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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 analysis of the Thematic Monitoring Review of the Conference of the Parties to CETS No.198 on Article 11 (“Previous Decisions), Article 25 §2 - 3 (“Confiscated Property”), and Article 14¹

¹ Adopted by the Conference of the Parties to CETS No. 198 at their 15th meeting, Strasbourg, 9 - 10 November 2023.

TABLE OF CONTENTS

INTRODUCTION	3
METHODOLOGY	4
ARTICLE 11	5
<i>Montenegro</i>	6
<i>Russian Federation</i>	6
<i>Serbia</i>	6
<i>Türkiye</i>	6
ARTICLE 25 (2 AND 3)	7
<i>Armenia</i>	8
<i>Azerbaijan</i>	8
<i>North Macedonia</i>	9
<i>San Marino</i>	9
<i>Serbia</i>	9
OVERALL CONCLUSION ON PROGRESS MADE WITH REGARD TO ARTICLES 11 AND 25 (2 AND 3)	9
ARTICLE 14	10
<i>Russian Federation</i>	10
OVERALL CONCLUSION ON ARTICLE 14	11

INTRODUCTION

1. The Conference of the Parties (hereinafter: “the COP”), at its 9th meeting held in Strasbourg from 21 to 22 November 2017, decided to initiate the application of a horizontal thematic monitoring mechanism for an initial period of two years. The 11th meeting of the COP (held in October 2019) decided to prolong the application of a horizontal monitoring for the next five years (i.e., until 2024). Such review looks at the manner in which all States Parties implement selected provisions 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, hereinafter: “the Warsaw Convention”). To that effect, the COP adopted a new Rule 19bis of the Rules of Procedures.
2. Further to this, the COP amended its Rules of Procedure with regard to the application of the follow-up process. To that end, Rule 19bis(20) states that *‘the Conference may decide that those Parties whose implementation of a certain provision of the Convention was not considered satisfactory report back on progress made within three years’ time at the latest, taking into account the nature of the recommendations rendered in the thematic monitoring reports. State Parties which declared not to apply the Articles selected to be assessed through the thematic monitoring shall be exempted from the follow – up process on these Articles.’* Consequently, at its 13th meeting the COP decided to launch a follow up process on Thematic Monitoring Report on Article 11 and Article 25(2) and 25(3) of the Convention and follow up analysis was adopted at its 14th meeting. The 14th plenary concluded that, with regard to Article 11, sufficient progress was observed with Azerbaijan and the United Kingdom. By contrast, Montenegro, the Russian Federation, Serbia and Türkiye didn’t report any significant progress since the Thematic Monitoring Report was adopted (2018). In relation to Article 25, progress made mostly concerned the EU jurisdiction, as a direct consequence of implementation of the EU Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, which brought all States Parties which are EU member states to a satisfactory level of compliance with Article 25 (2 and 3) of the Warsaw Convention. Further details on plenary’s views on the EU members States Parties compliance are also included in the Thematic Monitoring Review on Article 25 (2 and 3) as adopted in 2018². No progress in relation to implementation of Article 25 (2 and 3) was observed in Armenia and Azerbaijan, whilst progress made by San Marino and North Macedonia concerns only paragraph 3 of Article 25.
3. Following the discussion on the progress made by the States Parties, the COP decided to grant one more year to those State Parties who did not demonstrate sufficient progress in the implementation of Article 11 and Article 25 (2 and 3). Consequently, a questionnaire was circulated among selected States Parties and the responses thereto were analysed by the Secretariat.
4. In addition, at its 14th meeting, the COP also decided that the Russian Federation should report on progress made with regard to Article 14³ (‘postponement of suspicious transactions’). The analysis on this matter also constitutes the part of this follow-up report.
5. To sum up, Montenegro, the Russian Federation, Serbia, and Türkiye were invited to present their progress on implementation of Article 11. In the case of Article 25 (2 and 3), Armenia, Azerbaijan, and Serbia were requested to report on both paragraphs of Article 25, while North Macedonia and San Marino are subject to the follow-up procedure for Article 25 paragraph 2 only. As noted above, the Russian Federation was also invited to present progress made with

² <https://rm.coe.int/c198-cop-2018-1rev2-hr-ii-art-25-en/1680aaa208>

³ <https://rm.coe.int/c198-cop-2019-1rev2-hr-ii-art14-en/1680aaa20a>

regard to Article 14 ('postponement of suspicious transactions'). These countries are being assessed in relation to the respective articles mentioned, reflecting ongoing efforts to ensure their compliance with these requirements of the Warsaw Convention.

