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Poland

2nd Compliance Report

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LIST OF ACRONYMS

AML/CFT	Anti-money laundering and combating financing of terrorism
CC	Criminal Code
CEPs	Compliance Enhancing Procedures
CPC	Code of Criminal Procedure
CDD	Customer Due Diligence
CTR	Cash transaction report
DNFBP	Designated Non-Financial Businesses and Professions
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FT	Financing of Terrorism
KYC	Know your customer
LEA	Law Enforcement Agency
MER	Mutual Evaluation Report
ML	Money Laundering
MLA	Mutual legal assistance
NPO	Non-Profit Organisation
NRA	National Risk Assessment
SAR	Suspicious Activity Report
SR	Special recommendation
STR	Suspicious transaction report
UN	United Nations
UNSCR	United Nations Security Council resolution

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2nd Compliance Report submitted by Poland

Note by the Secretariat

Introduction

1. The purpose of this paper is to introduce to the Plenary Poland's second compliance report concerning the progress that the country has made to remedy the deficiencies identified since the 55th Plenary (5-7 December 2017).

2. MONEYVAL adopted the mutual evaluation report (MER) of Poland under the 4th round of mutual evaluations at its 41st Plenary meeting (April 2013). Poland was placed into regular follow-up and has submitted in total seven follow-up reports.

3. The 53rd Plenary had already noted in May/June 2017 that Poland had made progress in addressing many of the deficiencies identified in the 4th round MER since the adoption of that report in 2013. This included the criminalisation of the funding of terrorist organisation and individual terrorists for "any purpose", a deficiency the country rectified with amendments made to the Criminal Code in early 2017. Nevertheless, MONEYVAL stated at the time that the draft AML/CFT Law which was to address the outstanding deficiencies in relation to preventive measures (R.5, R.13 and SR.IV) had not yet been adopted.

4. In September 2017, the 54th Plenary noted that the draft AML/CFT had still not been adopted. Taking into account the severity of the outstanding deficiencies on a number of core and key recommendations, the Plenary considered the application of Step 1 of its Compliance Enhancing Procedures (CEPs). Mindful of the already advanced legislative process for the draft AML/CFT Law, the Plenary considered it appropriate to use enhanced peer pressure to ensure that the remaining legislative process was accelerated as much as Poland's constitutional process allows for. In addition to this, the Plenary considered that there were other deficiencies, mainly under R.3, which would remain outstanding despite of the adoption of the draft AML/CFT Law. Thus, the Plenary decided to apply Step 1 of CEPs with regard to Poland and asked the country to report back at its 55th Plenary in December 2017.

5. In December 2017, the 55th Plenary noted that there had been some progress with regard to the adoption of the draft AML/CFT Law by the Permanent Committee of the Council of Ministers, but urged Poland to complete the legislative process by the time of the 56th Plenary in order to avoid the application of Step 2 of CEPs. The Plenary also noted that some of the outstanding deficiencies under R.3 with regard to instrumentalities, albeit of a technical nature, were related to a recommendation on effectiveness and were not required to be implemented by the FATF 2003 recommendations. Therefore, the Plenary decided to maintain Poland under Step 1 of the CEPs and asked the country to report back at its 56th Plenary.

Progress made since the 55th Plenary (December 2017)

6. In its second compliance report, the Polish delegation informed the Plenary about the progress made since the 55th Plenary in December 2017. This relates primarily to the fact that the new AML/CFT Law was adopted and signed on 28 March 2018. The secretariat estimates new Law rectifies most of the outstanding deficiencies identified in the 4th round MER relating to R.5, 13 and SR. IV.

7. However, a few outstanding deficiencies are not yet covered by the new AML/CFT law. Such deficiencies are notably: the lack of an obligation to freeze funds owned or controlled directly or indirectly by persons acting on behalf or at the direction of designated persons; as well as the scope of the ML reporting requirement which does not cover "funds" suspected to be the proceeds of criminal activity, in relation to R.13 and SR.IV.

Progress Made with Regard to other Core and Key Recommendations

8. It should be recalled that Poland had already achieved substantial progress with regard to other core and key recommendations which did not form part of CEPs. In particular, the amendments made to Articles 299 and 165a of the CC (which came into force in early 2017) appear to address major outstanding technical deficiencies, such as the criminalisation of the funding of terrorist organisations and individual terrorists for "any purpose" and the elimination the purposive supplementary elements for some of the acts constituting offences in the treaties annexed to the FT Convention. MONEYVAL had already welcomed this at the occasion of the 53rd Plenary in May/June 2017. Although certain minor gaps still remain, the secretariat analysis concluded at the time that it appeared that the technical compliance with R.1, 35, SR. I and II had already been brought up to a level of "largely compliant".

