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CONFERENCE OF THE PARTIES

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no. 198)

FOLLOW UP REPORT OF THE CONFERENCE OF THE PARTIES TO CETS NO°198 ON POLAND¹

Memorandum prepared
by the Secretariat

¹Adopted by the Conference of the Parties to CETS 198 at its 7th meeting, (Strasbourg,5-6 November 2015)

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I. Introduction

1. Article 48 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (hereinafter: CETS no. 198) establishes a Conference of the Parties with the mandate to, inter alia; monitor the proper implementation of the Convention.
2. The Conference of the Parties adopted the assessment report on Poland at its fifth meeting (Strasbourg, 12-14 June 2013)². In application of the Conference of the Parties' rules of procedure, the report and subsequent comments made by Poland to the report were made public within four weeks of adoption.
3. At its fourth meeting, held in Strasbourg in June 2012, the Conference of the Parties decided to include in its Rules of Procedure a follow-up mechanism (Rule 19, paragraphs 30-36), based on a questionnaire completed by the assessed Party, assisted by a rapporteur country and a draft analysis prepared by the Secretariat of the Conference of the Parties. As a result of this process, Poland submitted an update of its progress in meeting the recommendations and /or other issues identified in the adopted report, based on a reporting template prepared by the Secretariat³. This report was received on 4 September 2015. The scope of the review is focused on the implementation of the recommendations formulated by the Conference of the Parties in the assessment report of Poland.
4. Albania was appointed as Rapporteur Country, being responsible for reviewing the replies to the questionnaire and for raising any questions to assist the Conference of the Parties in assessing whether the information supplied is sufficient to demonstrate satisfactory progress by the Party assessed.
5. The Conference of the Parties (hereinafter: COP), at its 7th meeting, examined the draft follow-up report on Poland and decided to adopt the analysis of the Secretariat, as amended in the light of discussions held in the Plenary, and the replies to the Questionnaire submitted by Poland.

Given the concerns expressed by several delegations, including the Rapporteur country, Poland was invited to present an updated follow-up report at the next meeting of the COP in 2016, on the basis of a tailor-made questionnaire prepared by the Secretariat covering recommendations made in respect of the mandatory provisions of the Convention.

² See C198-COP(2013)RASS3 PL – Assessment report of the Conference of the Parties to CETS no. 198 on Poland at www.coe.int/cop198

³ See C198-COP(2015)FU-QST – POL Follow-up report of Poland: country report

II. Review of implementation of selected articles of CETS no. 198 by Poland and progress made since June 2013

6. The following review of Poland's implementation of the CETS no.198 has been prepared by the Secretariat pursuant to Rule 19(33) of the Rules of Procedure, based on the information and statistics provided by the Party, the additional information and clarifications received from the Poland authorities and a review of other relevant evaluation reports of Poland, including the 2013 MONEYVAL 4th round mutual evaluation report on Poland⁴.

7. This report analyses the progress made by Poland to meet the deficiencies and to implement the recommendations and/or issues identified for follow-up by the Conference of the Parties. When assessing progress made, effectiveness was taken into account to the extent possible in a paper based desk review, on the basis of the information and statistics provided by the Party. The report also sets out an appraisal of the level of progress in meeting the recommendations and/or issues identified in the adopted report, in order to assist the Conference of the Parties in its analysis and decision-making process.

8. The sections below set out the main findings on issues pertaining to the implementation of selected provisions of CETS no. 198. They reflect the detailed article by article findings covering provisions of the Convention and recommendations for improvement made in the assessment report.

1. Laundering offences - Article 9 paragraphs 3, 4, 5, 6

9. The Conference of the Parties, in its assessment report, addressed 4 recommendations to Poland regarding the implementation of Article 9 of the Convention.

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.

10. Since the assessment, Poland has drafted amendments to address the identified shortcomings and at the time of the discussion of the report the act had been adopted by Parliament (Law no. 3659). The Secretariat has reviewed the initial draft provided by the

⁴[http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL\(2013\)2_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-MERMONEYVAL(2013)2_en.pdf)

authorities, and subject to the adoption of the act without further changes, are those appeared to address the issue of concern. The COP noted that following adoption by Parliament, the act had been signed by the President and was awaiting publication in the official journal.

However, considering that the legislation introduced to address this issue was not in force and effective at the time when this report was analysed, one could not conclude that this recommendation has been fully implemented.

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*

11. Poland reported that it has considered the matter, and that the authorities decided that they would not opt for criminalizing the acts referred to in article 9(3) under Article 299 of the Penal Code, as recommended.

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 Money Laundering (hereinafter: ML) prosecution in respect of the underlying predicate criminality.

12. The Deputy Prosecutor General issued binding guidelines to be applied in all ML investigations carried out in Poland, which were disseminated by a letter on 25 June 2014. The guidelines address the level and types of evidence in autonomous ML prosecutions. This recommendation has thus been implemented.