METHODOLOGY

6. The thematic monitoring report on Article 11 established the extent to which international recidivism is taken into account by the Parties. There are several possibilities to comply with the provision of Article 11, such as by providing for a harsher sanction in case of previous convictions by both domestic and foreign courts, or by providing that courts and prosecutors take previous convictions into account by assessing the offenders' past circumstances when setting a sentence⁴. It was also emphasised that Article 11 does not enforce a positive obligation on courts or prosecution services to inquire whether persons being prosecuted have received final convictions from the courts of another State Party.
7. The report on Article 25 (2 and 3) established the extent to which asset sharing, for the purposes of victim compensation and return of property to the legitimate owner, as well as the possibility to negotiate relevant asset sharing agreements between different States Parties, are taken into account by the States Parties. More precisely, Article 25(2) requires States Parties to have in place any kind of measure to oblige the competent authorities, to consider, as a matter of priority, returning the confiscated property to the legitimate owner or to compensate the victim(s) of crime, upon a request received from other State Party(ies). Moreover, it was noted that, according to Article 25(3), States Parties are not required, but encouraged to give special consideration to concluding arrangements or agreements on asset sharing, and preferably on a solid, long-term basis as the sharing of confiscated property usually concerns significant funds. Effective implementation of Article 25(2 and 3) was assessed through a combination of factors, such as the transposition of the provision into the respective legislative framework, and through submitted case studies and related statistics.
8. Both horizontal reviews contain a number of general recommendations following the summary findings, as well as country-specific recommendations following the individual state's analysis.
9. It needs to be noted that both reports were subject to a follow-up procedure in 2019 and respectively 2022. The first follow-up report (2019) concluded that little progress had been made to implement the recommended actions with regard to both articles. Only seven States Parties were able to demonstrate progress and present concrete measures that they applied with the aim to address the recommendations of Article 11 and eight countries with respect to the recommendations of Article 25 (2 and 3). Moreover, improvements with regard to the implementation of Article 25 resulted mostly from the adoption of Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, which is applicable to all State Parties that are EU member states.
10. Furthermore, the follow up report adopted at the 14th COP meeting (2022) noted that four years after the adoption of the Thematic Monitoring report of Article 11 and Article 25 (2 and 3) some progress has been achieved. In particular, progress in implementing Article 11 was observed in Azerbaijan and the United Kingdom, whilst other countries (Montenegro, the Russian Federation, Serbia and Türkiye) have not introduced any changes. Five countries (Croatia, Belgium, Montenegro, the Netherlands and Poland) demonstrated sufficient

⁴ Note that the drafters of the Warsaw Convention in the explanatory report consider that merely "assessing the offenders' past circumstances when setting a sentence" would possibly be too vague or ambiguous.

progress in implementing the provisions of Article 25 (2 and 3) whereas San Marino and North Macedonia made progress only in addressing deficiencies identified under Article 25 (3). The COP at its 14th meeting therefore proposed further follow up procedures for the State Parties that did not address the recommendations.