9. On a general note concerning all fourth-round follow-up and compliance reports: the procedure is a paper desk-based review, and thus by nature less detailed and thorough than a MER. Effectiveness aspects can be taken into account only through consideration of data and information provided by the authorities. It is also important to note that the conclusions in this analysis do not prejudge the results of future assessments, as they are based on information which was not verified through an on-site process and was not, in all cases, as comprehensive as it would have been during a mutual evaluation.

Review of measures taken in relation to Core and Key Recommendations

Recommendations related to legal issues

10. On the legal part, the Core and Key Recommendations rated PC were R.3 and SR.III.

Recommendation 3 (Confiscation and provisional measures)

Deficiency 1/Recommended action – *The discretionary character of the confiscation of instrumentalities raises concerns.*

11. The discretionary character of the confiscation of instrumentalities remains, as Art 44a § 2 ("The court may order the forfeiture…") of the CC still does not use mandatory language. However, the secretariat would like to recall the discussion held at the 55th Plenary in December 2017 considering this recommended action. While mandatory confiscation is required by the Council of Europe Convention CETS 198 (Article 3, paragraph 3: "Parties may provide for mandatory confiscation …"), the scientific experts had pointed out during the discussion that this recommended action did not relate to the technical requirements of R.3 of the 2003 FATF standards. This was also reflected in the meeting report of the December 2017 Plenary. Hence the secretariat considers that this should not be considered as a technical deficiency for the purposes of the present analysis.

Deficiency 2/Recommended action – *The Polish confiscation regime should allow confiscating of instrumentalities, especially when owned by third parties.*

12. Confiscation of instrumentalities owned by third parties is still not expressly provided for by the CC in all cases. However, Article 44a (2) of the amended CC (April 2017), provides for the confiscation of enterprises if those enterprises were used to commit an offence or conceal the benefit derived from it, even if they were not owned by the perpetrator. The authorities are strongly encouraged to fully address this deficiency by the time of the 5th round mutual evaluation.

Deficiency 3/Recommended action – *The Polish authorities should remedy the deficiencies identified in the TF offence that potentially affect the scope of confiscation and provisional measures especially with regard to "legal" activities of terrorist organisations and individual terrorists.*

13. The amended Article 165a of the CC (adopted in April 2017) now criminalises the funding of terrorist organisations and individual terrorists for "any purpose". It also covers the financing the specific terrorist crimes addressed by the treaties listed in the annex to the Convention for the Suppression of the Financing of Terrorism. Moreover, the list of terrorist crimes, which was included into Article 165a § 1 of the CC, makes financing of such crimes penalised without requiring any specific common purpose for those acts. Given that Poland has addressed these deficiencies under SR.II (in particular with regard to "legal" activities), the scope of confiscation has also been widened. This deficiency under R.3 has consequently been addressed.

Conclusion

14. Despite the remaining gaps in the confiscation of instrumentalities (which, as explained above, do partly not relate to technical deficiencies for the purposes of the 2003 FATF standards), the Polish authorities have overall taken sufficient legal steps to rectify the remaining deficiencies (related to the confiscation regime in light of the scope of the FT offence). Therefore, the technical compliance level with R.3 can be considered to be equivalent to "largely compliant".

Special Recommendation III (Freeze and confiscate terrorist assets)

Deficiency 1 – *The EU or Polish legislation do not cover the freezing of funds derived from funds owned or controlled directly or indirectly by persons acting on their behalf or at the direction of designated persons or entities.*

15. Article 118 of the new AML/CFT Act imposes the obligation to freeze assets and the prohibition to make them available covers all kinds of assets required by the UNSCR and SR.III, without however explicitly including funds owned or controlled directly or indirectly by persons acting on their behalf or at the direction of designated persons. As this deficiency has not yet been fully addressed, the Polish authorities are urged to make this explicit in the wording of the AML/CFT Law in view of the 5th round MER.

Deficiency 2 – *The time taken to amend the EU regulations following amendments made to the list published by the 1267 Committee is relatively long; in this respect the obligation to freeze terrorist funds without delay is not observed.*

Recommended action – *The Polish authorities may consider amending its national legislation in order to cover deficiencies under the EU Regulations.*

16. The new AML/CFT Act introduces a general and comprehensive procedure for implementing SR.III requirements. Article 117 (1) of the new AML/CFT Act now brings together a direct obligation to apply the specific restrictive measures against persons and entities designated under the relevant UNSCRs.

