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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)

First Assessment Report[1] of the Conference of the Parties to CETS no°198 on Poland

[1] Adopted by the Conference of the Parties at its 5th meeting (Strasbourg, 12-14 June 2013)

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A. Background information and general information on the implementation of the Convention

1. The Council of Europe **Convention on Laundering, Search, Seizure, Confiscation of the Proceeds from Crime and Financing of Terrorism**, which is the treaty number 198 in the Council of Europe Treaty Series (it is therefore referred to as CETS 198 or "the Convention") establishes under Article 48 a monitoring mechanism which is responsible for following the implementation of the Convention, the Conference of the Parties (COP).

2. The Convention came into force on 1 May 2008, when 6 instruments of ratification were deposited with the Secretary General of the Council of Europe, all of which were Member States of the Council of Europe.

3. The monitoring procedure under this Convention deals with areas covered by the Convention that are not covered by other relevant international standards on which mutual evaluations are carried out by MONEYVAL and the Financial Action Task Force (FATF). At its second meeting in April 2010, the COP adopted an evaluation questionnaire based on areas where the Convention "adds value" to the current international AML/CFT standards and agreed that the Conference would normally assess the countries in the order that they ratified the Convention[2]. At the fourth meeting, it was confirmed that Croatia and Poland would be the next countries to be assessed under this mechanism.

4. The monitoring questionnaire was sent to the Polish authorities in July 2012, who sent their replies in January 2013. The responses to the questionnaire were coordinated by the Polish Ministry of Finance.

5. In June 2010, a training seminar for potential rapporteurs took place and three rapporteurs were subsequently identified to assess the implementation of the Convention by Poland.

6. A draft report was prepared by the rapporteurs, namely, Mr Iacovos Michael (Cyprus) on the issues of the functioning of FIU, Mr Sorin Tanase (Romania) on new legal aspects under the CETS 198 and Ms Hasmik Musikyan (Armenia) on international co-operation. This monitoring report by the COP is based primarily on a desk review of the replies by Poland to the monitoring questionnaire. Public information available in MONEYVAL adopted evaluation or progress reports have been considered and taken into account. This report is not intended to duplicate but complement the work of other assessment bodies.

7. Poland signed the Convention on 16 May 2005 and ratified it on 8 August 2007. It entered into force in respect of Poland on 1 May 2008. Poland has deposited several declarations (see annex IV)[3] .

8. The draft report was discussed at a pre-meeting on 30 May, and subsequently discussed and adopted by the COP in June 2013.

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[2] If there is a number of countries that ratified on the same day, they would be assessed in alphabetical order.
[3] A list of declarations and reservations to CETS 198 is kept up to date on the website of the Treaty Office of the Council of Europe at
http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=198&CM=8&DF=27/03/2012&CL=ENG&VL=1

9. Poland is a founding member of MONEYVAL and has been the subject of four evaluations by MONEYVAL. The fourth round assessment discussed and adopted by MONEYVAL in April 2013. The evaluation report is available on MONEYVAL's website (www.coe.int/MONEYVAL). The evaluation report contains information on the developments which have occurred in Poland after the last evaluation report, including:

- amendments to the Public Prosecutor's Office Act on 9 November 2009 reinforcing the independence of the Prosecutor General and the highly professional Polish Prosecution Service
- implementation of a new AML/CFT Act incorporating 3rd EU Directive requirements,
- creation of an autonomous offence of financing of terrorism,
- implementation of further outreach and training to the private sector,
- implementation of further training to prosecutors and judges on the elements of money laundering offences.

B. Measures to be taken at national level

I. General provisions

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

The areas where it is considered that the Convention adds value on money laundering criminalisation are as follows:

- The predicate offences to money laundering have to, as a minimum, include the categories of offence in the Appendix to the Convention (which puts the FATF requirements on this issue into an international legal treaty [article 9(4)]).
- As to proof of predicate offence, paragraphs 5 and 6 establish new legally binding standards to better facilitate the prevention of money laundering: clarification that a prior or simultaneous conviction for the predicate offence is not required [article 9(5)], and to clarify that a prosecutor does not have to establish a particularised predicate offence on a particular date [article 9(6)].
- To allow for lesser mental elements for money laundering of suspicion (and negligence, the latter of which was to be found also in ETS141) [article 9(3)].

10. The relevant Convention provisions are set out in Annex I.

Description and analysis

11. Money laundering is criminalised under Article 299 of the Penal Code, which reads as follows:

> *§ 1. Whoever accepts, transfers or takes abroad, helps to transfer the ownership or possession of the means of payment, financial instruments, securities, foreign currency, property rights or other movable or immovable property derived from the benefits relating to the commission of a prohibited act or undertakes other actions that may obstruct or considerably hinder the assertion of criminal origin or place of depositing or detection or seizure or adjudication of the forfeiture, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years.*
> *§ 2. The penalty specified in § 1 shall be imposed on a person who being an employee or acting on behalf of or in favour of a bank or a financial or credit institution or any other subject with which under the provisions of law rests a duty of recording transactions and persons executing transactions, accepts, contrary to the regulations, means of payment, financial instruments, securities, foreign currency, makes transfer of the same or conversion or accepts hereof in other circumstances arousing justified suspicion that such items are an object of the act specified in § 1 or if such person provides other services that are to conceal criminal origin of the same or a service protecting such items from seizure.*
> *§ 3. (repealed).*
> *§ 4. (repealed).*
> *§ 5. If the perpetrator commits the act specified in § 1 or 2 acting in co-operation with other persons, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.*

§ 6. The punishment specified in § 5 shall be imposed on a perpetrator who, by committing the act specified in § 1 or 2, gains considerable material benefit.
§ 7. In the event of conviction for the offence specified in § 1 or 2, the court shall decide on the forfeiture of items derived either directly or indirectly from the offence, and also benefits derived form the offence or their pecuniary equivalent even though they are not the property of the perpetrator.
Forfeiture shall not be applied to the benefit as a whole or its part if the item, the benefit or its pecuniary equivalent is subject to return to the injured person or another entity.
§ 8. Whoever voluntarily disclosed before a law enforcement agency, information about persons taking part in the perpetration of an offence or about the circumstances of an offence: if it prevented the perpetration of another offence, he shall not be liable to the penalty for the offence specified in § 1 and 2; if the perpetrator undertook efforts leading to the disclosure of this information and circumstances, the court may apply extraordinary mitigation of punishment.

Material elements

12. As noted in the recent MONEYVAL report, the physical elements which are required under Article 9 paragraph 1 of CETS N°198, of the ML offence do not fully correspond to the Convention's requirements; some crucial elements from the ML offence are not specified with sufficient clarity in the present formulation, namely;
    - Conversion or transfer of property for the purposes of concealing or disguising the proceeds' illicit origin or
    - Converting or transferring such property for the purpose of assisting any person who is involved in the commission of a criminal offence,
    - Concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds and, subject to its constitutional principles and the basic concepts of its legal system.
    - The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.

13. The COP examiners reiterate the recommendations of MONEYVAL on the material elements of the offence.

Article 9(3)

14. It appears that there is no formal requirement regarding the intentional element in the ML legal definition (knowing that such property was proceeds). While it is considered implicit, there is no express reference in Article 299 of the Penal Code to the concept of knowledge that property was proceeds. Poland advised that the general provisions of Articles 8 and 9 of the Penal Code cover this element.

15. Article 9 paragraph 3 of CETS N°198 allows countries to establish money laundering offence where the person suspected or ought to have assumed that the property was proceeds. It is recalled that the Convention provides that countries may take either measure or both. The replies to the questionnaire clearly indicate that money laundering committed by negligence does not constitute a criminal offence under Polish law. Also suspicion is not a mental element that is provided for in Poland.

Article 9(4)

16. Poland has an "all crimes approach" to money laundering prosecution, which means that any offence set out within the penal legislation of Poland may be considered as a predicate for a ML offence. As shown in the table below the rapporteurs found that all the categories of offences listed in the Appendix to the CETS N° 198 are criminal offences either under the Penal Code of Poland or other laws prescribing the criminal offences.

Designated categories of offences in the Appendix to the CETS 198	Offences in domestic legislation
a. participation in an organised criminal group and racketeering;	Article 258 of the Penal Code
b. terrorism, including financing of terrorism;	Articles134 to136, 163 to165, 166 to167, 182 of the Penal Code -Terrorism Article 165a of the Penal Code – Terrorist financing
c. trafficking in human beings and migration smuggling;	Articles 189a of the Penal Code
d. sexual exploitation, including sexual exploitation of children;	Articles 199 to 200b of the Penal Code
e. illicit trafficking in narcotic drugs and psychotropic substances;	Articles 53 to 67 of the Act on counteracting Drug Addiction
f. illicit arms trafficking;	Article 263 of the Penal Code,
g. illicit trafficking in stolen and other goods;	Articles 291 and 292 of the Penal Code
h. corruption and bribery;	Articles 228 to 231 of the Penal Code
i. fraud;	Article 286 and 297 to 298 of the Penal Code
j. counterfeiting currency;	Article 310 of the Penal Code
k. counterfeiting and piracy of products;	Articles 303 to 308 of the Act on intellectual property
l. environmental crime;	Article 181 to 188 of the Penal Code
m. murder, grievous bodily injury;	Articles 148, 156 of the Penal Code
n. kidnapping, illegal restraint and hostage-taking;	Articles 189, 123, 252 of the Penal Code
o. robbery or theft;	Articles 278, 280 of the Penal Code
p. smuggling	Article 86 of the Fiscal Penal Code
q. extortion	Article 282 of the Penal Code
r. forgery	Article 270 of the Penal Code
s. piracy; and	Article 166 of the Penal Code
t. insider trading and market manipulation	Articles 179 to 181 and 183 of the Act on Trading in Financial Instruments of 29 July 2005

Article 9(5)

17. Concerning Article 9, paragraph 5 of the Convention, in ML cases the Polish legal framework does not require a prior or simultaneous conviction regarding the predicate offences.

