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(CDPC)

SELECT COMMITTEE OF EXPERTS ON THE EVALUATION OF ANTI-MONEY LAUNDERING MEASURES
(PC-R-EV)

SECOND ROUND EVALUATION REPORT ON POLAND

SUMMARY

1. A MONEYVAL team of examiners, accompanied by a colleague from a Financial Action Task Force (FATF) country, visited Poland between 22 and 25 April 2002. This visit took place in the framework of the second round evaluation. Its aim was to take stock of developments since the first round evaluation, and to assess the effectiveness of the anti-money laundering system in practice.

2. The situation regarding the money laundering trends has not changed significantly since the first evaluation round. The main offences to be considered as sources of illegal proceeds to be laundered continue to be production and trade of narcotics and psychotropic substances; forging money and securities; robbery; extortion and smuggling. In addition to these offences, corruption cases as a predicate offence of money laundering appears to be growing. Also the law enforcement institutions are increasingly being called upon to investigate other new forms of criminality directly linked to economic and financial activities – especially in the field of privatisation.

3. Combating organised crime, which is still a problem in Poland, constitutes one of the priorities of the security policy of the Polish authorities. Criminal groups are believed to be involved in committing both predicate crimes and laundering operations. As for money laundering operations, the most vulnerable institutions are banks, insurance companies and brokerage houses. The most frequently used methods of money laundering in Poland are the transfer of cash abroad through bank accounts, the use of loans, donations and fictitious accounts, the use of entities exempted from tax and division of transactions. The Polish authorities have advised that income obtained from criminal activity (most frequently from smuggling, drug dealing, trade in arms, financial and tax fraud, prostitution and theft) is often introduced by organised crime groups to legal financial trading, by depositing it in banks or other financial institutions.

4. There have been significant changes in the anti-money laundering policy in Poland since the first evaluation of 1999 where the overall system was considered as "both inadequate and not performing well". Taking this context into account, the changes made can be seen as reflecting a new and positive attitude of the Polish Government with regard to anti-money laundering policies.

5. One of the most significant changes in the anti-money laundering regime in Poland has been the adoption of the anti-money laundering law – the Law on Countering Introduction into Financial Circulation of Property Values Derived from Illegal or Undisclosed Sources – which came into force in November 2000. An equally important change has been the establishment of the Polish FIU – the General Inspector for Financial Information (the GIFI). An important change has also taken place regarding the money laundering offence, which is to be found in article 299, paragraph 1, of the Criminal Code, and which now has the character of an all crimes offence.

6. As for article 299, paragraph 1, of the Criminal Code, it is also clear, that it includes own funds or "self laundering"; it continues to be based on intentional fault and does not therefore encompass negligent conduct; and upon conviction an offender is liable to significant sanctions (the maximum being deprivation of liberty for a period of up to 10 years in certain specified circumstances). The evaluators welcomed the improved money laundering offence.

7. At the level of practice the evaluators also took note of several indications of progress. For example, there has been a substantial increase in the number of investigations and prosecutions for money laundering in recent years. Between 1 September 1998 and 30 March 2002, 166 proceedings were instituted in cases involving money laundering. In these proceedings 155 persons were charged with committing money laundering offences. In five investigations a total of 20 indictments were filed. As of the date of the on-site visit one conviction for money laundering had been secured.

8. Notwithstanding the positive development at the level of practice, the evaluators were still concerned about the level of proof required to demonstrate that the proceeds in question derived from a relevant predicate offence. The extent to which there is still no consensus on such a fundamental element of the law became apparent in the course of the on-site visit when radically different interpretations were provided to the evaluators. In the first mutual evaluation report it was advised "that inter-departmental consideration is given to the level of proof that is required for the money laundering offence generally and proof of the predicate offence in particular". This important recommendation has yet to be acted upon, and therefore the evaluators adopt the above recommendation as its own and urge the Polish authorities to afford priority to its early implementation.

9. As for confiscation the Criminal Code provides for both special forfeiture and general forfeiture in money laundering cases. Both provisions have been subject to amendments since the first evaluation of Poland. Special forfeiture in a money laundering context is addressed in article 299, paragraph 7, of the Criminal Code. This provision is now framed in mandatory terms and encompasses both property and value confiscation. It is also worded in such a way as to reach proceeds transferred to third parties. The revised wording constitutes a significant advance over the previously existing formulation.

10. As for the use of confiscation in practice, it became clear that there existed a widespread perception that the system was ineffective. For example, it was stated on several occasions within differing parts of the Polish administration that the confiscation, post conviction, of a house or car bought with money derived from drug trafficking was very much an exception. Various contributing factors were mentioned. This picture is a disappointing one which needs to be addressed as a matter of urgency. It is recommended that, as a first step, an assessment be undertaken to determine the actual extent to which the existing legal framework is invoked in practice and to what effect. On this basis interdepartmental consideration should be given, at an appropriately senior level, to the identification and removal of impediments to the effective operation of the existing system.

11. Since the time of the first evaluation Poland has remained actively engaged in international co-operation. By way of illustration, it has both signed and ratified the UN Convention against Transnational Organised Crime, the negotiation of which, it will be recalled, was a Polish initiative. However, perhaps the most significant development since the first evaluation for present purposes is its full participation in the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime. This entered into force for Poland in April 2001.

