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**COUNCIL OF
THE EUROPEAN UNION**

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**5568/4/02
REV 4**

LIMITE

**COPEN 8
COMIX 48**

NOTE

from :	Secretariat
to :	Article 36 Committee
Subject :	Draft explanatory report on the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union

The Article 36 Committee examined at its meeting on 19 and 20 September 2002 the draft explanatory report set out in document 5568/3/02 COPEN 8 COMIX 48 REV 3. In the light of these proceedings, the Presidency and the Secretariat have established the attached revised version of the explanatory report for the purpose of its publication.

The Luxembourg delegation maintained its reservation on the last sentence on page 8 (see footnote 2 on page 8). The French and Swedish delegations could not accept the deletion of the sentence referred to.

The Article 36 Committee is invited to examine this question with a view to asking Coreper to invite Council to take note of the report and decide its publication in the Official Journal:

Draft explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union

I INTRODUCTION

In June 2000 France introduced a draft instrument relating to mutual assistance in criminal matters between the Member States of the Union. The initiative was made in the light of the conclusions of the European Council held at Tampere on 15 and 16 October 1999, in which it was concluded that serious economic crime is one of the sectors of particular relevance and that money laundering is at the very heart of organised crime and should be rooted out wherever it occurs. The initiative also took into account the results of the mutual evaluations relating to the implementation of international obligations in the field of mutual assistance in criminal matters that have been carried out on the basis of the 1997 Joint action.¹

The initiative was originally framed as a new Convention designed to supplement in particular the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (hereinafter referred to as the "European Mutual Assistance Convention") and the Convention on Mutual assistance in Criminal Matters between the Member States of the European Union adopted on 29 May 2000² (hereinafter referred to as "the 2000 Convention"). In the course of the negotiations the instrument was changed into a Protocol to the 2000 Convention and supplemented by certain provisions which were not originally covered (Articles 3 and 9). One provision in the original draft relating to abolishment of the dual criminality requirement was not included in the Protocol.

¹ Joint action establishing a mechanism for evaluating the application and the implementation at national level of international undertakings in the fight against organized crime (OJ L 344, 15.12.1997, p. 7).

² OJ C 197, 12.7.2000, p. 1. See also the explanatory report on the Convention in OJ C 379, 29.12.2000, p. 7.

The Protocol was established by the Council on 16 October 2001 ¹ and was signed on the same day by all Member States. Norway and Iceland informed the Council that they were in agreement with the content of the provision applicable to them (Article 8). A declaration by the Council relating to the dual criminality requirement was entered in the minutes of the Council at the adoption of the instrument. ²

II GENERAL OBSERVATIONS

As stated in the preamble of the Protocol, the provisions of the Protocol are annexed to and form an integral part of the 2000 Convention. This implies that the provisions of the 2000 Convention apply to those of the Protocol, and vice versa, in the same way as they would have done if they had all been in the same instrument. The 2000 Convention, in its turn, supplements the European Mutual Assistance Convention, the 1978 Additional Protocol to that Convention as well as the Schengen Implementation Convention and the Benelux Treaty (cf. Article 1 of the 2000 Convention). This means, i.a., that the provisions in Article 24 of the European Mutual Assistance Convention relating to the definition of "judicial authority", Article 3 of the same Convention relating to the manner in which a request shall be executed, Article 4 of the 2000 Convention relating to formalities and procedures in the execution of requests and Article 6 of the 2000 Convention allowing for requests to be made by means of fax or e-mail under conditions allowing the receiving Member State to establish authenticity and providing for direct transmission of requests between judicial authorities apply also to the measures provided for in the Protocol. Like the European Mutual Assistance Convention and the 2000 Convention, the provisions of the Protocol are of general application with one important exception: the provisions in Article 1 apply only to certain offences.

¹ OJ C 326, 21.11.2001, p.1.