18. In the reply to the questionnaire, it is provided that in 2011 there were 3 convictions without prior or simultaneous conviction for the predicate offence. In the first case the suspect has been found guilty of laundering the proceeds of an Internet scam, performed as "phishing attack" by an unknown perpetrator. Similarly in the second case, the suspect was convicted of accepting the monetary funds coming from larceny and afterwards transferring these funds to an unknown person to hinder the determination of their deposit location and detection. In the last case the conviction for ML was established in respect of sham business activity (allegedly involved in trading metal scraps between the entities), which significantly hindered the determination of the illegal source of the funds, their deposit location, their detection, seizure and forfeiture.

Article 9(6)

19. The Polish authorities assert that there is no need to determine that the predicate offence was committed on a particular day and time or precise legal qualification of the proceeds generating offence in support of this they referred to the ruling of the Supreme Court of Poland, on 4th October 2011 (Ref. no III KK 28/11), which is said to be authority for the proposition that it is not necessary that committing of an offence generating material benefits, has been established in the ruling of any judicial entity, in particular a final conviction. It is said that the ruling of the Supreme Court shows that it is necessary to identify only the kind of offence, not all the factual circumstances of it. The court has also stated that, the legislator does not require determining by the court that an act being a source of financial gains meeting the characteristics of "dirty money" meets all the criteria of an offence. This is understood to mean that there is no need to determine a precise predicate offence or a specific perpetrator, his or her fault or any other additional premises conditioning penal liability.

20. That said, MONEYVAL evaluators found in the 4th round report that the liability to define a predicate offence is a major cause for the termination of money laundering proceedings. It may therefore still be useful, notwithstanding the judgement "Ref. no III KK 28/11" that clear prosecutorial guidance is given on this issue. Such guidance should make it clear that the underlying predicate criminality can be proved by inferences drawn from objective fact and circumstances and give more practical assistance on the amount of evidence that may be sufficient to establish this element of the ML offence

Effective implementation

21. Although no comprehensive statistics were provided, the authorities stated that in 2011, out of 19 convictions for money laundering, 3 convictions have been obtained without prior or simultaneous convictions for predicate offences. Nonetheless, more emphasis still needs to be given to autonomous ML prosecutions and convictions.

Recommendations and comments

22. The Polish authorities should clearly cover all elements provided in Article 9 paragraph 1 of the CETS N° 198, mainly:
    - Conversion or transfer of property for the purposes of concealing or disguising the proceeds' illicit origin, or,
    - Converting or transferring such property for the purpose of assisting any person who is involved in the commission of a criminal offence,
    - Concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds and, subject to its constitutional principles and the basic concepts of its legal system,
    - The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.

23. The Polish authorities should consider introducing in Article 299 of the Penal Code, an incrimination of some of the acts referred to in paragraph 3 of Article 9 of the CETS N° 198, in either or both of the following cases where the offender:
    - suspected that the property was proceeds (with appropriately lower penalties),
    - ought to have assumed that the property was proceeds.

24. The Polish authorities should consider issuing clear prosecutorial guidance on the level and types of evidence which are likely to be sufficient for the prosecutor to adduce in an autonomous ML prosecution in respect of the underlying predicate criminality.

25. The Polish authorities should maintain comprehensive statistics including the predicate offences as an important tool for assessing the effectiveness of Polish AML legal system.

2. Corporate liability – Article 10 paragraphs 1 and 2

The areas where it is considered that the Convention adds value are as follows:

- Some form of liability by legal persons has become a mandatory legal requirement (criminal, administrative or civil liability possible) where a natural person commits a criminal offence of money laundering committed for the benefit of the legal person, acting individually who has a leading position within the legal person (to limit the potential scope of the liability). The leading position can be assumed to exist in the three situations described in the provisions (see Annex II).

- According to Article 10 paragraph 1:

  "*Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*
  a. a power of representation of the legal person; or
  b. an authority to take decisions on behalf of the legal person; or
  c. an authority to exercise control within the legal person,
  as well as for involvement of such a natural person as accessory or instigator in the

above-mentioned offences."

- The Convention expressly covers lack of supervision (article 10 paragraph 2 makes it a separate, additional requirement).

Description and analysis

26. Corporate liability of legal persons was introduced in 2002 through provisions of the Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty. The Act regulates in a comprehensive manner the liability of collective entities. It introduces a broad definition of collective entities subject to such liability, which comprises legal persons and organisational entities without legal personality. The Act provides for a number of sanctions, beginning with fines and forfeiture of benefits and others, such as a ban on promoting or advertising business activities, products or services, a ban on using financial support from public funds and aid provided by international organisations, a ban on applying for public procurement contracts; a ban on pursuing indicated business activities. However, the liability of legal persons cannot be named strictly "criminal". The principle is that only the natural person can be held criminally liable. It stems both from the Polish Constitution, as well as other laws. The authorities state that, however, this principle does not constitute any obstacle for holding the collective entities liable for offences committed by certain natural persons in the form presented below. Pursuant to the Article 3 paragraphs 1 to 4, in case of commission of a money laundering offence (mentioned by Article 16 § 1 item 1a of the act) by a natural person, a collective entity is liable for such an act in the following situations, if such conduct did or could have given the collective entity an advantage, even of non-financial nature,

    When a perpetrator:

    1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, make decisions in its name, or exercise internal control, or whenever such person abuses the authority or neglects the duty,
    2) is allowed to act as the result of abuse of the authority or neglect of the duty by the person referred to in point 1 above,
    3) acts in the name or on behalf of the collective entity on consent or at the knowledge of the person referred to in point 1,
    4) is an entrepreneur.

27. Pursuant to the provisions of Article 6 of the Act, the individual liability of the perpetrator employed in a collective entity is not excluded even if such an entity does not incur liability provided by the Act. Neither the existence nor non-existence of liability of the collective entity under the principles set out in this Act exclude its civil, administrative or personal legal liability for the inflicted damage.

28. Analysing legal provisions, the rapporteurs conclude that the requirements provided by Article 10 paragraph 1 of the Convention are met.

29. Regarding Article 10 paragraph 2 of the Convention, Poland indicated that pursuant to the provisions of Article 5 of the Corporate Liability Act, the collective entity shall be held liable even if found to have failed to exercise due diligence in selecting the natural person referred to in Art. 3.2 or 3.3, or to have had no due supervision over the person, or whenever the organisation of the entity's activities does not guarantee the prevention of the prohibited act its perpetration could have been prevented by due

caution required in the circumstances and exercised by the person referred to in Art. 3.1 or 3.4. Therefore, as a consequence, the requirements of Article 10 paragraph 2 are met.

Effective implementation

30. Despite the fact that more than 10 years have passed since the adoption of the legislation that introduced corporate liability of legal persons, there are still no ML cases in which this corporate liability was applied. This raises a real concern on effective implementation of corporate liability of legal persons.

Recommendations and comments

31. The Polish legal framework appears broadly in line with the requirements of the Convention with respect to corporate liability of legal persons. That said, it is understood that "quasi criminal" liability of a legal entity is secondary to the criminal liability of an individual acting on its behalf. It appears that, the entity can be held liable only after the person who committed the offence has been found guilty and sentenced by a court, or a valid decision to "leave voluntary submission to liability," or a valid decision to conditionally discontinue the proceedings, or a valid decision to discontinue the proceedings for circumstances excluding punishment of the perpetrator. Therefore prolonged criminal proceedings to establish the liability of an individual could discourage proceedings in respect of the legal entity. Bearing this in mind, it is noted that no final convictions or indictments of legal persons for money laundering or any other economic crime have occurred. This raises questions on the effective implementation of the relevant legal provisions. Therefore, it is recommended to Poland,
    - to conduct a review as to what are the potential obstacles to the use of corporate liability mechanisms in respect of legal entities by judicial authorities in money laundering and terrorist financing cases, (including the possible elimination of the pre-condition of establishing the liability of a natural person before holding a legal person liable) and to take appropriate steps to remove them.

3. Previous decisions – Article 11

Article 11 is a new standard dealing with international recidivism. It recognises that money laundering and financing of terrorism are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. Article 11 provides for a mandatory requirement for the State to take certain measures but does not place any positive obligation on courts or prosecution services to take steps to find out about the existence of final convictions pronounced in another State-Party; its wording is as follows:

"Each Party shall adopt such legislative and other measures as may be necessary to provide for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with this Convention."