Maintain comprehensive statistics including the predicate offences as an important tool for assessing the effectiveness of Polish Anti Money Laundering (hereinafter : AML) legal system.

13. This recommendation has not yet been implemented. Poland reported that they are currently working on a new model of statistics, which is also aimed at implementing the additional requirements arising from the implementation of the Directive 2014/42/European Union of April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

14. The Conference of the Parties thus concludes that only one out of three recommendations has been implemented with the consideration of the legislation introduced to address this issue was pending entry into force at the official gazette. It also noted that Poland has opted not to implement Article 9 paragraph 3.

2. Corporate liability - Article 10 paragraphs 1 and 2

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.

15. The Conference of the Parties, in its assessment report, concluded that the definition of corporate liability was broadly in line with respect to corporate liability of legal persons, though there had been no final convictions or indictments of legal persons for money laundering or any other economic crime.

16. Poland indicated that the Ministry of Justice, in cooperation with the Criminal Law Codification Commission, which is an advisory body of the Minister of Justice, is conducting an analysis on corporate liability. The timetable for this study will be clarified after the parliamentary elections which will be held on at the end of October 2015.

17. The Conference of the Parties concludes that preparatory steps have been taken to address this recommendation, though it has not yet been implemented.

3. Previous decisions - Article 11

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.

18. The Conference of the Parties, in its assessment report, recognised that Poland applies the principle of international recidivism in relation to European Union (hereinafter: EU) member States and that courts need to take into account, as required by article 114a of the Penal Code, final judgments rendered by a court of another member state of the European Union.

19. As regards non- EU countries, article 53 paragraph 2 of the Penal Code enables Polish courts to take into account “the characteristics and personal conditions of a perpetrator, the way of life of the perpetrator prior to the commission of the offence”. Any prior offence committed by the perpetrator abroad is reflected in criminal proceedings as an aggravating circumstance.

20. The Conference of the Parties concludes that Poland has measures in place to implement this recommendation.

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

21. The Conference of the Parties concluded in its assessment report that the Poland legal framework on confiscation is broadly in line with the requirements of Article 3 of the Convention. It addressed 4 recommendations to Poland regarding the extension of confiscation and the effective implementation of the respective article, as set out below.

Consider extending the scope of mandatory confiscation to the instrumentalities used in or intended for use in the commission of a money laundering offence.

22. Poland has considered the recommendation and confirmed its decision not to implement article 3 paragraph 1.

Consider extending the scope of the confiscation regime to the instrumentalities which have been transferred to or belong to third parties.

23. Poland has considered the recommendation and confirmed its decision not to implement article 3 paragraph 3, as it is not mandatory.

Improve the quality and scope of statistics (so as to assess the actual effectiveness of confiscation measures in ML, Terrorist Financing (hereinafter: TF) and all predicate offences) and to ensure that the provisions on confiscation and provisional measures are properly and effectively applied.

24. Poland has reported that it has not yet implemented this recommendation. Statistics on freezing and confiscation of assets are under the responsibility of the Ministry of Justice, the Prosecution Service and the Assets Recovery Unit (within the Police).

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.

25. Poland has deposited a declaration in accordance with Article 53 paragraph 4b that article 3 paragraph 4 shall not be applied and has confirmed its intention to uphold this provision. Hence this recommendation is not implemented.

26. The Conference of the Parties notes Poland's position with respect of the recommendations of the assessment report related to the non-mandatory provisions of Article 3 paragraphs 3 and 4. Poland has not implemented the remaining recommendation.

5. Management of frozen or seized property – Article 6

27. The Conference of the Parties concluded in its assessment report, that there is no legal framework in Poland on management of frozen or seized property and addressed 2 recommendations to Poland in order to comply with the requirements of Article 6.

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

28. Poland referred in its response to existing provisions in the Anti Money Laundering / Countering Financing of Terrorism (hereinafter: AML/CFT) law requiring financial institutions to have established procedures on suspension of transactions, blocking of accounts and asset freezing and to several provisions of the Criminal Procedural Code, Penal execution Code, Code of Civil procedure (on measures related to the application of security on property) and to the Act on liquidation of court deposits (dated 18.10.2006). These measures were in place at the time of the adoption of the assessment report.

29. It is thus unclear whether any additional measures have been taken since the assessment report, in order to introduce, as recommended, a clear procedure for managing seized assets.

30. The Conference of the Parties concludes that Poland has not taken any additional measures to implement this recommendation.

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.

31. Poland has taken certain measures to improve the scope and quality of the statistics. The Deputy Prosecutor General’s Order of 10 June 2010 provides that the department of Organised Crime and Corruption in the GPO collects and elaborates comprehensive data on ongoing and completed investigations into ML/TF, which includes also information on confiscation measures and type and number of disclosed predicate offences. This data is further included in the annual reports of the General Prosecutor.