Deficiency 3 – *The freezing mechanism under Article 20d of the AML/CFT Act excludes movable and immovable property, which restricts the scope of the obligations imposed by EU Council Regulation 881/2002.*

Recommended action – *Movable and immovable property should be included in the freezing mechanisms in place pursuant to Article 20(d) of the AML/CFT Law.*

17. Article 2(2), item 27 of the new AML/CFT Act now includes immovable and movable property.

Deficiency 4 – *Reliance on criminal proceedings in order to freeze terrorist funds is not fully in line with the requirements of UNSCR 1267 since the requirement to freeze assets could be limited in time according to the Criminal Procedure Rules.*

Recommended action – *Consideration should be given to the merits of a more general administrative procedure for handling SR.III in its entirety, subject to proper safeguards (especially with regard to bona fide third parties).*

18. The new AML/CFT Act (in particular Art.119 to Art.126) introduces administrative procedures applicable to frozen assets under the UNSCRs that explicitly cover issues related to designations, challenging designations, reviewing designations, de-listings, mechanism for communicating designations and de-listings to financial sector and DNFBPs, providing access to frozen assets, protection of rights of third parties, penalties for abusing sanctions regime.

Deficiency 5 – *Poland has not yet taken specific measures to cover "EU internals".*

Recommended action – *Polish authorities should apply mechanism set out under section 20d of the AML/CFT Act that provides a clear legal mechanism, which would potentially cover designations in Poland in respect of EU citizens or named persons not covered by the EU clearing house list proposed by other countries.*

19. Chapter 10 of the new AML/CFT Law provides for an explicit procedure which covers both designations in Poland in respect of EU citizens and persons/entities not covered by the EU clearing house list proposed by other countries.

Deficiency 6 – *No communication system between the authorities and DNFBPs.*

Recommended action – *The Polish authorities should establish an effective system of communication with the DNFBP sector in respect of the obligations under SR.III.*

20. The new AML/CFT Law provides for a clear legal obligation to immediately communicate designations to the financial sector and the DNFBPs upon taking such action both by the UN as well as by the General Inspector of Financial Information (GIFI). According to the law, there is a legal duty for the lists of designated persons and entities (both UN lists and the list kept by GIFI) to be published in the Public Information Bulletin on the website of the minister responsible for public finance (Article 118(2) of the AML/CFT Law). In practice, all sanctions lists are published on the dedicated bookmark of the GIFI's website titled "International sanctions" as well. Moreover, according to the new AML/CFT Law, GIFI may make an announcement to apply targeted financial sanctions against designated persons or entities in the media (Article 118 (3)). Information on obligations under SR.III is published on the website of GIFI under the following link: http://www.mf.gov.pl/en/aml-ctf/news.

Conclusion

21. Poland has addressed a number of outstanding deficiencies and taken further steps to strengthen its legal framework for applying TFS through the amendments brought into the new AML/CFT Law. Some deficiencies remain, such as the lack of an obligation to freeze funds owned or controlled directly or indirectly by persons acting on behalf or at the direction of designated persons. Overall, SR.III has been brought to a level of "largely compliant".

Recommendation 5 (Customer due diligence)

Deficiency 1 – *The legislation does not cover full CDD requirements when carrying out occasional transactions that are wire transfers equal to or exceeding €1,000.*

Recommended action – *A provision should be included in the AML/CFT Act expressly requiring financial institutions to carry out customer due diligence measures when carrying out occasional transactions that qualify as a wire transfer amounting to or exceeding €1,000.*

22. Article 35 paragraph 1, point 2, b) of new AML/CFT Law provides for the application of CDD measures by the obliged entities while conducting occasional transactions being a wire transfer of funds, referred to in Regulation (EU) 2015/847, that exceeds the amount of €1,000.

Deficiency 2 – *Financial institutions are required to verify the customer identity on the basis of documents and information from a public source, but not specifically from reliable and independent sources.*

Recommended action – *Financial institutions should be required to verify customer identity on the basis of document, data or information obtained from a reliable and independent source.*

23. According to the Article 37 of the new AML/CFT Act, obliged institutions shall verify the identity of the customer on the basis of documents specified by the AML/CFT Act or on other documents, data or information stemming from reliable and independent source.

Deficiency 3 – *There is no clear requirement to identify the beneficial owner since financial institutions are only required to attempt to identify the beneficial owner.*

Recommended action – *Financial institutions should be required to identify the beneficial owner, where applicable, and not simply attempt to identify the beneficial owner. Additionally, there should be a clear provision to explicitly prohibit financial institutions from establishing (or continuing) a business relationship with a customer in those instances where the ultimate beneficiary owner cannot be determined.*

24. Article 34 paragraph 1 point 2 of the new of AML/CFT Act provides for a clear obligation for obliged institutions to identify the beneficial owner and to undertake justified activities in order to verify his/her identity.

25. In line with Article 41 paragraph 1 of the new AML/CFT Law, in the instance that the application of CDD is not possible, the obliged entity is neither allowed to establish a business relationship, nor to conduct a transaction. In that instance, the provision obliges the entity to terminate the business relationship.