Description and analysis

32. From the replies to the questionnaire it appears that recidivism does not constitute an aggravating circumstance when it is related to offences committed abroad and the Law does not provide (except in the case of the EU member states - see beneath) a possibility to take into account judgements of foreign courts. Nevertheless, in one of its judgements[4], the Supreme Court allowed for the possibility for an abroad conviction decision to be taken into account, in order to accept a special type of recidivism. Moreover, it is stated that, pursuant to Article 114 of the Penal Code, a sentencing judgement rendered abroad shall not bar criminal proceedings for the same offence from being instituted before a Polish court. However, this provision does not apply when a sentencing judgement given abroad has been transferred to be executed within the territory of the Republic of Poland, and when the judgement given abroad related to an offence, in connection with which either a transfer of the prosecution or extradition from the territory of the Republic of Poland has occurred, and also when this results from an international treaty binding the Republic of Poland.

33. In addition, pursuant to Article 53^2 of the Penal Code, when imposing a penalty the court shall, inter alia, take into account of *"the characteristics and personal conditions of perpetrator, the way of life of the perpetrator prior to the commission of the offence"*.

34. In relation to EU member states the Polish authorities pointed to the Council Decision 2008/675/JHA of 24 July 2008, on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (Official Journal 15.8.2008). The relevant implementing provision, Article 114a, which was added to the Polish Penal Code on 8 May 2011, states that as a general rule, in criminal proceedings, a final judgment rendered by the court having jurisdiction in criminal matters in another Member State of the European Union, according to which a person has been found guilty for a criminal offense on a different action than that which is the subject of criminal proceedings, needs to be taken into account.

35. The provisions of the Schengen acquis as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community are directly applicable in Poland. Pursuant to Article 54 of the Schengen Protocol "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*". In addition, exchange of information from judicial records of foreign countries has been effectuated pursuant to Article 22 of the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959 and bilateral agreements have been concluded by Poland. Extracts from and information relating to judicial records could also be requested by the judicial authorities pursuant to Article 13 of the European Convention on Mutual Assistance in Criminal Matters.

36. Therefore, it is concluded that Polish legislation allows, to some extent, especially in relation with EU countries, for the possibility of foreign decisions being taken into account when determining a penalty.

[4] 24 April 1975 VI KZP59174 (OSNK W 1975/6/71)

Recommendations and Comments

37. Given that there is no explicit legal provision or jurisprudence, except for the Polish Supreme Court judgement mentioned above, granting the possibility for the courts to take into account the international recidivism as required under the Convention, excepting the case when the decision was taken in an EU country, it is recommended to Poland to introduce within the national legal framework the principle of international recidivism and to ensure that the courts and prosecution services are in a position to take into account final decisions rendered in another Party in relation to offences established in accordance with CETS N° 198.

4. Confiscation - Article 3 paragraph 1, 2, 3, 4 of the CETS 198

The confiscation and provisional measures set out in the Convention which are considered to add value to the international standards are in the following areas:

- Article 3, paragraph 1 introduces a new notion to avoid any legal gaps between the definitions of proceeds and instrumentalities as, according to it, *"Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds* ***and laundered property****."*

- Confiscation has to be available for ML **and to the categories of offences in the Appendix** (and no reservation is possible) (Article 3 paragraph 2).

- Mandatory confiscation for some major proceeds-generating offences is contemplated under this Convention (Article 3 paragraph 3 [Annex III]). Though not a mandatory provision, the drafters sent a signal that, given the essential discretionary character of criminal confiscation in some countries, it may be advisable for confiscation to be mandatory in particularly serious offences, and for offences where there is no victim claiming to be compensated.

- Reverse burdens are possible (after conviction for the criminal offence) to establish the lawful or other origin of alleged proceeds liable to confiscation – Article 3 paragraph 4 [subject to a declaration procedure in whole or in part].

Description and analysis

General

38. The Polish confiscation regime is mainly regulated under the Penal Code which provides for both general forfeiture and also special forfeiture in money laundering cases. The general confiscation system is mainly based on Articles 44 and 45 of the Penal Code. Other specific confiscation regimes exist for money laundering (Article 299 paragraph 7 of the Penal Code) and fiscal crimes (Article 33 of the Penal Fiscal Code).

39. Article 44 covers objects derived directly from an offence and instrumentalities that served the crime or were used to commit the crime and reads as follows:

§ 1. The court shall impose the forfeiture of items directly derived from an offence.

§ 2. The court may decide on the forfeiture, where law so provides for, of the items which served or were designed for committing the offence.
§ 3. The forfeiture described in § 2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed, the court may impose a compensatory damages to the State Treasury instead.
§ 4. In the event that imposing the forfeiture of items specified in §§ 1 or 2 is not possible, the court may impose the obligation to pay a pecuniary equivalent of items directly derived from an offence or items which served or were designed for committing the offence.
§ 5. The forfeiture of items referred to in § 1 or 2 shall not be imposed if they are subject to return to the injured person or other legitimate entity.
§ 6. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may decide or, if the law so provides, shall decide on the forfeiture thereof.
§ 7. If the items referred to in § 2 or 6 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in the law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the obligation to pay a pecuniary equivalent of its value.
§ 8. Property which is the subject of forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

40. As prescribed in the Article 45 § 1 of the Penal Code, if the perpetrator, even indirectly, acquired a property-related benefit from the crime, and the benefit is not subject to forfeiture of items set out in Article 44 § 1 or 6, the court shall decree the forfeiture of such benefit or its equivalent. Therefore indirect proceeds are also subject to the general confiscation regime.

41. The special forfeiture regime set forth for money laundering cases, which enables forfeiture of equivalent value to proceeds of crime is stipulated in § 7 of Article 299 of the Penal code, which regulates the ML offence, reads as follows:

"In the event of conviction for the offence specified in § 1 or 2, the court shall decree the forfeiture of implements derived either directly or indirectly from the crime, and also forfeiture of benefits from the crime or its equivalent even though they are not the property of the perpetrator. A decision on the forfeiture in part or in whole shall not be made if benefits from the crime or its equivalent are to be returned to a wronged person or other authorized entity."

42. In addition to the above-mentioned provisions, a special forfeiture regime is regulated by Article 33 of the Penal Fiscal Code. This is a law applicable to fiscal offences, including some that are money laundering predicates (e.g. tax fraud, customs fraud). As it is prescribed in this Article, if the perpetrator has derived from the commission of a fiscal offence, even indirectly, a property benefit, not subject to forfeiture of things defined in art 29 point 1 or 4 of this Law, the court imposes a penalty measure of forfeiture of this benefit. In the event of impossibility of imposing penalty measure of forfeiture of this benefit, court imposes penalty measure of enforcement of financing equivalence.

Application of Article 3 of the Convention to categories of the offences in the appendix

43. The Polish authorities have indicated, as noted above, that all the offence categories in the appendix to the Convention are in the Penal Code or other provisions, prescribing criminal offences. Article 116 of the Penal Code makes the general part of the Code (which includes confiscation/forfeiture measures) applicable to other laws providing for penal liability, unless those laws specifically exclude the application of these provisions. Thus all offences in the appendix which are covered by the Penal Code are subject to confiscation. The offence categories not in the Penal Code have been considered so far as is possible. There are no provisions excluding confiscation in the Act on Trading in Financial Instruments. The same applies to the offences under the Act on Intellectual Property and Counteracting Drug Addiction.

Laundered Property

44. The provision in the Convention was introduced to ensure that laundered property in a stand-alone ML case could be subject to confiscation as they are the proceeds of a predicate offence, not the proceeds of ML offence.

45. The Polish Penal Code provides for the criminalisation of money laundering as a stand-alone criminal offence and the confiscation provision applies to all offences established in the Penal Code and other laws prescribing criminal offences. Article 299 § 7 contains the following provision: "*In the event of conviction for the offence specified in § 1 or 2, the court shall decide on the forfeiture of items derived either directly or indirectly from the offence…".* Although there is no specific reference to laundered property, the wording of this article seems also to cover the notion of "laundered property".

Confiscation to apply to the offences in the appendix – Article 3(2)

46. The offences listed in the table of paragraph 16 above that are prescribed in the special part of the Penal Code are subject to forfeiture under the general part of the Code. Under Article 116 of the Penal Code, the provisions of the general part of the Penal Code apply to other laws providing for penal liability, unless those laws specifically exclude the application of these provisions. So far as the rapporteurs can deduce neither the Act on Counteracting Drug Addiction exclude application of the forfeiture provisions, thus offence categories in the appendix are, in principle, covered by forfeiture.

Mandatory Confiscation for Particular Offences – Article 3(3)

47. Article 44 paragraph 1 of the Penal Code is the basis for forfeiture of direct proceeds and Article 45 § 1 is the basis for forfeiture of indirect proceeds (the language used is benefit). Both provisions are now couched in mandatory terms. Article 45 was amended in 2001, so far as the mandatory nature of the obligation is concerned. Previously the confiscation based on Article 45 was discretionary. Thus in principle Article 3 § 3 of the Convention (itself not required in mandatory terms) is satisfied.

48. Forfeiture of the instrumentalities remains discretionary.

49. Reading together the wording of Article 44 § 7 and Article 299, it appears that instrumentalities transferred to third parties are not in the scope of the confiscation regime. As a consequence, there seems to be no provision available that would prescribe mandatory confiscation of instrumentalities used in or intended for use in the commission of a money laundering offence and no possibility of confiscating the instrumentalities which do not belong to the perpetrator.