11. In addition to articles 11 and 25 (2 and 3), the 14th plenary decided to carry out the follow-up procedure on Article 14. The report⁵ on implementation of this article was adopted in 2019, and only one country (the Russian Federation) was found non-compliant. Consequently, the follow-up on Article 14 included the assessment of progress made in that jurisdiction, i.e., whether the *FIU or any competent authority is granted to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion*. Unlike the follow-ups on articles 11 and 25(2 and 3), this is the first follow-up report on Article 14.
12. This follow-up report therefore analyses the measures adopted by the States Parties since the adoption of three thematic monitoring reports (on articles 11, 14 and 25 (2 and 3)) and two follow up reports (both on articles 11 and 25 (2 and 3)). In other words, this report aims at assessing the extent to which selected countries have introduced measures to implement the referred articles of the Convention and address country specific recommendations. This analysis, however, does not assess the implementation of ‘soft recommendations’ which aim at better implementation of the articles concerned (e.g. maintaining statistics), or enhanced application of the provisions concerned (by e.g. providing for aggravating circumstances in law in case of previous decisions).

ARTICLE 11

13. The following general recommendations with regard to the implementation of Article 11 were made in the 2018 report:

“With the aim to promote a harmonised notion of recidivism at the international level, States Parties are recommended, if they have not yet done so, with regard to Article 11, to:

- *Amend their laws with an express reference made to the concept of international recidivism, handing the competence to their criminal courts and prosecutor’s offices to take into account previous decisions handed down by another State Party;*
- *Extend the possibility of taking into account the decisions by criminal courts to all States Parties, as required by Article 11;*

For the purposes of more effective results of the use of Article 11, States Parties are invited to consider, with regard to Article 11, to:

- *If appropriate and practicable, maintain statistics on the application of Article 11 by judges and prosecution services.*

States Parties, in particular those which did not provide case examples on the practical implementation of Article 11, are recommended to continue to familiarise judges, prosecution services and other competent authorities with the concept of international recidivism and the related domestic provisions.”

14. The country specific analysis, which is provided below, aimed at assessing any progress made in implementing country specific recommendations from the 2018 Report. Findings of

⁵ <https://rm.coe.int/c198-cop-2019-1rev2-hr-ii-art14-en/1680aaa20a>

the previous follow-up report were taken into account; however, the main source of information were the responses to the follow-up questionnaire provided by the States Parties.

Montenegro

15. Montenegro reported that in June 2023, the Government proposed amendments to the Criminal Code introducing the requirement for the court to consider previous convictions as an aggravating circumstance when determining the punishment for recidivism offenses. According to the proposed amendments the condition for applying this aggravating circumstance is that less than five years have passed since the previous conviction, as stipulated in proposed amendments to Article 43 of the Criminal Code. Whilst the proposed amendment to a large extent would satisfy the requirements of Article 11, these amendments have not yet been adopted. Therefore, Montenegro has to make further progress to implement Article 11 of the Convention.

Russian Federation

16. The Russian Federation has undergone a 'selected follow up procedure' in 2021 and the report on Article 11 was then amended⁶. The then report called for a need to introduce the specific notion of international recidivism into domestic legislation. Furthermore, the 2022 follow up report⁷ noted that no progress was achieved towards implementing this recommendation.

17. In their response to the 2022 follow-up questionnaire, the authorities indicated that draft amendments to the Criminal Code prepared in March 2023 provide for the international recidivism to be taken into account when deciding on the criminal penalty. While this appears to be a step in the right direction, no other details were provided on the proposed amendments. Considering that the draft legislation is still pending adoption, the conclusion is that the Russian Federation has to make further progress to implement Article 11 of the Convention.

Serbia

18. The authorities informed the COP that there was no progress that could be reported with regard to the implementation of the provisions of Article 11 during the period under review.

Türkiye

19. The authorities reiterated their view expressed during the previous plenary meetings (namely in 2018 and 2022), that their national legislation sufficiently complies with Article 11. The arguments, as expressed by the country's delegation, emphasise the fact that a number of predicate offences to ML are included in the scope of the domestic legislation on recidivism. This has already been a subject of the 2018 Thematic Monitoring Review and the 2022 Follow-Up Report which both confirm that international recidivism is only applied in some specific circumstances (i.e., when the offender commits looting, fraud, production and trade of narcotics or psychotropic substances, and counterfeiting money or valuable stamps) and it was considered insufficient to comply with Article 11 requirements. Meantime, no legislative amendments have been reported to ensure that all predicate offences to ML would be subject

⁶ <https://rm.coe.int/c198-cop-2018-1rev2-hr-i-art-11-en/1680aaa206>

⁷ <https://rm.coe.int/c198-cop-2022-3prov-fuhr-art11-25-en/1680aac055>

to recidivism. Consequently, it could be concluded that no progress since the adoption of the thematic monitoring report was achieved.