Deficiency 4 – *There is no requirement to verify whether any person purporting to act on behalf of a legal person is so authorised.*

26. Recommended action – *Financial institutions should be required to ensure that a person acting on behalf of a legal person is so authorized.* Article 34 paragraph 2 of the new AML/CFT Law imposes on obliged institutions the obligation to identify persons authorised to act on behalf of the customer, and then verify his/her identity.

Deficiency 5 – *When conducting on-going due diligence on the business relationship there is no requirement to establish, where necessary, the source of funds.*

Recommended action – *Financial institutions should be required when conducting on-going due diligence on the business relationship to establish, where necessary, the source of funds.*

27. The new AML/CFT Law, in Article 34 paragraph 1 (point 4, b), provides for the obligation, while monitoring the business relationship with the customer, to establish where necessary the source of funds.

Deficiency 6 – *The provisions dealing with simplified CDD permit financial institutions to waive all CDD measures, except for on-going monitoring.*

Deficiency 7 – *There is no prohibition against applying simplified CDD when there is a suspicion of ML/FT.*

Recommended action – *Financial institutions should not be permitted to waive the application of CDD measures entirely when dealing with low risk customers and products. Additionally, the application of simplified CDD should not be accepted whenever there is a suspicion of ML/FT.*

28. In line with the provisions of Article 42 of the new AML/CFT Law obliged entities may apply simplified customer due diligence measures only in cases where the risk assessment referred to in Article 33(2) confirms a lower risk. In fact, the obliged entities may apply simplified CDD measures only after the application of all CDD measures set out in law, where low risk has been identified.

29. During the application of simplified CDD, the obliged entities apply the Joint Guidelines of the European Supervisory Authorities (ESA), Article 17 and 18(4) of Directive (EU) 2015/849, on simplified and enhanced CDD**.** Simplified CDD cannot be applied in establishing a business relationship, when there is a suspicion of ML/FT or when there are doubts about the veracity or adequacy of identification data previously obtained (Article 35(1)(5) and (6)).

Deficiency 8 – *There is no requirement to complete verification of identity as soon as reasonably practicable in those cases where verification is not carried out before the establishment of a business relationship.*

Deficiency 9 – *Article 9b permits financial institutions to open an account without performing full CDD.*

Recommended action – *Financial institutions should be required to complete the verification of identity as soon as reasonably practicable in those cases where verification is not carried out before the establishment of a business relationship. Additionally, financial institutions should not be permitted to open an account without performing full CDD measures, since the relevant criterion merely refers to the postponement of verification and not full CDD.*

30. Article 39, paragraph 1 of the new AML/CFT Law obliges institutions to verify the identity of a customer or the beneficial owner before establishing a business relationship or performing an occasional transaction. Moreover, paragraph 2 of the provision states that "the verification of the customer's and beneficial owner's identity may be completed while establishing business relationship if it is necessary to ensure adequate conduct of economic activity and when there is low risk of money laundering or terrorist financing. In such cases customer's and beneficial owner's identity is verified as soon as possible since initial contact."

Recommended action – *Financial institutions should be required to conduct CDD measures to existing customers, including those customers holding an anonymous account.*

31. Although, Article 35 paragraph 2 of the new AML/CFT Law imposes the obligation to apply CDD to existing customers, this requirement only applies when there is a change to a customer's situation.: "*The obligated institutions shall also apply customer due diligence*

measures in relation to customers with whom they maintain a business relationship, taking into consideration the identified risk of money laundering or terrorist financing, in particular, in situations when a change in the previously determined nature or circumstances of business relationship occurred".

Conclusion

32. Although the recommended action on CDD to existing customers has only been partly implemented, overall it appears that the technical deficiencies identified in the 4th Round MER have been addressed by the new Law. R.5 has been brought to a level of "largely compliant".

Recommendations related to law enforcement issues

33. On the law enforcement part, the core Recommendations rated PC were R.13 and SR.IV.

Recommendation 13 and SR.IV (Suspicious transaction reporting)

Deficiency 1 – *The scope of the reporting requirement is only linked to transactions related to ML/TF and does not extend to the reporting of "funds" suspected to be the proceeds of a criminal activity.*

34. The scope of the reporting requirement under Article 74 paragraph 1 of the new AML/CFT Act still does not explicitly extend to the reporting of "funds" suspected to be the proceeds of a criminal activity as required by C.13.2. Hence the deficiency remains:

"Article 74 (1) The obligated institution shall notify the General Inspector of any circumstances which may indicate the suspicion of committing the crime of ML/TF.