50. The MONEYVAL 4th round report also noted that instrumentalities generally cannot be confiscated if they have been transferred to third parties. However, Polish authorities propose to amend the ML offence with a new paragraph so stipulating that: "*In case of sentencing a person for the crime specified in § 1,2 or 7, the court may decree a forfeiture of implements, that served the crime or were used to commit the crime, even if they do not belong to the perpetrator".* Thus on this basis "laundered property" may become subject to confiscation in the future. At present, in the absence of an obligation to forfeit instrumentalities in stand-alone ML cases this remains a serious gap.

Burden of Proof – Article 3(4)

51. As a general principle in Polish Law, the burden of proof with regard to establishing the illicit origin of proceeds liable to forfeiture/confiscation rests with the prosecution. In line with this principle, in accordance with Article 53, paragraph 4b, of the Warsaw Convention, the Republic of Poland has declared that Article 3, paragraph 4 of the Convention shall not be applied. The Declaration is contained in the instrument of ratification deposited on 8 August 2007. Despite this declaration, Polish Law has some provisions which to some extent provide for reverse burden of proof and the offender is required to demonstrate the lawful origin of the property.

52. Pursuant to the Article 45 § 2 and § 3 of the Penal Code and Article 33 § 2 and 3 of the Fiscal Penal Code if the perpetrator has been convicted for the crime as a result of which he acquired, even indirectly and if the property related benefit at stake is of considerable value, it is assumed that the property which he acquired any title of ownership during or after the crime is derived from the commission of the offence and before any final judgement is deemed to be the benefit derived from the offence and the offender is required to demonstrate the lawful origin of the property. Similarly if the perpetrator has actually ceded, under any legal title, the property constituting the benefit acquired by committing the crime to a natural person, legal person or an entity without legal personality, it is also assumed that the items remaining in possession of such a person or entity (as well as their property rights) belong to the perpetrator, unless the interested person or entity proves their lawful acquisition. While this provision go some way to meeting the spirit of Article 3(4), they only relate to property acquired around the time of the commission of the offence and not to property of the defendant acquired much earlier. Thus they could not be used to apply for deterrent confiscation orders so called "life style crime". Moreover, it is unclear whether provisional measures are taken in respect of any property held prior to the commission of the offence.

53. It was unclear to the rapporteurs which principle or principles of domestic law inhibit a wider application of the use of assumptions. As seen from the paragraph above assumptions can be applied in certain circumstances in relation to incomes acquired between the date of the offence and date of conviction. The terms of the reservation which Poland has entered to Article 3(4) of the Convention are wide. The rapporteurs cannot immediately deduce why the assumptions currently used in some cases cannot extend in particularly serious offences to income and property acquired before the date of the relevant offence. No principle of domestic law which could obstruct an extension to this approach, to be fully in line with the Convention requirements, was pointed to by the Polish Authorities.

Effective implementation

54. The only statistics received cover confiscation applied in ML cases. Statistics on the application of confiscation more generally are not systematically kept on a systematic basis.

Money laundering cases- forfeiture of property

	2008	2009	2010	2011
Value of property forfeited	76.156 EUR	1.868.467EUR	466.332 EUR	514.055 EUR
Number of cases in which forfeiture has been decreed	6	10	13	6

55. Regarding the confiscation/forfeiture, the overall effectiveness of the legal framework, despite mandatory confiscation provisions in the law, is questionable. The available statistics show that the sums collected annually are relatively small (recently around 500.000 Euros. More statistics on provisional measures and confiscation in proceeds-generating predicate offences need to be kept.

Recommendations and comments

56. Based on the information provided, the legal framework on confiscation is broadly in line with the requirements under review of article 3 of the Convention. However, some issues of concern remain: for instance, the law does not require that instrumentalities used in or intended for use in the commission of a money laundering offence be confiscated, unless it is prescribed clearly in the Law, which it is not the case, as yet. Furthermore, the Law does not allow for the confiscation of instruments belonging to third Parties. Therefore, it is recommended to Poland:

- to consider extending the scope of mandatory confiscation to the instrumentalities used in or intended for use in the commission of a money laundering offence,
- to consider extending the scope of the confiscation regime to the instrumentalities which have been transferred to or belong to third parties,
- to improve the quality and scope of statistics (so as to assess the actual effectiveness of confiscation measures in ML, TF and all predicate offences) and to ensure that the provisions on confiscation and provisional measures are properly and effectively applied,
- to review the practice on assumptions which can be applied in assessing forfeiture orders after conviction, as set out in paragraph 52 above, with a view to considering whether they can be extended to a time before the commission of the offence in particularly serious cases, and to reconsider the reservation to Article 3(4) of the Convention in that light.

5. Management of frozen and seized property – Article 6

The Convention introduces a new standard which relates to the requirement of proper management of the frozen and seized property enshrined in Article 6 which reads as follows:

"Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention."

Description and analysis

57. Poland indicated that there is no special legal framework regarding proper management of frozen and seized assets. There are some procedures in place only regarding bank accounts, which traditionally are frozen in many jurisdictions until a final court decision is issued. There are also specific provisions in the Criminal Procedure Code regarding objects discovered or surrendered during a search. These items are stored in warehouses (in case of seizure of movable goods) of the Police or other law enforcement agencies. Other relevant provisions refer to material objects which are perishable or the storage of which would entail unreasonable expense or excessive hardship or would significantly impair the value of the object. This category of assets may be sold without an auction.

Effective implementation

58. Since there is no legal framework regarding the measures for the management of assets subject to temporary measures, the evaluators are not in the position to assess the effective implementation.

Recommendations and comments

59. While the evaluators appreciate the establishment of the Polish Asset Recovery Office, (although the latter does not have the management of seized assets included in its mandate) in order to better support and complement this initiative, Poland is recommended to:
- introduce a clear procedure for managing seized assets and in this respect to comply with requirements of Article 6 of CETS No. 198;
- develop and maintain statistics or general figures regarding the "chain" of identified proceeds of crime, instrumentalities and other categories of assets which may be confiscated, starting from identification during criminal investigation phase, seizures, confiscation ordered by courts and last the effective valorisation of confiscated assets.

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

The areas where the Convention is considered to add value are as follows:

- The provisions of article 7 introduce powers to make available or seize bank, financial or commercial records for assistance in actions for freezing, seizure or confiscation. In particular: Article 7 paragraph 1 provides that "Each Party shall adopt *such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy*."
- Article 7 paragraph (2a) provides for power to determine who are account holders: "*To determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts*;"
- Article 7 paragraph (2b) provides for the power to obtain "historic" banking information *"To obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account*;"
- Article 7 paragraph (2c) [subject to declaration under article 53] provides for the power to conduct "prospective" monitoring of accounts as it provides for "*To monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts;*"
- Article 7 paragraph (2d) provides for the power to ensure non-disclosure *"To ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out*.*"*
- States should also consider extending these powers to non-banking financial institutions (article 7 paragraph (2d))

Description and analysis

Paragraph 1

60. As a general rule foreseen in Article 217 § 1 of the Criminal Procedure Code, objects including banking, financial or commercial records which may serve as evidence or be subject to seizure in order to secure penalties regarding property, penal measures involving property or claims to redress damage, must be surrendered when so required by the court, the state prosecutor, and in emergency cases, by the Police or other authorized agency. If a natural or legal person holding the objects in question refuses to release them voluntarily, a seizure may be affected. Pursuant to the Article 219 and 220 of the CPC, the Police or another agency in cases specified in law have the power to conduct a search on the premises and other places for the objects which might serve

as evidence in criminal proceedings located upon a warrant for search is issued by the court or state prosecutor.

61. Pursuant to article 149, paragraph 2 of the Act on Trading in Financial Instruments, all the information covered by the professional secrecy obligation which is held by the persons provided by Article 148, paragraph 1 can be revealed at the demand of a court, a public prosecutor or another authorized authority indicated in the Act.

62. The list of natural persons enumerated in Article 148, paragraph 1 encompasses:
    1) brokers and advisers;
    2) members of the governing bodies, established pursuant to the articles of association, of:
        - an investment firm,
        - a custodian bank,
        - a commodity brokerage house which engages in activities related to trading in financial instruments other than securities,
        - companies operating stock exchanges and companies operating over the counter markets,
        - the National Depository,
        - the commercial chamber,
        - the associations and the organisations referred to in Art. 9.1.4 of the Act on Capital Market Supervision;
    3) persons employed by the abovementioned entities;
    4) persons bound by a legal relation under a mandate contract or in any other legal relation of a similar nature with the abovementioned entities;
    5) persons employed by the entities bound by a legal relation under a mandate contract or in any other legal relation of a similar nature with the abovementioned entities;
    6) any other persons, if their professional secrecy obligation results from other statutory provisions.

63. Pursuant to Article 147 of the above-mentioned act, the professional secrecy applies to any information obtained by the person specified in Article 148, paragraph 1 in connection with the performance of such persons' professional duties under an employment or a mandate contract or another legal relation of a similar nature, relating to the legally protected interests of the entities performing activities related to trading in financial instruments, or any other activities performed as part of a statutorily regulated business falling within the scope of supervision or information concerning the activities taken as part such supervision, in particular any information comprising:
    1) personal details of a party to an agreement or another legal transaction;
    2) the contents of an agreement or the subject of a legal transaction;
    3) information on the economic standing of a party to an agreement, including the designation of a securities account, any other account in which financial instruments other than securities are registered, or of a cash account auxiliary to any such accounts, the number and designation of financial instruments and the value of funds credited to any such accounts.

