guidance and instructions for the law enforcement and prosecutors on the practical application of the legal provisions on corporate criminal liability.

40. The Maltese authorities have not taken any action on this issue.

41. This recommendation has not been implemented.

Refusal and postponement of co-operation – Article 28, paragraphs 1d, 1e, 8c

42. The Conference of the Parties made one recommendation concerning refusal and postponement of international co-operation.

To ensure that the Maltese authorities are in position to provide statistical data on the practice of international co-operation with regard to: a) refusals to provide international co-operation and b) postponement of co-operation.

43. The authorities were unable to provide any statistics as there had been no instances in which international co-operation was refused or postponed.

44. The implementation of this recommendation is not deemed relevant as there have been no instances of refusal or postponement of co-operation.

Confiscation – Article 23, paragraph 5, Article 25, paragraphs 2 and 3

45. The Conference of the Parties made one recommendation concerning legal provisions allowing the Maltese authorities to execute measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, particularly where it concerns international co-operation.

To ensure that the Maltese authorities co-operate to the widest extent possible under its domestic law with Parties that seek assistance in the execution of measures equivalent to confiscation leading to the deprivation of property which are not criminal sanctions, within the meaning of the Convention's provisions.

46. The Maltese authorities had no action to report in relation to confiscation *in rem*.
47. If not already provided for, the Conference of the Parties considers this recommendation as not implemented.

F. Investigative assistance – Article 17, paragraphs 1, 4, 6, Article 18, paragraphs 1 and 5 ; Monitoring of transactions – Article 19, paragraphs 1 and 5

48. The Conference of the Parties made two recommendations concerning investigative assistance and monitoring of transactions.

To ensure that the Maltese authorities are in position to provide clear statistical data as regards the total number of requests made based on Articles 17 and 18 (including the requests for which the Attorney General made an application, and whether it was executed or refused).

49. The authorities reported that the Office of the Attorney General did not receive any requests from abroad for a monitoring order, in the period 1 January 2015 to 30 April 2018. The Office received the following number of incoming requests for an attachment order: 2013 (17); 2014 (12); 2015 (6); 2016 (9); 2017 (13). It may, after such request, apply to the Criminal Court for an investigation and attachment order.
50. No complete information is provided regarding the action undertaken by the Office of the Attorney General after having received a request from abroad (e.g. how often an application was made).
51. The Conference of the Parties considers this recommendation partially implemented.

To consider extending the scope of the monitoring order under Article 435AA to bring it in line with the equivalent order as set out under Article 4B of the PMLA.

52. The Maltese authorities indicated that legislative amendments resulted in alignment of the texts of Article 435AA and 435BA of the Criminal Code and Article 4B of the PMLA. In particular, Act XXIV of 2014, amending Article 435AA of the Criminal Code, introduced the wording of Article 4B of the PMLA as follows: “*or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons*”.

53. Act VIII of 2015, further amending Article 435AA of the Criminal Code, widened the scope of the article to transactions of banking operations.

54. Article 435BA of the Criminal Code replicates the amendments.

55. It is therefore concluded that this recommendation has been implemented.

G. Procedural and other rules (direct communication) – Article 34, paragraphs 2 and 6

56. The Conference of the Parties made one recommendation on direct communication within the framework of international co-operation.

To ensure that foreign authorities can easily identify the appropriate Maltese authorities and also that Maltese authorities engage with foreign authorities, as necessary.

57. The Maltese authorities noted that there was no action to report. They however maintained that there is no lack of information about mutual co-operation in criminal matters by Malta, as the information on the designated central authority is published on various (European) websites and this authority is actively participating in bilateral and multilateral meetings on mutual legal assistance.

58. The Conference of the Parties concludes that this recommendation has not been implemented.

Conclusion

59. In order for Malta to make full use of the Convention's provisions and adequately implement its obligations under the Convention, the Conference of the Parties reiterates a number of its recommendations previously formulated in the assessment report. The Conference of the Parties invites Malta to fasten its reforms aimed at adapting the domestic legal framework to the Convention's requirements and also to consider additional measures, as appropriate, in order to support the implementation of the adopted provisions.

Adaptation of the national legislation to the Convention's requirements and implementation aspects

Implementation of Article 3 of the Convention

- a. As previously recommended, the Maltese authorities are advised to consider amending the legislation as necessary to provide law enforcement authorities with more appropriate legal instruments to freeze assets at an early stage of an investigation without putting them under disproportionate pressures to finalise investigations.

Implementation of Article 7 of the Convention

- b. The Maltese authorities are advised to further raise awareness of the law enforcement agencies on possibilities to apply in practice the powers provided in Article 7 of the Convention. These powers could be used regularly in investigations of proceeds-generating crimes.

Implementation of Article 9 of the Convention

- c. The authorities of Malta should continue raising the awareness among prosecutors and judges of the elements of the money laundering offence (with emphasis on autonomous ML), as interpreted by the courts.

Implementation of Article 10 of the Convention

- d. The authorities are advised to review the system of corporate criminal liability and identify any legal or practical obstacles that impede obtaining convictions against legal persons, including in money laundering cases.
- e. The authorities are also advised to reconsider if a conviction against a natural person is a pre-condition for criminal liability of a legal entity in money laundering cases.
- f. The authorities should draw up guidance and instructions for the law enforcement and prosecutors on the practical application of the legal provisions on corporate criminal liability.

Implementation of Article 23 of the Convention

- g. If not already established, Malta should ensure that the Maltese authorities co-operate to the widest extent possible under its domestic law with Parties that seek assistance in the execution of measures equivalent to confiscation leading to the deprivation of property which are not criminal sanctions, within the meaning of the Convention's provisions.

Implementation of Article 17 of the Convention

- h. The Maltese authorities are advised to further enhance the statistics as regards the total number of requests made based on Articles 17 and 18 (including the requests for which the Attorney General made an application, and whether it was executed or refused).

Implementation of Article 34 of the Convention

- i. The authorities should ensure that foreign authorities can easily identify the appropriate Maltese authorities and also that Maltese authorities engage with foreign authorities, as necessary.

The Secretariat