2. The notification shall be submitted immediately, in any case, not later than two business days following the day of confirming the suspicion referred to in paragraph 1 by the obligated institution.

3. The following data shall be provided in the notification: …

3) value and type of assets and place of their storage;

Deficiency 2 – *The FT reporting obligation is limited to "transactions" related to FT and does not extend to "funds".*

Recommended action – *The FT reporting obligation should be extended to "funds" as required under Criterion 13.1.*

35. The deficiency has not yet been addressed. Article 74 para.3 (3) of the AML/CFT Law stipulates that an obligated institution shall notify the FIU of suspicion on ML/FT. In particular, the notification should include the value and type of assets and place of their storage, among others. However, the requirement of the law to report "any circumstance which may indicate the suspicion of committing the crime of ML/FT" appears too general and it is not clear whether it covers funds that are the proceeds of a criminal activity.

Deficiency 3 – *The deficiencies identified with respect to R.1 and SR.II restrict the scope of the reporting requirement.*

36. The amendments to the ML offence in February 2016 and the latest amendments to the FT offence (Article 165a of the CC adopted in April 2017) appear to have largely addressed this deficiency (please see MONEYVAL(2017)6_Analysis and part V of this document).

Deficiency 4 – *Possible confusion between reporting obligations under Articles 8.3, 11.1 and 16 (e.g. attempted transactions are not covered under Article 11.1).*

Recommended actions – *The reporting requirement under Article 11 paragraph 1 should expressly provide for attempted transactions. The Polish authorities should revise the legal text of the entire reporting regime to remove any overlaps between the requirements under Article 11 and 16, to provide for a clear legal basis for the reporting of suspicious activity reports.*

37. The scope of the reporting requirement under Article 74 paragraph 3 (item 5) of the new law explicitly covers transactions or attempts aimed at their execution.

38. As concerns the second recommendation, the amended provisions of the new Law (Articles 74, 75 and 77) appear to address the concerns on possible confusion between reporting obligations.

Conclusion

39. Overall, some of the deficiencies have been addressed either through amendments to the CC or through the new AML/CFT Law. Nonetheless, the deficiencies concerning the scope of the reporting requirements still remain. For the purposes of the CEPs, it can be concluded that R.13/SR.IV has been brought to a level of "largely compliant". In light of MONEYVAL's 5th round of mutual evaluations, the Polish authorities are urged to remedy the remaining gaps.

OVERALL CONCLUSIONS ON STEP 1 OF CEPS WITH REGARD TO POLAND

40. In light of Poland's second compliance report, the country has undertaken measures since the 55th MONEYVAL Plenary in 2017 which demonstrate that the application of Step 1 of CEPs have triggered measurable results in a very short time. With the entry into force of the new AML/CFT Law in March 2018, Poland has rectified a number of outstanding deficiencies under R.5, R.13/SR.IV and SR.III, which has brought the level of compliance to a "largely compliant". However, Poland is urged to address the outstanding deficiencies outlined in the present analysis before the 5th round mutual evaluation. Overall, the Secretariat considers that Poland has sufficiently met the expectation of the 55th Plenary in December 2017. As a consequence, it is proposed that the Plenary lifts the application of CEPs with regard to Poland.

Whether to Remove Poland from the Follow-Up Process of the 4th Round of Mutual Evaluations

41. For a country to be removed from the follow-up process, Rule 13, paragraph 4 of MONEYVAL's 4th round rules of procedure requires that the country has effective anti-money laundering and combating the financing of terrorism (AML/CFT) system in force, under which the State or territory has implemented the core and key recommendations at a level essentially equivalent to a "compliant" (C) or "largely compliant" (LC). However, the Plenary may retain some limited flexibility with regard to those recommendations listed that are not core recommendations if substantial progress has also been made on the overall set of recommendations that have been rated "partially compliant" (PC) or "non-compliant" (NC).

42. The following section recalls the measures taken by Poland since the 2013 MER with regard to other core and key recommendations originally rated "partially compliant", which the plenary however already considered as having been brought to a level of "largely compliant" in light of progress made in the past five years. In this respect, the secretariat notes that the conclusion made at the 53rd Plenary in May/June 2017 had been that, in light of the progress made since the adoption of the 4th round MER in 2013, the rating for these recommendations had meanwhile been brought to a level equivalent to "largely compliant". This analysis is replicated in the following.

Detailed review of measures taken in relation to other Core and Key Recommendations

Recommendation 1 (Money laundering offence)

Deficiency 1/Recommended action – *Article 299 of the Criminal Code should be amended to ensure that conversion, concealment, disguise, acquisition, possession and use, as well all types of property, are fully covered by legislation in accordance with the Vienna and Palermo Conventions.*

Recommended action – *The clarification should be provided (either by legislation or by binding interpretative mechanism) that the subject matter of money laundering offence covers property obtained directly through the commission of an offence.*

43. On 27 October 2015 the President of Poland signed the Act on the amendment of the Criminal Code and some other acts, which modified the text of both ML (Article 299 CC) and FT offences (Article 165a CC) provisions, while its explanatory report ("justification") makes direct reference to the MONEYVAL recommendations. This amendment came into force on 13 February 2016.