64. Similarly, according to the Article 105 of the Banking Act, with the scope of information related to a natural or a legal person, banking secrecy can be lifted at the request of a court or public prosecutor in connection with legal proceedings under way in cases involving criminal or fiscal offences against a natural person where such person is party

to an agreement with the bank, or when these offences committed with respect to the activity of a legal person.

65. The Polish authorities indicated that 946 money laundering investigations were conducted in 2011, but that they do not keep statistics regarding the numbers of seizure orders and search warrants. However, they also advised that in practically every criminal investigation concerning money laundering, at least a few such orders/warrants have been issued.

Paragraph 2 a)

66. The Polish legal system does not provide for any centralized register of bank accounts held or controlled by natural persons. There is also no reference to any fast procedure in order to identify the owner of bank accounts or real owner. However, in the presence of particulars identifying (for instance, the bank in which the account is opened) the requested information can be provided. In the absence of such particulars, additional information must be sought (for example Tax Identification Number (TIN) or Personal Identification Number (PESEL)) and by the assistance of competent revenue authorities bank accounts relating to natural persons can be identified. The Polish Authorities advised that tax authorities have information on natural persons. If they have such information they are obliged to provide it to other authorities. However, it is limited to people who have tax obligations in Poland. Therefore this source of information is not of itself exhaustive.

67. In case of persons conducting business activity, information can be found in a separate database (the National Tax-payers Register) by way of using TIN.

68. Information on bank accounts of legal persons and entrepreneurs is held by the Ministry of Finance, which collects this information under Article 82 sec. 2 of the Tax Ordinance Act. As it was stated under paragraph 60, all this information can be accessible following court orders or public prosecutor`s demands in connection with legal proceedings under way in cases involving criminal or fiscal offences against a natural person where such person is party to an agreement with the bank, or when these offences committed with respect to the activity of a legal person.

Paragraph 2 b)

69. Law enforcement authorities rely on the general provisions of Criminal Procedure Code referred to in paragraph 60 above and Banking Act. There is also a specific text applicable only in ML/FT cases, being provided by Article 13a of the AML/CFT Act, which indicates that at the written request of the General Inspector, any obligated institution shall immediately disclose any information about the transactions covered by the provisions of the Act. Such a disclosure consists in particular the provision of information about the parties of transaction, the content of documents, including the balances and turnovers on the account, provision of certified copies of theirs, or a disclosure of relevant documents for insight of the authorized employees of the unit referred to in Article 3 paragraph 4 in order to produce notes or copies.

70. The latter applies only to reporting institutions and is part of the AML preventive system, being an FIU prerogative and not of one of the police or prosecution authorities.

Paragraph 2 c)

71. Polish legislation does not provide for any possibility of law enforcement authorities monitoring, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request.

Paragraph 2 d)

72. The Banking Act and the Act on Trading in Financial Instruments do not provide any legislative or other measures to ensure that banks do not disclose to the bank customer concerned or to third persons, that information has been sought or obtained by law enforcement or that an investigation is being carried out. The only explicit prohibition of disclosure of information and tipping-off is prescribed in the Article 34 of AML/CFT Act, according to which any disclosure of information to unauthorized parties, including the parties of the transaction or the account holders, of the fact that the General Inspector has been informed about the transactions, the circumstances of which indicate that asset values may be derived from money laundering; or on the accounts of entities for which there is a reasoned suspicion that they have a connection with terrorist financing; or on transactions made by these entities, is prohibited. Therefore it appears that Poland has not taken appropriate measures to implement article 7 paragraph 2d) of the Convention.

73. As already indicated above, pursuant to Article 149, paragraph 2 of the Act on Trading in Financial Instruments, all the information covered by the professional secrecy obligation which is held by the persons enumerated in Article 148, paragraph 1 in connection with the performance of such persons' professional duties under an employment or a mandate contract or another legal relation of a similar nature, relating to the legally protected interests of the entities performing activities related to trading in financial instruments, or any other activities performed as part of a statutorily regulated business, can be revealed at the demand of a court or a public prosecutor. Therefore it can be concluded that the powers of the competent authorities regarding the implementation of the Article 7 of the Convention have been extended to non-bank financial institutions that are obliged to keep professional secrecy.

Effective implementation

74. Due to the lack of information and taking into account that no statistics were provided, the effective implementation of relevant provisions of Art. 7 of the Convention could not be assessed.

Recommendations and comments

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

7. International co-operation

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

The Convention is considered to add value in the following areas:

The Convention introduces a new obligation to confiscate that extends to "*in rem*" procedures. Hence, Article 23 paragraph 5 reads as follows:

> "*The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures* ***equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions****, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention*." (i.e. transformed or converted etc)

Asset sharing (though Article 25(1) retains the basic concept that assets remain in the country where found, the new provisions in Article 25(2) and (3) require priority consideration to returning assets, where requested, and concluding agreements).

Description and analysis

76. Poland has not introduced provisions which would allow them to cooperate within the meaning of Article 23 of CETS No. 198, though it has provided a mechanism of confiscation of property without a conviction on any person. An important element of confiscation foreseen under Article 23 of Warsaw Convention, namely confiscation of property in relation to a criminal offence, is missing in the civil confiscation mechanism in Polish legislation. Instead, the mentioned confiscation is executed in terms of property obtained from the intentional commission of an illegal act.

77. Although, article 585 of the CPC gives a possibility to conduct judicial assistance on confiscation of material objects and their delivery abroad, the legislation of Poland does not foresee any clear provision which would either authorize or restrain returning confiscated property to the Requesting Party. Poland has not concluded agreements or arrangements with other Parties in this matter. Though the Polish Authorities in their answers did not refer to direct application of CETS 198 as a basis for giving priority consideration to returning the confiscated property to the requesting Party, Article 25, paragraph 2 could be applied in such a case.

Effective implementation

78. The Polish authorities confirmed that there have been no applications either to execute a request for a non-conviction based confiscation order or for international legal assistance in respect of such cases. Since no evidence of effective implementation was presented by the Authorities regarding whether they have received and executed any request for deprivation of the property that is not criminal sanction or they returned any property to the requesting party or shared with it, there is no possibility to assess the effective implementation of Articles 23 and 25 of the Convention.

Recommendations and comments

79. Poland has not adopted specific measures to implement articles 23 paragraph 5 of the Convention; the same goes for article 25 paragraphs 2 and 3. Therefore, it is recommended to Poland to establish a mechanism for execution of measures equivalent to confiscation of property, which are not criminal sanctions, in relation to a criminal offence as part of international cooperation.

80. The authorities should also consider concluding agreements or arrangements on sharing with other Parties, on a regular or case-by-case basis, confiscated property, in accordance with its domestic law or administrative procedures.

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

The areas where the Convention is considered to add value here are the following:

- The Convention introduces the power to provide international assistance in respect of requests for information on whether subjects of criminal investigations abroad hold or control accounts in the requested State Party. Indeed, Article 17 paragraph 1 reads as follows: *"Each Party shall, under the conditions set out in this article, take the measures necessary to determine, in answer to a request sent by another Party, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide the particulars of the identified accounts."* This provision may be extended to accounts held in non-bank financial institutions and such an extension may be subject to the principle of reciprocity.

- The Convention also introduces power to provide international assistance in respect of requests for historic information on banking transactions in the requested Party (which may also be extended to non bank financial institutions and such extension may also be subject to the principle of reciprocity). Article 18 paragraph 1 provides that *"On request by another Party, the requested Party shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account*."

- The Convention is considered to add also value as it establishes the power to provide international assistance on requests for prospective monitoring of banking transactions in the requested Party (and may be extended to non bank financial institutions). Article 19 paragraph 1 reads as follows:
  "Each Party shall ensure that, at the request of another Party, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Party."

Description and analysis

Article 17 paragraphs 1, 4, 6; Article 18 paragraphs 1 and 5; Article 19 paragraphs 1 and 5

81. Information on banking accounts can be obtained by means of MLA requests. Under Article 588, paragraph 4 of Criminal Procedure Code, Polish law applies to the procedural actions performed pursuant to a request from a foreign court or state prosecutor. However, if special proceedings or some special forms of assistance are required by foreign relevant bodies, they should be done, unless this is not in conflict with the principles of the legal order of the Republic of Poland.

82. Article 105, paragraphs 1 and 2c of the Banking Act are applicable in this case, according to which, banks are required to disclose information that is subject to the obligation of banking secrecy at the request of a court or public prosecutor in connection with the performance of a request for legal assistance from a foreign country which, on the basis of a ratified international agreement binding on the Republic of Poland, has the right to request information that is subject to the obligation of banking secrecy.

83. According to Article 217, paragraph 1 of the Criminal Procedure Code, objects (including banking, financial or commercial records) which may serve as evidence, or be subject to seizure in order to secure penalties regarding property, penal measures involving property or claims to redress damage, can be surrendered when so required by the court, the state prosecutor, and in cases not amenable to delay, by the Police or other authorised agency. In the event of refusal of a voluntary surrender of objects, a search may be affected.

84. Interpretation of Article 217, paragraph 1 of the Criminal Procedure Code in combination with Article 588, paragraph 4 of the same code shows that a request may be dependent on the same conditions as applied in respect of requests for search and seizure.