ARTICLE 25 (2 and 3)

20. The following general recommendations with regard to implementation of Article 25 (2 and 3) were made in the 2018 report:

“With the aim to promote a harmonised approach to sharing of confiscated property, States Parties are recommended, if they have not yet done so, with regard to Article 25(2), to:

- *Ensure that their authorities are, to the extent permitted by domestic law and if so requested, in a position to give priority consideration to returning the confiscated property to the requesting Party in order to both compensate the victims or return such property to the legitimate owners (as required by Article 25(2)).*
- *Modify their domestic legislation to put in place appropriate legislative measures and the institutional framework as to guarantee that this provision of the Convention can be effectively applied;*
- *Introduce provisions in domestic legislation permitting priority consideration for returning the confiscated property to the requesting Party for both victim compensation and return of property to the legitimate owner;*

For the purposes of the successful implementation and application of Article 25(2), States Parties are invited to consider with regard to Article 25(2) to:

- *Include in their training programmes for the judiciary and other relevant authorities the strengthening of the institutional capacities to better understanding and applying in practice the provisions of Article 25(2 and 3) of the Convention;*
- *Maintain statistics on the effective implementation of these provisions.*

States Parties are also recommended, if they have not yet done so, with regard to Article 25(3), to:

- *Provide for the possibility to conclude agreements or arrangements on asset sharing specifically by introducing such provisions into their domestic legislation;*
- *Negotiate and conclude asset sharing agreements, in accordance with its domestic law or administrative procedures, either on a case-by-case or on a regular basis, with other States Parties, to effectively apply this Convention’s provision;*
- *Extend the possibility to conclude asset-sharing agreements (which may be limited to COP States Parties which are at the same time EU Member States) to all COP States Parties⁸”*

⁸ At the 10th plenary meeting one delegation raised a concern as to whether EU Member States would be competent to conclude *ad-hoc* agreements on asset sharing with non-EU Member States. The delegation noted that the competence to sign such agreements might fall within the exclusive competence of the European Union. The Plenary clarified that the relevant general recommendation shall not be understood as a requirement of the Warsaw Convention to extend the EU asset sharing framework (to which the EU Member States are bound) to all COP States Parties. The recommendation would merely entail that States Parties which are EU Member States provide for a possibility to sign asset-sharing agreements with non-EU COP States Parties, as long as this is in line with the EU legal framework.

21. The country specific analysis provided below assesses progress reported by Parties since 2018 in application of Article 25 (2 and 3), primarily on the basis of their responses to the follow-up questionnaire, while also taking into account the findings of the previous follow-up report.

Armenia

22. In their responses to the follow-up questionnaire, the Armenian authorities informed that amendments to the “Law on on Legal Assistance in Criminal Cases” are pending adoption. Proposed amendments to Article 82 of the Law aim to ensure that, based on the request of foreign country, victims’ compensation and/or returning the property to the legitimate owner(s) would be given priority. More specifically Parts 4 and 5 of Article 82 of the draft Law read as follows:

“4. During the distribution of confiscated property, based on the request of the state that sent the request, compensation for the damage caused to the victims, as well as the return of the property to the rightful owners, is provided as a priority. Compensation for damages caused to the victims, as well as the return of property to the rightful owners, is carried out through a foreign state.

5. After the distribution of the property provided for in Part 4 of this Article, based on the judgment of the court of a foreign state, half of the confiscated property or its value shall be transferred to that foreign state at the request of the requesting state. The States concerned may conclude case-specific or general agreements that provide for property distribution rules that differ from those provided for in this part.”