44. The amended text of the ML offence seems to address some deficiencies identified under the 4th round MER. It covers the acquisition, possession, use, concealment, transfer or conversion of property. The authorities have indicated that the word "concealment" in Polish also extends to "disguise". Given the limitation of a desk-based review, this aspect could only be verified with practitioners in the context of an on-site visit.

45. With regard to the ML offence, its scope extends to payment, financial instruments, securities, foreign currency, property rights or other movable or immovable property derived from the proceeds relating to the commission of a prohibited act. Although, the amended version of the ML offence does not contain a clear reference to the proceeds derived from the committed crime (directly obtained), the Supreme Court issued a resolution that the subject of the offence referred to in Article 299 §1 of the Criminal Code (the ML offence) covers all means of payment, financial instruments, securities, foreign exchange values, property rights, or other movable or immovable property, listed in this provision, derived directly or indirectly from the offence. That resolution of the Supreme Court is considered as a legal principle based on Art. 61 §6 of the Act of 23 November 2002.

Deficiency 2/Recommended action – *Association with or conspiracy to commit money laundering should be recognised as a criminal offence.*

46. The association with or conspiracy to commit ML would also appear to be covered by Article 299 paragraph 6(a) of the CC as provided in the amendment that came into force on 13 February 2016.

Deficiency 3/Recommended action – *The financing of terrorism in all its forms, as explained in the Interpretative Note to SR.II, should be clearly covered as a predicate offence to money laundering.*

47. The recent amendments to the Article 165a of the CC (adopted in April 2017) appear to address this deficiency (please see the analysis under SR.II).

Recommended action – *Guidance should be issued to clarify that the predicate base of money laundering extends to conduct which occurs in another country but which is not an offence in that country, but would be an offence if it occurs in Poland.*

48. Regarding the recommendation to issue guidance in order to clarify that the predicate base of ML extends to conduct which takes place in another country, but which is not an offence in that country, but would be an offence if it occurred in Poland, no further information has been provided. The conclusion expressed in the analysis of the first follow-up report (that on a desk-

based review the Secretariat cannot form a view as to whether the clarifications given adequately address the concerns of the 4th Round evaluation team) are still valid.

Recommended action – *Knowledge that such property is proceeds - as widely defined in the Palermo and Council of Europe Convention – is impliedly covered by Article 299, but it should be formally set out in the legislation.*

49. It was recommended in the MER to formally set out in the intentional element that property is proceeds - as widely defined in the Palermo and the Warsaw Conventions. However, the authorities are of the view that given that the ML offence specified in Article 299 is an intentional offence and as such, the perpetrator has to be aware of the basic circumstances constituting the offence and in accordance with the Polish criminal law principles, it is neither required nor feasible to implement this recommendation. The authorities also stated that this requirement results from both the definition of an intentional act set out in the general part of the Criminal Code and from well-established jurisprudence. Therefore, this issue has to be further addressed with practitioners during the 5th round of mutual evaluation of Poland.

Recommended action – *Guidance should be issued to clarify that knowledge (the intentional element) can be inferred from objective factual circumstances.*

50. The Guidelines issued by the Deputy Prosecutor General and disseminated to the prosecutors via the letter of 25 June 2014 clarify that the perpetrators' knowledge of the illegal origin of the funds and their intention to legalise the funds may be inferred from objective factual circumstances of their actions, assessed in the context of the principles of life experience.

Recommended action – *The Polish authorities may also wish to consider an alternative lower mental element, like suspicion for Article 299 (1), with appropriately lower penalties, to cover situations where knowledge cannot clearly be proved. Equally, introducing the concept of negligent money laundering will also assist the prosecutorial effort.*

51. In response to this recommendation, Poland referred to the fact that this issue has already been considered by the Polish authorities in the course of the implementation of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16.05.2005 (CETS 198).

Recommended action – *Greater emphasis needs to be placed on autonomous prosecution of money laundering by third parties.*

52. The number of convictions achieved in 2016 and 2017 for ML has increased compared to previous years. Although no details of the cases have been provided to the Secretariat, they appear to include a number of convictions for third-party money laundering.

Conclusion

53. Although minor limitations still exist, it would appear that the level of technical compliance with R.1 is now equivalent to largely compliant.