85. Article 588, paragraph 3 subparagraph 3 which sets the reciprocity rule may be a restrictive measure to international cooperation under Article 17 of CETS No. 198. In particular, under the mentioned provision of domestic legislation the court or state prosecutors' office may refuse to give judicial assistance if the request is concerned with an act which is not an offence under Polish law.

86. Application of Article 17 of the Warsaw Convention has been extended to non-bank financial institutions, inter alia other entities obliged to keep professional secrecy. In particular, Article 149, paragraph 2 of the Act of 29 July 2005 on Trading in Financial Instruments, all the information covered by the professional secrecy obligation which is held by the persons enumerated in Article 148, paragraph 1 can be revealed at the demand of a court or a public prosecutor, in connection with a request for legal assistance made by a foreign country which, on the basis of a ratified international agreement binding on the Republic of Poland, has the right to request to be provided with information covered by the professional secrecy obligation.

87. As to the ability to provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period and the conditions of its execution, the same provisions apply as in case of implementing powers foreseen

by Article 17 of CETS No. 198. In particular, Article 105 of Banking Law and Article 217, paragraph 1 of the Criminal Procedure Code apply.

88. Polish legislation does not provide any regulation for the cases when, at the request of another Party, authorities need to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request.

Effective implementation

89. The replies to the questionnaire do not give any evidence that such requests under this Convention have been made so far. Therefore the effectiveness of the implementation of the provision of the Convention could not be assessed.

Recommendations and comments

90. Polish authorities should take legislative measures to determine the ability to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request.

7.3. Procedural and other rules (Direct communication) – Article 34 paragraphs 2 and 6

The Convention is considered to add value in that it introduces the possibility for direct communication prior to formal requests. According to article 34 paragraph 6:

"Draft requests or communications under this chapter may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party."

Description and analysis

91. The legal framework for international judicial co-operation in criminal matters is addressed in the Criminal Procedure Code, Part XII. Mutual legal assistance in criminal cases is addressed in the provisions of Chapter 62 of this part of the Code of Criminal Procedure which provides for the activities of criminal proceedings amenable to be taken in the course of legal assistance, the conditions and modalities of their execution.

92. Where a Mutual Legal Assistance Treaty (MLAT) or other information-sharing agreement exists, mutual legal assistance can be rendered directly by the relevant agency. In the absence of such an agreement, the request is received by the Ministry of Foreign Affairs and is directed to the appropriate ministry. With respect to EU partners, on the other hand, there is typically direct contact between judicial authorities.

93. Pursuant to Article 91 of the Constitution of the Republic of Poland a ratified international agreement constitutes a self-executing legal act and be applied directly, unless its application depends on the enactment of a statute. Therefore Polish authorities can communicate directly as foreseen by Article 34 of CETS 198, as it is a self-executing Article.

Effective implementation

94. Though Poland can provide a wide range of mutual legal assistance and the legal framework allows direct communication, the effectiveness of the implementation of the provision of the Convention could not be assessed due to lack of statistics.

Recommendations and comments

95. The Polish authorities should ensure that they are in position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the parties.

8. International co-operation – Financial Intelligence Units - Article 46 paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

It is considered that the added value of the Convention in A.46 is that it sets out a *"detailed machinery for FIU to FIU cooperation, which is not subject to the same formalities as judicial legal cooperation."* The relevant provisions are set out in full.

> **Paragraph 1** *Parties shall ensure that FIUs, as defined in this Convention, shall cooperate for the purpose of combating money laundering, to assemble and analyse, or, if appropriate, investigate within the FIU relevant information on any fact which might be an indication of money laundering in accordance with their national powers.*
> **Paragraph 2** *For the purposes of paragraph 1, each Party shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Convention or in accordance with existing or future memoranda of understanding compatible with this Convention, any accessible information that may be relevant to the processing or analysis of information or, if appropriate, to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.*
> **Paragraph 3** *Each Party shall ensure that the performance of the functions of the FIUs under this article shall not be affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.*
> **Paragraph 4** *Each request made under this article shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used.*
> **Paragraph 5** *When a request is made in accordance with this article, the requested FIU shall provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.*
> **Paragraph 6** *An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Party or, in exceptional circumstances, where divulging the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Party concerned or would otherwise not be in accordance with fundamental principles of national law of the requested Party. Any such refusal shall be appropriately explained to the FIU requesting the information.*
> **Paragraph 7** *Information or documents obtained under this article shall only be used for the purposes laid down in paragraph 1. Information supplied by a*

counterpart FIU shall not be disseminated to a third party, nor be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU.

Paragraph 8 *When transmitting information or documents pursuant to this article, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those stipulated in paragraph 7. The receiving FIU shall comply with any such restrictions and conditions.*

Paragraph 9 *Where a Party wishes to use transmitted information or documents for criminal investigations or prosecutions for the purposes laid down in paragraph 7, the transmitting FIU may not refuse its consent to such use unless it does so on the basis of restrictions under its national law or conditions referred to in paragraph 6. Any refusal to grant consent shall be appropriately explained.*

Paragraph 10 *FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this article is not accessible by any other authorities, agencies or departments.*

Paragraph 11 *The information submitted shall be protected, in conformity with the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and taking account of Recommendation No R(87)15 of 15 September 1987 of the Committee of Ministers of the Council of Europe Regulating the Use of Personal Data in the Police Sector, by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.*

Paragraph 12 *The transmitting FIU may make reasonable enquiries as to the use made of information provided and the receiving FIU shall, whenever practicable, provide such feedback.*

Description and analysis

Article 46 paragraphs 1, 2 and 3

96. The Financial Intelligence Unit of Poland is the General Inspector of Financial Information (GIFI). It was established by the Act of 16 November 2000 on Counteracting Money Laundering and Terrorism Financing (the AML/CFT Act). The legal basis for the FIU is to be found in Article 3 of the AML/CFT Act. From that, it is noted that the General Inspector of Financial Information is a competent government authority responsible for counteracting money laundering and terrorist financing. The General Inspector is appointed by the Prime Minister and can be dismissed by the Prime Minister on petition by the Minister responsible for financial institutions. The General Inspector is an Under-Secretary of State in the Ministry of Finance. He performs his duties with the assistance of an organisational unit created for that purpose in the Ministry of Finance. The GIFI is an administrative FIU.

97. The duties of the General Inspector, as mentioned in Article 4 of the AML/CFT Act, involve acquiring, collecting, processing and analysing information in the manner prescribed by law, and undertaking actions aimed at counteracting money laundering and terrorist financing. According to Article 31 of the AML/CFT Act, the GIFI shall notify the public prosecutor of a suspicion of crime commitment and at the same time shall provide him with the evidence supporting this suspicion.

98. According to Art. 33 p.5 of the AML/CFT Act –"Information relating to the introduction of asset values originating from money laundering and terrorist financing to the financial system may be disclosed by the General Inspector for foreign institutions referred to in Article 4 paragraph 1 point 8, on a reciprocal basis, in the manner specified in bilateral agreements concluded by the General Inspector, and also by a computerized data storage carriers", where the aforementioned Article refers to "foreign institutions and international organizations dealing with anti-money laundering or combating terrorist financing". Since Poland's accession to the European Union on 1 May 2004, the GIFI cooperates with its counterparts in the European Union Member States on the basis of the Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (2000/642/JHA). This provides a formal basis for GIFI's cooperation with countries with which Poland did not enter into separate agreements. The cooperation with some FIUs from the European Union Member States is being executed according to Memoranda of Understanding (MOUs) concerning cooperation in the exchange of financial intelligence related to money laundering and financing of terrorism. The GIFI cooperates also with counterparts outside the European Union (i.e. Peru, Israel, Ukraine, Republic of Korea, Taiwan, Russian Federation, Argentina and the USA) on the basis of MOUs. In total Poland has signed 65 MOUs. The GIFI can sign MOUs on its own authority. The signed MOUs are based on the Model of the Egmont Group (the Polish FIU has been a member of the Egmont Group since June 2002) and provide the possibility of exchanging information both spontaneously and upon request, and also in relation to both money laundering and the underlying predicate offences.

99. The GIFI cooperates with FIUs from other countries of any type by using the rules and terms prepared by the Egmont Group (also using the Egmont Secure Web System, which is used for the sending and answering of requests). It is obvious from the list of signed MOUs that the GIFI can co-operate with various types of FIUs. As indicated by the Polish Authorities, they do not differentiate between different types of FIUs. No statistics are kept regarding the exchange of information based on FIU type. .

Article 46 paragraph 4

100. As stated in a model MOU which has been presented to the rapporteurs, any request for information should be justified by a brief statement of the underlying facts. A sample of a request was provided by the Polish FIU to verify the above. As stated by the authorities, there was only one case when a foreign FIU refused to provide them with information because of the lack of information regarding the predicate offense.

101. Each request to a foreign FIU includes a sentence that the information obtained will be used only for analytical purposes and if there is a need to disseminate such information a prior written consent will be requested. This is also stated in the provided draft of an MOU. In the sample FIU request provided it is stated that "*All the information received will remain confidential and will not be disseminated without your prior consent*."