32. Poland has provided statistics, which show the figures of property frozen and the property confiscated in 2012, 2013 and 2014. Statistics on frozen assets are collected by the Asset Recovery Unit and the Office of the Prosecutor General, while those on confiscated assets by the Ministry of Justice. Discrepancies in data collected are due to different methods of collection of data, and also based on the needs of the authorities which have been collecting those. The data collected does not appear to provide information on the effective valorisation of confiscated assets.

33. The Conference of the Parties notes that work is in progress to develop further and maintain statistics and that that this recommendation has been partly implemented.

6. Investigative powers and techniques - Article 7 paragraphs 1, 2a, 2b, 2c, 2d

34. The Conference of the Parties had concluded that Poland had not fully implemented the measures required under Article 7 of the Convention and had issued the following recommendation:

Take the necessary measures to fully implement article 7 of the Convention CETS N°198, in particular to ensure that a) prosecutorial or law enforcement bodies have adequate 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.

35. The information provided by Poland authorities does not refer to additional measures taken since the adoption of the assessment report, hence the analysis in the assessment report remains unchanged. It has also been reported that Poland intends to take into account the recommendation after October 2015.

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

7. International co-operation

7.1 Obligation to confiscate - Article 23 paragraph 5; Confiscated property - Article 25 paragraphs 2 and 3

37. The Conference of the Parties, in its assessment report, addressed two recommendations in respect of Article 23 paragraph 5 and the implementation of Article 25.

1. *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.*
2. *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.*

38. Poland indicated that these two recommendations will be considered during the legislative procedure. It is unclear whether Poland has had the opportunity to consider concluding agreements or arrangements on sharing with other Parties, depending on whether such a situation or need has arisen.

39. The Conference of the Parties concludes that no measures have been taken to implement the recommendations.

7.2 Requests for information on bank accounts – Article 17 paragraphs 1, 4, 6; Requests for information on banking transactions - Article 18; Requests for the monitoring of banking transactions - Article 19

40. The Conference of the Parties, in its first assessment report addressed one recommendation regarding the implementation of Article 19, noting the absence of measures to regulate cases when, at the request of another Party, authorities should monitor, during a specified period, the banking operations that are being carried out through one or more accounts.

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.

41. The situation has remained unchanged. Poland indicated that this recommendation will be taken into account in the future legislative process.

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

7.3 Procedural and other general rules - Direct Communication - Article 34

43. The Conference of the Parties, in its assessment report concluded that Polish rules and regulations are in compliance with article 34 of the Convention and addressed a recommendation to ensure their effective implementation.

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

44. Poland should consider streamlining its manner of collection of statistical information on these issues so as to have available information on the basis upon which assistance was provided.

45. The Conference of the Parties thus concludes that this recommendation is partly implemented.

8. Co-operations between Financial Intelligence Units - Article 46

46. The Conference of the Parties, in its assessment report recommended that Poland should 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 and that they are clearly applicable to the Financial Intelligence Unit (hereinafter: FIU) and that it should maintain appropriate statistics.

1. *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.*
2. *Maintain appropriate statistics so as to be able to evaluate the effectiveness of the system.*

47. Poland indicated that it does not consider necessary to implement the provisions of article 46 paragraph 6 to 9 and 12 of the Convention, as they are self-executing on the territory of Poland, on the basis of articles 87 and 91 of its Constitution. From a desk based review, and subject to any further guidance to be issued by the COP in the future, the COP's confirmation, at the time of the report it was considered that these provisions are not self executing and require specific measures in order to be adequately implemented in the context of cooperation with foreign FIUs.

48. Poland has provided statistics which show an increasing number of requests received from foreign FIUs in 2012, 2013 and 2014. The Polish FIU has not refused to provide information on the requests sent by FIUs from EU countries/State Parties and has indicated refusing requests with other non EU States in the absence of a bilateral agreement. The FIU refused 5 requests in 2012, 6 requests in 2013, and 17 requests in 2014. Poland does not keep detailed statistics on the number of cases where the request for permission to disseminate information to a third party followed the request, though it estimates those to more than 50 percent of cases. In all cases the Polish FIU granted permission to disseminate information for intelligence purposes only when the request for information with the request for permission to disseminate information to a third party. The FIU appears to be in a position to keep certain statistics, though it is uncertain that those are comprehensive and should be reviewed to that effect.

49. The Conference of the Parties concludes that no measures have been reported to implement the recommendation of the assessment report in respect of paragraphs 6,7,8,9 and 12 of article 46.

9. Postponement of domestic suspicious transactions - Article 14

50. The Conference of the Parties assessed that Polish provisions and regulations were compliant with the requirements of article 14 of the Convention and addressed one recommendation.