Special Recommendation II (Terrorism Financing Offence)

Deficiency 1 – *Funding terrorist organisation for "any purpose" is not fully criminalised.*

Deficiency 2 – *The funding of an individual terrorist is not criminalised in all circumstances.*

Recommended action – *The Polish authorities are strongly encouraged to urgently address the shortcomings identified in the TF regime, especially with regard to criminalisation of funding terrorist organisation and individual terrorists for "any purpose".*

54. According to the Criminal Code, which was amended in April 2017, the wording of the new FT offence (Article 165a) criminalises the funding of terrorist organisations and individual terrorists for "any purpose". It reads as follows (emphasis added):

§ 1. Whoever collects, transfers or offers legal tenders, financial instruments, securities, foreign currencies, property rights or any other movable or immovable property with an intent of financing a crime of a terrorist character or criminal offenses referred to in ***art. 120, art. 121, art. 136, art. 166, art. 167, art. 171, art. 252, art. 255a or art. 259a****, shall be liable to penalty of imprisonment from 2 to 12 years.*

§ 2. The same penalty shall apply to whoever makes available property as defined in § 1 to an organized group or association having an intention to commit the offense referred to in that provision, or to a member of such group or association or ***a person who intends to commit such an offense****.*

§ 3. Whoever, without being obliged to do so by law, ***covers the costs associated with meeting the needs or fulfilment of financial obligations*** *of the group, association or the person referred to in § 2, shall be liable to penalty of imprisonment to 3 years.*

§ 4. The same penalty shall be imposed on the perpetrator of the act specified in § 1 or 2, who acts unintentionally.

55. Although it was not specifically mentioned as a deficiency in the 4th MER, the amended FT offence does not appear to clearly cover the collection or provision of funds by any means, directly or indirectly, and their use, in full or in part, for FT purposes.

56. As was already noted in the Secretariat analysis of the second and the third follow-up reports, the authorities have indicated in the additional information provided at that time that, in the very first FT investigation which started in Poland, funds intended to support the ISIL were collected among members of one ethnical minority and sent through a chain of intermediaries to ISIL fighters. Therefore, the authorities consider that this illustrates the possibility of punishing the indirect financing of terrorism under Article 165a of the Criminal Code.

57. However, it is difficult to assess on a desk-based review how this issue is interpreted in practice. In the absence of a binding interpretation by the Polish courts, it cannot be concluded that the collection or provision of funds by any means (directly or indirectly, and their use, in full or in part, for FT purposes) is sufficiently covered by the wording of the TF offence. Therefore, this issue has to be further addressed with practitioners during the 5th round of mutual evaluation of Poland.

58. Moreover, it is not clear that paragraphs 2 and 3 of Art. 165a would cover the mere *collection* of funds for terrorist organisations and individual terrorists, as required by the standard, without having made funds available or without having covered any costs. Furthermore, it is noted that the acts from Art. 165 § 1 and 2 carry a sentence of two to twelve years whereas the possible sentence for the acts from Art. 165a § 3 is limited to up to three years. These sanctions might not be fully proportionate and dissuasive given that all funds provided in support of terrorists are fungible.

Deficiency 3 – *There are purposive supplementary elements for some of the acts constituting offences in the treaties annexed of the Convention.*

Recommended action – *Legislation should be amended to bring it in line with Article 2 (1) (a) of the TF Convention which doesn't require any specific common purpose for those acts constituting offences in the treaties annexed of the Convention.*

59. The amended CC (see Article 165a § 1 above) covers the financing of specific terrorist crimes addressed by the treaties listed in the annex to the Convention for the Suppression of the Financing of Terrorism. Putting the list of terrorist crimes into article 165a § 1 of the CC makes financing of such crimes penalised without any requirement for a specific common purpose for those acts.

Deficiency 3 – *Terrorist financing abroad is not fully covered.*

60. The evaluators in the 4th Round MER remained unsatisfied as to potential lack of criminality in a situation of wilful provision or collection of funds abroad intending that they be used by a terrorist organisation or an individual terrorist for a purpose considered legitimate under Polish law (e.g. charitable activity) which may not be considered an "offence against the interests of the Republic of Poland" (Chapter XIII, Article 110 of the CC). It was stated that in such a case it is questionable under current legislation if criminal proceedings could be initiated in Poland.

61. No additional information has been provided on that issue. However, the authorities are of the opinion that this deficiency is addressed either by Article 165a para.3 of the CC or the application of Art. 113 CC (that establishes "conventional jurisdiction"), depending on where the collection/provisions of funds or the charitable activity have taken place. Nevertheless, given that it is difficult to assess this issue on a desk-based review, it is proposed to consider it with practitioners during the next round of mutual evaluation of Poland.