23. The draft amendments clearly address the requirements as stipulated in Article 25 (2 and 3). Consequently, their approval by the legislator would provide a solid legal basis for application of the aforementioned article of the Convention. This notwithstanding, the fact that these amendments are not yet adopted, the conclusion is that insufficient progress has been achieved by the country to meet the requirements of Article 25 (2 and 3) the Convention during the period under review.

Azerbaijan

24. Azerbaijan, in their responses to the follow up questionnaire, informed that legislative amendments were introduced to address the recommendation made in the 2018 thematic horizontal review on Article 25 (2 and 3). The Criminal Procedure Code has been amended in November 2022 by introducing a new Article 525.4 which sets up a basis for sharing of confiscated assets with other countries. It specifies that *‘unless other rules stipulated in the international agreements to which the Republic of Azerbaijan is a party, fifty percent of the confiscated property or its value after deducting court and property storage costs shall be returned to the requesting state, and the rest shall be transferred to the state.’* Moreover, the authorities also underlined Article 525.5 which provides the possibility to transfer confiscated property to the requesting country with the purpose to compensate victims or return to the legitimate owner. This article excludes the application of Article 525.4 in *‘cases of compensation of damages caused to the injured person from the confiscated property or its value or return of the confiscated property to its legal owner. Under the provisions of this chapter, the property or its value shall be returned to the requesting state in full, except court and property storage costs, to compensate the victim for damages or to return the property to its legal possessor.’* The referred provisions clearly aim to implement the requirements of Article 25, paragraphs 2 and 3, by creating a legal basis for sharing confiscated assets as well

as for giving priority consideration to returning confiscated property to the victims or legitimate owners. Given the fact that these legislative changes are quite recent, the country is invited to report back in due course on their effective implementation.

North Macedonia

25. North Macedonia reported that no legislative amendments were introduced in order to allow priority consideration to be given to victims' compensation. Consequently, no progress has been noted and the recommendations as put forward in the 2018 Thematic Monitoring Review⁹ remain valid.

San Marino

26. San Marino has recently amended its AML/CFT law (Law no.100 as amended in September 2023) to improve implementation of Article 25(2). Legal amendments were introduced to Art.15 which enables sharing of confiscated assets with other countries. More precisely, amended Article 15 para 3 of the law ensures that "the rights of the victims to compensation and the return of property to its rightful owners shall be guaranteed". Although the amended legislation does not specifically refer to 'giving priority consideration to compensation of victims and returning property to the legitimate owners', the authorities advised that Art.15 paragraph 3 of the Law arises from the need to guarantee and give priority to the rights of victims and legitimate owners. They also noted that it is important to bear in mind that in San Marino, at the end of a criminal proceeding, the judge has two options with regard to the confiscation request: a) to return the assets to the State (Treasury); and/or b) to return assets to the victims or legitimate owners. Before the new legislation entered into force, the judge had a discretionary power to give priority to a) or b). Now, with the entry into force of this new provision, which specifies that "*the rights to compensation for the victims of crime and return to the rightful owners shall be guaranteed*", the judge, at the outcome of the proceedings, if the status of a victim of crime or legitimate owner(s) is confirmed, he/she must guarantee their rights, i.e., giving priority to option b). The authorities also stated that this means, in practice, that option b) prevails over option a).

27. Further to this clarification made by the authorities and their interpretation of the new legislation, it could be concluded that San Marino fully implements Article 25(2) of the Warsaw Convention.

Serbia

28. The authorities indicated that no legislative amendments were introduced in order to rectify deficiencies identified in relation to the implementation of Art. 25 (2 and 3) of the Warsaw Convention. In view of that, the recommendations as put forward in the 2018 Thematic Monitoring Review remain valid.

OVERALL CONCLUSION ON PROGRESS MADE WITH REGARD TO ARTICLES 11 AND 25 (2 AND 3)

29. Following the adoption of the 2018 Thematic Monitoring and 2022 Follow-Up Report, several State Parties introduced legislative changes in order to meet requirements of Article 11, as

⁹ <https://rm.coe.int/c198-cop-2018-1rev2-hr-ii-art-25-en/1680aaa208>

noted in the 2022 Follow up report. Nevertheless, in the last year, none of the selected countries (Montenegro, the Russian Federation, Serbia and Türkiye) introduced and adopted legislative or other measures to transpose Article 11 and facilitate its application.