Article 46 paragraph 5

102. In accordance with Article 15 of the AML/CFT Act "At the request of the General Inspector, all the cooperating units are obliged to provide, within their statutory authority, any information necessary to carry out his tasks in the field of prevention as referred to in Article 165a and Article 299 of the Penal Code." In Art. 2 p. 8 of the AML/CFT Act the cooperating units are defined as "any government and local

government authorities and other public organizational units, as well as the National Bank of Poland, the Polish Financial Supervision Authority and the Supreme Chamber of Control". This is the legal basis for the GIFI to obtain information from other agencies.

103. GIFI has access to a wide range of information:
   i. SIGIIF – the internal database kept by the GIFI which is accessible exclusively by the GIFI. It contains threshold transactions, STRs, data concerning analytical issues, as well as information on cash declarations over 10, 000 EUR.
   ii. KCIK - National Centre of Criminal Information
   iii. KEP - National Tax-payers Register
   iv. KRS - National Court Register - publicly available database, administered by the Ministry of Justice
   v. PESELnet - database gathering information on personal identification numbers assigned to Polish citizens
   vi. CELINA - system of analysis of customs declarations
   vii. VIES - database which gathers data on turnover of goods within the EU
   viii. REMdat - tax declarations register
   ix. CERBER - bank accounts and accounts held by cooperative savings and credit unions, including deposits register.

104. The above information is shared with other FIUs according to Art. 33 p.5 of the AML/CFT Act. The GIFI indicated that it has issued an internal procedure which indicates the sources of information that it can access and the general framework for providing that information.

105. According to statistics provided by the GIFI, during the period of 2010-2011 the GIFI received 293 FIU requests, 30.4% of them were answered within 1-7 days, 50.5% within the period of 7-30 days, 9.9% within the period of 31-60 days, 2.9% within the period of 61-90 days and 0.4% took more than 90 days. Furthermore, 16 FIU requests were rejected, the only reason were the absence of an MOU with the requesting FIU.

Article 46 paragraph 6

106. There is no legal basis in the domestic law of Poland regarding the refusal to provide information. GIFI can refuse to provide information in the circumstances established by the Convention since the sources of universally binding law of the Republic of Poland are: the Constitution, statutes, ratified international agreements, and regulations pursuant to the Article 87 of the Polish Constitution and a ratified international agreement constitutes a self-executing legal act and be applied directly in accordance with the Article 91 of the Constitution.

107. The Polish Authorities indicated that they refused to provide information in the past in the absence of an MOU and in some cases they asked for clarifications whether there was no indication of money laundering or financing of terrorism. No request has been rejected on the basis of the circumstances referred to in this paragraph.

Article 46 paragraph 7

108. There is no legal basis in the domestic law of Poland regarding the use of information received from other FIUs. However, it is indicated in the provided draft MOU that "*the information or documents obtained from the respective Authorities will not be disseminated to any third party, nor be used for administrative, prosecutorial or judicial*

purposes without prior written consent of the disclosing Authority". It is understood that information obtained in accordance with this Memorandum can only be used for judicial purposes when related to money laundering originating from predicate criminal offences, as defined by respective national legislation.

109. Likewise, in principle the Polish Authorities are obliged to use such information as stated in the Convention based on Article 87 and 91 of the Polish Constitution, as stated before.

Article 46 paragraph 8

110. There is no provision in the Polish domestic legislation regarding the requirement to impose restrictions and conditions on the use of information transmitted to other FIUs. The Polish authorities have stated that, when transmitting information to another FIU, they inform them that they require a prior written consent for dissemination purposes. It is also prescribed in provided draft MOU that the authorities will not use or release any information or document obtained from the respective authorities for purposes other than those stated in the memorandum without the prior written consent of the disclosing authority.

111. When consent for dissemination is requested, GIFI will provide consent clearly indicating that the information is to be used for intelligence purposes only. During the past two years they have not refused such a request.

Article 46 paragraph 9

112. There are no restrictions in the domestic law of Poland regarding the use of transmitted information for criminal investigations or prosecutions. In practice in such cases the GIFI requires that a request for legal assistance is submitted. However, they have never received a request from another FIU to use transmitted information other than for analytical purposes.

Article 46 paragraph 10

113. According to Article 34 of the AML/CFT Act: *"Any disclosure of information to unauthorized parties, including the parties of the transaction or the account holders; on the fact that the General Inspector has been informed about the transactions, the circumstances of which indicate that asset values may be derived from money laundering; or on the accounts of entities for which there is a reasoned suspicion that they have a connection with terrorist financing; or on transactions made by these entities, is prohibited."* Furthermore, Article 30a of the Act requires the General Inspector and the staff of the Department of Financial Information to maintain confidential any information which came in their possession pursuant to the performance of their duties, in accordance with the principles and procedures specified in separate regulations. The requirement to maintain confidentiality shall apply to the staff of the Department even after the termination of their employment.

114. GIFI's premises are separated from the rest of the Ministry of Finance building and access is possible only upon production of a personalized card. The information held by the GIFI is also physically protected through various measures. The GIFI network system is an isolated network and is never connected to the internet. All workstations having access to the GIFI system are located in a secure zone and access to the zone is monitored and locked. Access to the secure zone is limited to FIU employees who

are required to have valid security clearance. Data transfers to and from the GIFI network is monitored. Users are accountable for all transfers. All activities within the system are subject to internal security regulations which are regularly revised.

115. GIFI uses the Egmont Secure Web and FIU.NET in exchanging information.

Article 46 paragraph 11

116. The Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No108) was signed by Poland on the 24th of April 1999, ratified on 23rd of May 2002 and it came into force on 1st of June 2002. Therefore, it also constitutes a self-executing legal act and be applied directly in accordance with the Article 91 of the Constitution.

117. Reference was also made by the Polish Authorities to the Act of August 29, 1997 on the Protection of Personal Data, Article 23 paragraph 1 which states that *"the processing of data is permitted only if processing is necessary for the purpose of exercise of rights and duties resulting from a legal provision."*

Article 46 paragraph 12

118. The replies to the questionnaire indicate that in the domestic law of Poland there is no explicit provision on requesting or providing feedback on the use of information transmitted. However, the Polish authorities have stated that they provide feedback when it is requested and only ask for feedback if it is related to another case. No statistics are kept regarding feedback by the GIFI.

Effective implementation

119. In general it would appear that the rules and manner in which the Polish FIU operates meet to a large extent the various requirements of article 46 of the Convention; however there remain pending issues. Furthermore, very few statistics are kept regarding international co-operation and thus the rapporteurs are not in a position to draw accurate conclusions on some effectiveness issues.

Recommendations and comments

120. The Polish authorities are recommended to take the necessary steps so as to ensure that the requirements of paragraphs 6, 7, 8, 9 and 12 are fully reflected in the domestic law so they are clearly applicable to the FIU.

121. The Polish authorities should maintain appropriate statistics so as to be able to evaluate the effectiveness of the system.

9. Postponement of domestic suspicious transactions – Article 14

The Convention is considered to provide added value by requiring State Parties to take measures to permit urgent action in appropriate cases to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion.

Description and analysis

122. Article 16 of the AML/CFT Law provides that any reporting entity which received a disposition or an order of the transactions, or carried out such a transaction, or has any information about the intention to carry out such a transaction, for which there is a reasoned suspicion that it may be related to ML or FT offenses, is obliged to inform to the General Inspector, which may suspend the transaction for 72 hours. In such a case, the General Inspector informs the competent prosecutor and provides him with any information and documents concerning the suspended transaction or the account blocked.

123. In accordance with the Article 18a of the AML/CFT Law, the General Inspector also has the powers to request the obligated institution to suspend a transaction or block the account without having previously received a report from an obliged entity, if the information in his possession indicates the conduct of activities aimed at money laundering or terrorist financing.

124. Following the suspension issued by the General Inspector, the prosecutor may decide to prolong the suspension or the blockage of the account, for a period not longer than 3 months.

Effective implementation

125. The authorities have informed the rapporteurs that between 2007-2011, the Polish FIU demanded the "blockage" of 626 accounts, connected with suspicious financial transactions (regarding funds of approximately 220.41 million PLN), including blockage of 333 accounts on its own initiative for the amount of approximately 20.7 million PLN) and suspended 2 transactions for the amount of 0.03 million PLN pursuant to the Article 18 and 18a of the Act.

Recommendations and comments

126. Polish provisions and regulations appear to be compliant with Art. 14 of the Convention. They are recommended to keep extensive statistics regarding the orders for suspension and also, in order to have a complete overview, how many were prolonged by the prosecutor and also how many reports on suspension of transactions sent to the prosecutor resulted in indictments.

10. Postponement of transactions on behalf of foreign FIUs – Article 47

Article 47 establishes a new international standard, namely:

"1 Each Party shall adopt such legislative or other measures as may be necessary to permit urgent action to be initiated by a FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transactions.

2 The action referred to in paragraph 1 shall be taken where the requested FIU is satisfied, upon justification by the requesting FIU, that:

a the transaction is related to money laundering; and
b the transaction would have been suspended, or consent to the transaction going ahead would have been withheld, if the transaction had been the subject of a domestic suspicious transaction report."