Conclusion

62. Poland has taken measures to address the major outstanding deficiencies with regard to SR.II. The amended Article 165a of the CC now criminalises the funding of terrorist organisation and individual terrorists for "any purpose" and eliminates the purposive supplementary elements for some of the acts constituting offences in the treaties annexed of the FT Convention. Although some gaps still remain which should form part of Poland's 5th round mutual evaluation, the level of technical compliance with SR.II is now equivalent to "largely compliant".

Recommendation 35 (Conventions)

Deficiency 1 – *The physical elements of money laundering offence do not fully correspond to the Vienna and Palermo Conventions, in particular conversion, concealment, disguise, acquisition, possession or use are not covered in all circumstances (R.1).*

Deficiency 2 – *Not all essential criteria are provided for in the Polish legislation, e.g. association with or conspiracy as an ancillary offence (R.1).*

63. Please see the analysis under R.1.

Deficiency 3 – *The confiscation of instrumentalities is discretionary (R.3).*

Deficiency 4 – *Confiscation regime does not cover instrumentalities transferred to third parties (R.3).*

64. Please see the analysis under R.3.

Deficiency 5 – *Funding terrorist organisation for "any purpose" not fully criminalised (SR.II).*

Deficiency 6 – *The funding of an individual terrorist is not criminalised in all circumstances (SR.II).*

Deficiency 7 – *Terrorist Financing abroad is not fully covered (SR.II).*

Deficiency 8 – *There are purposive supplementary elements for some of the acts constituting offences in the treaties annexed of the Convention (SR.II).*

65. Please see the analysis under SRII.

Deficiency 9 – *Limited scope of terrorist financing offence potentially affects the scope of confiscation and provisional measures especially with regard to "legal" activities of terrorist organisations and individual terrorists (R.3).*

66. Please see the analysis under R.3.

Recommended action – *Poland should take necessary measures to remedy identified deficiencies under Recommendations 1 and 3 and SR.II to fully implement the Vienna, Palermo and TF Conventions.*

67. Please see the analysis under R.1, R.3 and SR.II.

Conclusion

68. Given that Poland has rectified many of the deficiencies with regard to R.1 and SR.II, the technical compliance with R.35 is now at a level equivalent to largely compliant.

Special Recommendation I (Implement UN instruments)

Deficiency 1 – *Funding terrorist organisation for "any purpose" not fully criminalised (SR.II).*

Deficiency 2 – *The funding of an individual terrorist is not criminalised in all circumstances (SR.II).*

Deficiency 3 – *Terrorist Financing abroad is not fully covered (SR.II).*

Deficiency 4 – *There are purposive supplementary elements for some of the acts constituting offences in the treaties annexed of the Convention (SR.II).*

69. Please see the analysis under SR.II.

Deficiency 5 – *Deficiencies under SR.III.*

Recommended action – *The Polish authorities should take steps to address the deficiencies identified under SR.III to fully implement the requirements of the UNSCRs, in particular implement the mechanism set out in Chapter 5a of the AML/CFT Act.*

70. Please see the analysis under SR.III.

Conclusion

71. Given that Poland has rectified most of the deficiencies with regard to SR.II, the technical compliance level of SR.I is now at a level equivalent to "largely compliant".

Overall conclusions:

72. In light of Poland's second compliance report, the country has undertaken measures since the 55th MONEYVAL Plenary in 2017 which demonstrate that the application of Step 1 of CEPs has triggered measurable results in a very short time. With the entry into force of the new AML/CFT Law in March 2018, Poland has rectified a number of outstanding deficiencies under R.5, R.13/SR.IV and SR.III, which has brought the level of compliance of these recommendations to "largely compliant". However, Poland is urged to address the outstanding deficiencies outlined in the present analysis before the country's 5th round mutual evaluation. Overall, the secretariat considers that Poland has sufficiently met the expectation of the 55th Plenary in December 2017.

73. Prior to the 56th Plenary, Poland had already addressed deficiencies on the other core and key recommendations originally rated "partially compliant" in the MER of 2013, which the Plenary had considered to have brought the level of compliance to "largely compliant". The secretariat has not received any information that any measures have in the meantime been taken by Poland which would call into question this previous assessment, which has been confirmed in the present analysis.

74. Therefore, it can be concluded that Poland has brought all outstanding core and key recommendations to a level of "largely complaint", as required by the removal-conditions in Rule 13, paragraph 4 of MONEYVAL's 4th round rules of procedure. As a consequence, the secretariat proposes that the Plenary lifts the application of CEPs with regard to Poland and removes the country from the 4th round follow-up process. Poland should be invited to report to the Plenary on the outstanding deficiencies

outlined in the present analysis under MONEYVAL's *tour de table* procedure in preparation of the country's 5th round mutual evaluation.

The MONEYVAL Secretariat