30. With regard to Article 25 (2 and 3), Azerbaijan made sufficient progress against the requirements of both paragraphs of this article of the Convention, while San Marino made progress with regard to application of Article 25(2). Nevertheless, other three countries are either in the process of reforming their legislation (Armenia) or have not yet initiated them (Serbia and North Macedonia).
31. The plenary is, therefore, invited to adopt this follow up report and proceed with further procedures in relation to the countries which have not demonstrated the sufficient progress with regard to both or any of the articles concerned, as per the decision adopted by the 14th COP Plenary. This decision, as noted in the 14th plenary meeting report, is as follows: *‘if the information provided in the next Conference plenary do not confirm that these articles are applied to a satisfactory level, a letter will be sent, noting that if the implementation is still not sufficient after one year, the country in question will face a high-level visit as per the Rule 19bis of the COP Rules of Procedure.*

ARTICLE 14

Russian Federation

32. In line with the decision of the 14th meeting, the COP concluded that the Russian Federation should report on progress made in relation to application of Article 14 of the Warsaw Convention (*‘Postponement of domestic suspicious transactions’*). Article 14 requires Parties to take measures to permit urgent action to be taken by FIUs or other competent authorities or bodies in order to postpone a domestic suspicious transaction. The paragraph does not foresee a maximum duration of the postponement; instead the duration of the measures shall be determined by national law. Parties may permit reporting entities to carry out a transaction in urgent cases before a suspicious transaction report (STR) is submitted. Parties may also require a STR as a basis for every postponement order issued by the FIU (or any other competent authority), but they could opt for extending the basis of the order to other information sources (i.e. upon the request of a domestic judiciary authority or upon request of a foreign FIU).
33. The Thematic Monitoring Review on Article 14¹⁰ concluded that *‘the legal framework of the Russian Federation does not provide specific provisions which address the requirements of Article 14. The Conference of the Parties welcomes efforts currently under way by the Russian authorities to adopt measures, which would enable the FIU to take urgent measures when there is a suspicion that a transaction is related to money laundering, to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion. The Russian Federation is encouraged to ensure the enactment of such legislation.’*
34. Consequently, the Russian Federation provided information on legislative developments following the adoption of the report in 2019.
35. The authorities provided information on several legal acts which have not yet been adopted or which did not yet enter into force. These include (i) the Federal Law No. 369-FZ on Introducing Changes to the Federal Law on the National Payment System - its provisions

¹⁰ <https://rm.coe.int/c198-cop-2019-1rev2-hr-ii-art14-en/1680aaa20a>

concern transactions which may be refused or not executed by money transfer operator (e.g. in cases of money transfers without client consent); (ii) the draft amendments to the Criminal Procedure Code, which introduces a new measure of *procedural coercion*, which seeks to *temporarily (up to 10 days) suspend debit transactions*; and (iii) amendments to the legislative acts in relation to countering terrorism financing and (or) other offences - authorities advised that these draft amendments foresee that transactions suspected of being related to the laundering of proceeds of specific crimes may be postponed by the FIU. The draft law is currently under consideration by the Government.

36. In addition to the on-going efforts, the authorities also reiterated arguments and inputs provided during the horizontal review process back in 2019 (e.g. mechanism used by the Federal Tax Service, which is authorised to suspend the flow of funds on bank accounts and electronic money transfers of a tax payer; freezing powers based on the Criminal Procedure Code).

OVERALL CONCLUSION ON ARTICLE 14

37. To analyse the progress made, only the legislation that is in force at the time of reporting can be taken into account. Whilst the points ii) and especially iii) above suggest that the draft legislation takes into account Article 14's requirements, not having it adopted allows for a conclusion that the Russian Federation has to make further progress to meet the requirements of this Article. Further steps with regard to continued non-application of this article of the Convention should therefore be decided by the COP.