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.

51. Poland indicated that the FIU started in 2014 to collect data on the number of orders for suspension of transactions/and blocking of account request sent to the prosecutor for which submittal of indictments or prolongation of suspension/blocking from 2014. Data available has been submitted, which shows that the Polish FIU continues to make use of its powers on a regular basis, and that almost every situation led to a prolongation of the order by the prosecutor and subsequently an indictment.

| Year | Number of postponement orders issued by FIU to suspend transactions/block account | Number of cases where a prosecution /indictment was initiated |
|------|---|---|
| 2012 | 144 | N/A |
| 2013 | 347 | N/A |
| 2014 | 288 | 285 |

52. The Conference of the Parties concludes that the recommendation regarding Article 14 has been implemented.

10. Co-operation for postponement of transactions on behalf of foreign FIUs - Article 47

53. The Conference of the Parties, in its assessment report, concluded that Poland had put in place various measures to allow its FIU to initiate an urgent action, upon a request from a foreign FIU, to suspend or withhold consent to a transaction.

Maintain 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.

54. Poland reported that it receives roughly several dozen of requests for suspension from foreign FIUs per year but even at the position of executing these requests, more than 90% of the cases, there were no assets on accounts or the accounts were blocked by the bank on the basis of Act on banking law and the procedure was stopped at the initial level. While Poland has certain statistics, it has not been demonstrated that those enable Poland to have a full picture on the level of co-operation for postponement of transactions with Parties to the Convention.

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

III. Conclusions

56. Poland has ratified 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 August 2007 and the Convention entered into force in respect of Poland in May 2008.

57. Two years after the adoption of its first assessment report on Poland, the Conference of the Parties notes that Poland has taken some measures to adapt its national legal framework and implement the recommendations set out in the assessment report in order to meet the Convention's requirements. However, based on the information received and as provided above, there are still a number of issues to be considered and gaps that need to be addressed.

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

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

Implementation of Article 9 of the Convention:

- a. Poland should take steps to enforce the newly adopted legislation covering all elements provided in Article 9 paragraph of the CETS N° 198,:
- 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.

Implementation of Article 10 of the Convention:

- b. As previously recommended, Poland should finalize its review on corporate liability, ensuring that it identifies the potential obstacles for 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 take appropriate steps to remove any obstacles identified.

Implementation of Article 7 of the Convention:

c. As previously recommended, Poland should take measures to fully implement article 7 of the Convention CETS N°198, in particular to ensure that a) prosecutorial or law enforcement bodies have adequate 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.

Implementation of Article 46 of the Convention:

d. As previously recommended, Poland should take additional steps to reflect the requirements of article 46 paragraphs 6, 7, 8, 9, and 12 in domestic law.

Development of tools and procedures at national level to assist the implementation of the Convention

Implementation of Article 3 of the Convention:

e. Poland should take any additional measures, as appropriate, to ensure that the provisions on confiscation and provisional measures are properly and effectively applied.

Implementation of Article 6 of the Convention:

f. As previously recommended, Poland should introduce a clear procedure for managing seized assets to comply with the requirements of Article 6 of the Convention.

International co-operation on the basis of the provisions of CETS no. 198:

Implementation of Articles 23 and 25 of the Convention:

g. As previously recommended, Poland should :

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

Implementation of Article 19 of the Convention:

h. As previously recommended, Poland should take legislative measures to implement article 19.

Data collection/statistics

Implementation of Article 3 of the Convention:

- i. Poland should consider improving the quality and scope of statistics (so as to assess the actual effectiveness of confiscation measures in practice as previously recommended in the assessment report).

Implementation of Article 9 of the Convention:

- j. Poland is encouraged to pursue and finalize current efforts so as to maintain comprehensive statistics including the predicate offences, as an important tool for assessing the effectiveness of Polish AML legal system.

Implementation of Article 9 of the Convention:

- k. Poland is encouraged to continue developing and maintaining statistics regarding the chain of identified proceeds, of crime, instrumentalities and other categories of assets which may be subject to confiscation.

Implementation of Article 34 of the Convention:

- l. Poland should consider streamlining its manner of collection of statistical information so as to have available information on the basis upon which assistance was provided.

Implementation of Article 47 of the Convention:

- m. Poland should ensure that the data and statistics kept enable it to keep track of the level of co-operation for postponement of transactions with Parties to the Convention.

59. The COP also recommends Poland to consider taking additional measures in order to support the implementation of the standards in the Convention which add value to existing international standards and which are not mandatory, as previously recommended⁵.

60. The COP invites Poland to present an updated follow up report at its next meeting in 2016.

⁵ See previous recommendations (Article 9 paragraph 3, Article 3 paragraphs 1 and 3