Description and analysis

127. Article 18a of the AML/CFT Act provides the possibility to postpone a transaction for 72 hours. In accordance with this article the General Inspector of Financial Information may submit a written request to an obliged entity to suspend a transaction or block the account without having previously received the notification, if there is information that the transaction is related to money laundering or terrorist financing. Although there is no explicit wording which states that this can also be executed following a request from another FIU, it would appear that this is also possible in practice since there is no restriction. As indicated by the Polish Authorities, in practice an FIU request can be the basis for commencing analytical proceedings and if suspicions of money laundering or terrorist financing are confirmed, the procedure of suspending a transaction or blocking an account is initiated. In cases where the information included in an FIU request is not sufficient then the GIFI does not proceed with blocking the account or suspending the transaction.

Effective implementation

128. No relevant statistics are kept. Poland indicated that there have been a few cases when accounts were blocked on the basis of information provided by another FIU.

Recommendations and comments

129. In case of possible money laundering or terrorist financing related transactions, it appears that Poland has various measures in place that allow the Polish FIU to initiate an urgent action, upon a request from a foreign FIU, to suspend or withhold consent to a transaction. To evaluate the effectiveness of the system, on the other hand, it is recommended that the Polish authorities maintain appropriate statistics.

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

The Convention is considered to add value here as, according to article 28 (i.e.) and article 28 (id), the political offence ground for refusal of judicial international cooperation can never be applied to financing of terrorism (it is the same in respect of the fiscal excuse)

Provision is made in article 28(8c) to prevent refusal of international cooperation by States (which do not recognise self laundering domestically) on the grounds that, in the internal law of the requesting Party, the subject is the author of both the predicate offence and the ML offence.

Description and analysis

130. There are no provisions in Polish legislation explicitly prohibiting international cooperation in cases of fiscal or political offences, which also relate to terrorism financing. The offence of ML in Poland applies to self laundering, so this is not an issue in relation to international co-operation. Cooperation may be granted also in case of self-laundering.

131. According to Article 91 of the Constitution of the Republic of Poland, after promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. On this legal basis Article 28 of Warsaw Convention is self-executing, and therefore, the country cannot refuse international cooperation in the abovementioned cases.

Recommendations and comments

132. It seems that international cooperation under Article 28 paragraph 1d; 1e; 8c; is possible and can be provided without any obstacles.

II. Overall Conclusions on Implementation of the Convention

133. The information provided on the legal structure and practice in response to the questionnaire is basically adequate and in general the Polish legal framework appears to meet to a large extent the various requirements of the Convention. Where information is generally lacking is on evidence of effective implementation and, in particular, evidence that the new measures in the Convention which add value to the existing international standards are being used to improve the national performance on AML/CFT issues. It is important that these new measures are tested in practice, and that statistical data is maintained to demonstrate that the authorities are making use of these provisions, wherever possible, to improve national AML/CFT performance.

134. Based on the information provided, however, the Polish criminal law framework appears to have some deficiencies regarding some aspects of implementing requirements of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETs 198). For instance, criminalisation of ML is not adequate to cover all elements provided in Article 9 paragraph 1 of the CETS N° 198. In addition, some issues arise regarding the confiscation of the instrumentalities used in or intended for use in the commission of a money laundering offence and the instrumentalities which do not belong to the perpetrator. Moreover, there is no legal framework regarding the measures for the management of assets subject to temporary measures. Some other concerns which are described in the report also arise regarding Articles 7, 23, 25 and 46 of the Convention.

135. The present report has identified a series of improvements which are desirable in order to ensure a higher degree of compliance with 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), in areas where this treaty adds value to the Recommendations of the Financial Action Task Force (FATF).

136. The following recommendations were addressed to Poland:

- to cover all elements provided in Article 9 paragraph 1 of the CETS N° 198, mainly:
  - conversion or transfer of property for the purposes of concealing or disguising the proceeds' illicit origin, or
  - converting or transferring such property for the purpose of assisting any person who is involved in the commission of a criminal offence,
  - concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds and, subject to its constitutional principles and the basic concepts of its legal system,
  - the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds,

- to consider introducing in Article 299 of the Penal Code, an incrimination of some of the acts referred to in paragraph 3 of Article 9 of the CETS N° 198, in either or both of the following cases where the offender:
  - suspected that the property was proceeds (with appropriately lower penalties),
  - ought to have assumed that the property was proceeds.

- to consider issuing clear prosecutorial guidance on the level and types of evidence which are likely to be sufficient for the prosecutor to adduce in an autonomous ML prosecution in respect of the underlying predicate criminality,

- to maintain comprehensive statistics including the predicate offences as an important tool for assessing the effectiveness of Polish AML legal system,

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

- to introduce within the national legal framework the principle of international recidivism and to ensure that the courts and prosecution services are in a position to take into account final decisions rendered in another Party in relation to offences established in accordance with CETS N° 198,

- to consider extending the scope of mandatory confiscation to the instrumentalities used in or intended for use in the commission of a money laundering offence,

- to consider extending the scope of confiscation regime to the instrumentalities which have been transferred to or belong to third parties,

- to improve the quality and scope of statistics (so as to assess the actual effectiveness of confiscation measures ML, TF and all predicate offences and to ensure that the provisions on confiscation and provisional measures are properly and effectively applied,

- to review the practice on assumptions which can be applied in assessing forfeiture orders after conviction as set out in paragraph 52 above, with a view to considering whether they can be extended to a time before the commission of the offence in particularly serious cases, and to consider the reservation to Article 3(4) of the Convention in that light,

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

- to develop and maintain statistics or general figures regarding the "chain" of identified proceeds of crime, instrumentalities and other categories of assets which may be confiscated, starting from identification during criminal investigation phase, seizures, confiscation ordered by courts and last the effective valorisation of confiscated assets,

- to take the necessary measures to implement article 7 of the Convention CETS N°198, in particular to ensure that;
  - a) prosecutorial or law enforcement bodies have adequate and timely access to information (especially non-bank financial information not related to a direct suspect) for the purposes of tracing, identifying, confiscating and securing criminal assets;
  - b) monitoring of accounts is introduced as a special investigative technique;

- c) adequate provisions prevent financial institutions from informing their customers and third persons of any investigative step or enquiry,

- to establish a mechanism for execution of measures equivalent to confiscation of property, which are not criminal sanctions, in relation to a criminal offence as part of international cooperation,

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

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

- to ensure that they are in position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the parties,

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

- to maintain appropriate statistics so as to be able to evaluate the effectiveness of the system,

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

137. The Conference of the Parties invites Poland to implement the findings contained in the present evaluation report and to report back, as set out under the follow up procedures, within eighteen month after the adoption of the report.

III. Annexes

ANNEX I

Article 9 of the Convention – Laundering offences

3. Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this Article, in either or both of the following cases where the offender

    a) suspected that the property was proceeds,

    b) ought to have assumed that the property was proceeds.

4. Provided that paragraph 1 of this article applies to the categories of predicate offences in the appendix to the Convention, each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies:

    a) only in so far as the predicate offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or for those Parties that have a minimum threshold for offences in their legal system, in so far as the offence is punishable by deprivation of liberty or a detention order for a minimum of more than six months; and/or

    b) only to a list of specified predicate offences; and/or

    c) to a category of serious offences in the national law of the Party.

5. Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.

6. Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property, the object of paragraph 1.a or b of this article, originated from a predicate offence, without it being necessary to establish precisely which offence.

ANNEX II

Article 10 of the Convention – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

    a) a power of representation of the legal person; or

    b) an authority to take decisions on behalf of the legal person; or

    c) an authority to exercise control within the legal person,

    as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

ANNEX III

Article 3 of the Convention – Confiscation measures

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

ANNEX IV

Declarations deposited by Poland – situation on 27 May 2013

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 53, paragraph 4b, of the Convention, the Republic of Poland declares that Article 3, paragraph 4, shall not be applied.
Period covered: 1/5/2008 -
The preceding statement concerns Article(s) : 3

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 53, paragraph 2, of the Convention, the Republic of Poland declares that Article 9, paragraph 6, shall not be applied.
Period covered: 1/5/2008 -
The preceding statement concerns Article(s) : 9

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 53, paragraph 1, of the Convention, the Republic of Poland declares that the methods of transmission referred to in Article 31, paragraph 2, of the Convention shall be applied on its territory only in so far as they are provided for in appropriate international agreements relating to legal assistance between the Republic of Poland and the Party transmitting a judicial document.
Period covered: 1/5/2008 -
The preceding statement concerns Article(s) : 31

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 35, paragraph 3, of the Convention, the Republic of Poland declares that all requests and documents transmitted to its authorities under Chapter IV of the Convention shall be accompanied by a translation in Polish or into one of the official languages of the Council of Europe.
Period covered: 1/5/2008 -
The preceding statement concerns Article(s) : 35

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 42, paragraph 2, of the Convention, the Republic of Poland declares that information and evidence transmitted for the execution of a request filed pursuant to Chapter III of the Convention shall not, without its prior consent, be used for purposes other than those specified in the request.
Period covered: 1/5/2008 -
The preceding statement concerns Article(s) : 42

Declaration contained in the instrument of ratification deposited on 8 August 2007 - Or. Engl.

In accordance with Article 33, paragraph 2, of the Convention, the Republic of Poland declares that the central authorities shall be :

– the Ministry of Justice of the Republic of Poland, Al. Ujazdowskie 11, 00-950 Warsaw, and
– the Ministry of Finance of the Republic of Poland, Swietokrzyska Street 12, 00-916 Warsaw.

Period covered: 1/5/2008 -

The preceding statement concerns Article(s) : 33