12. While the position of Poland in international co-operation has been strengthened in a significant fashion the evaluators regret that the use of double criminality as a mandatory ground for refusal of confiscation at the request of a foreign state will preclude co-operation in instances in which the requesting state utilises, inter alia, a different knowledge standard.

It is recommended that the Polish authorities revisit this difficult issue and consider whether an approach can be formulated and implemented more in keeping with the wording and spirit of FATF Recommendation 33 and its Interpretative Note. In the view of the evaluators it would also be appropriate to give further consideration to the issue of asset sharing.

13. Up until the enactment of the Anti-Money Laundering Law in November 2000 only banks and brokerage houses came within the ambit of anti-money laundering regulation. As a result of the new law, the following types of enterprises are subject to the regulation: Exchange bureaux, insurance companies, investments funds, pension funds, Polish Post, entities involved in gaming and betting, notaries public and real estate agents. It was noted by the evaluators that the greatly expanded scope of regulated activities does not encompass the legal and accountancy professions, nor does it include dealers in high value items. The evaluators recommend that consideration be now given to including these professions, which would bring the law fully into compliance with the 2001 EU Money Laundering Directive.

14. As for customer identification, the Anti-Money Laundering Law specifically requires customer identification in relation to transactions above the threshold level of euro 10.000 (will be euro 15.000 as of 1 January 2004). It does not, however, explicitly require customer identification at the time of opening an account. It was said that such provision, for banks at least, is rooted in the Banking Act, and more specifically in Sections 54 and 65. However, the position is not entirely clear since the translation provided to the evaluators of Section 54 of the Banking Act merely requires that at the time of opening an account the customer must be specified, and "specified". Although the Polish financial institutions may interpret the requirement to "specify" a customer as a requirement to establish a customer's identity, for the avoidance of doubt, it is recommended that there should be a clearer legal requirement to do so for all obligated institutions, so that failure to adhere to it can result in penalties.

15. Customer identification requirements for legal persons caused some concerns. The only requirement in place for legal persons is to identify account signatories. There is no requirement in Banking Law to identify directors or major shareholders. There is no provision on how to deal with foreign bearer share companies. The evaluators recommend that the customer identification provisions in respect of legal persons should be brought fully into line with FATF Recommendations.

16. The anti-money laundering law requires obligated institutions to provide training to their personnel in identifying suspicious transactions potentially linked with money laundering. GIFI has made training a top priority. It has organised many training courses for the various types of institutions designed to enhance their ability to spot suspicious transactions and adopt internal policies, procedures and controls that would deter money launderers.

17. The legal basis for the obligated institutions to disclose a report on suspicious transactions to the GIFI is article 16, section 1, of the Anti-Money Laundering Law. Pursuant to this provision, obligated institutions intending to carry out a transaction in circumstances justifying a suspicion of money laundering or terrorist financing, shall inform the GIFI of the suspicion providing information and indicating that the transaction should be suspended or the account blocked, indicating the planned date of the transaction. Furthermore, article 11 provides that the obligated institutions shall, upon a written demand by the GIFI, "make available its documentation pertaining to transactions" related to money laundering to the GIFI.

18. It is the view of the evaluators that the concept of reporting only on the basis of "transactions" rather than "activities" could in some cases lead to the intermediaries refraining from sending a report, because a real transaction has not yet been asked for by the client. Even where the level of a specific transaction has not yet been reached, the obligated institution might have a money laundering suspicion, for example based on advice sought by the client or documents shown by the client. The evaluators recommend, that this question should be revisited by the Polish authorities, potentially with a view to changing the law so as to include suspicious activity or to communicate expressly to the obligated parties, that the term "transactions" should be understood to also cover suspicious activities other than just transactions.

19. Suspicious transaction reports continue to be relatively few in number, though their number has been increasing. Moreover, most reports have come from a small number of institutions in the banking sector. Very few reports have come from brokerage houses, and not one at the time of the on-site visit from bureaux de change.

20. The evaluators noted with satisfaction a number of improvements since the first evaluation concerning the operational matters relevant to money laundering cases. Noteworthy is the explicit power in article 33, section 1-3 of the Anti-Money Laundering Law given to the GIFI in terms of providing relevant law enforcement and supervisory authorities with confidential information. Furthermore, the access of the police to bank information, for example on bank accounts and transactions, has been made easier after the creation of the GIFI. Having said this, a number of improvements and refinements will still have to be made in order to further fine-tune the effectiveness of the system in place.

21. The co-operation between the GIFI, on the one hand, and police and prosecutorial services, on the other hand seems generally to be working quite well. However, as for money laundering cases not emanating from a suspicious transaction report, the evaluators were not convinced, that the GIFI always were provided with the relevant information by the law enforcement authorities. For a proper updating of its own databases, it is important, than the GIFI receives all information related to money laundering. The evaluators therefore recommend that clear procedures be established in order to make sure, that the GIFI receives all relevant information also on money laundering cases not emanating from a suspicious transaction report.

22. According to article 5 of the Anti-Money Laundering Law, staff from various state agencies can act as liaison officers within the FIU. In order to further strengthen the co-operation with the National Prosecutor's Office, the evaluators advise the Polish authorities to consider whether the Prosecutor's Office could also exercise a similar function within the FIU.

23. Poland has adopted a number of measures since the first evaluation that demonstrate significant progress and the strengthening of its anti-money laundering regime. By addressing the issues above, Poland can further improve its fight against money laundering and make the regime to combat it more effective.

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