² The Council declaration reads as follows: "The Council takes note of the fact that the debate on the abolition of the dual criminality requirement has not allowed for the establishment of a definitive position of the Member States on that question. The Council agrees that the issue of refusals of requests for mutual assistance, including in particular refusals based on the dual criminality requirement, shall be further examined by the Council two years after the entry into force of the Protocol in the light of any information transmitted to the Council and to Eurojust pursuant to Article 10 of the Protocol."

The provisions of the Protocol can be divided into three different parts: Assistance relating to bank accounts (Articles 1–4), Additional requests (Articles 5 and 6) and Grounds for refusals (Articles 7–10). Articles 11–16 include provisions relating to reservations, entry into force, accession of new Member States, position of and entry into force for Iceland and Norway and depositary.

III COMMENTS ON INDIVIDUAL ARTICLES

A. Assistance relating to bank accounts

Articles 1 to 4 of the Protocol contain provisions, which aim at improving mutual assistance in respect of information held by banks. Article 1 can be used to get information on bank accounts in cases where the requesting Member State considers that the information is likely to be of substantial value for the purpose of an ongoing investigation. Article 2 sets out provisions on assistance for the purpose of getting information on operations carried out during a certain period on a specified bank account, whereas Article 3 contains provisions on assistance relating to the monitoring of any operations that may take place in the future on a specified bank account. Article 4 includes provisions to ensure that any assistance given in accordance with Articles 1 to 3 is not made known to the holder of the bank account or any third persons.

Article 1: Requests for information on bank accounts

This Article obliges Member States to, upon request in concrete cases, trace bank accounts that are located in its territory, and thereby indirectly obliges the Member States to set up a mechanism whereby they can provide the requested information. The scope of the obligation is limited by paragraphs 2, 3 and 5. The intention of paragraph 4 is to restrict the request where possible to certain banks and/or accounts and to facilitate the execution of the request.

With regard to formalities and procedure, Article 3 of the European Mutual Assistance Convention and Article 4 of the 2000 Convention apply.

Paragraph 1

The obligation in the first paragraph extends to being able to trace bank accounts throughout the territory of the requested Member State. Paragraph 1 does not oblige the Member States to set up a centralised register of bank accounts, but leaves it to each Member State to decide how to comply with the provision in an efficient way. If the requested State manages to trace any bank accounts in its territory it is under an obligation to provide the requesting State with the bank account numbers and all its details. The requesting Member State may on the basis of this information wish to proceed with a request under Article 2 or 3, making use of the simplified procedure provided for in Article 6.

The obligation is restricted to accounts that are *held*, or *controlled*, by a *natural or legal person* that is the *subject of a criminal investigation*. Also accounts for which any such person has *powers of attorney* are, under certain conditions, included (second subparagraph).

It was understood during the negotiations that accounts that are *controlled by* the person under investigation include accounts of which that person is the true economic beneficiary and that this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special-purpose funds, the identity of the settlers or beneficiaries of which is unknown. The concept of economic beneficiary should be interpreted in accordance with Article 3(7) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, ¹ as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 ² (hereinafter referred to as "the Money Laundering Directive").

¹ OJ L 166, 28.6.1991, p. 77.

² OJ L 344, 28.12.2001, p. 76.

Accounts for which the person that is the subject of the proceedings has *powers of attorney* are as such covered by the notion "accounts controlled by, but in respect of such accounts a special provision applies (second subparagraph). They are not automatically covered. It presupposes that such information has been specifically requested by the requesting State. Furthermore, it presupposes that the information can be provided within a reasonable time. That expression implies an obligation on the requested Member State not to make every effort, however costly and time consuming it may be to collect the information, but to make an effort which is proportional, in terms of resources, to the importance and urgency of the case. The requested State will be in a position to make such an appraisal on the basis of the information that the requesting State must supply under paragraph 4. One reason for these restrictions is that information relating to powers of attorney often is more complicated to get access to, even if it is "in the possession of the bank". For example, it may be that such information is not available via the computer system of the head office of the bank, but has to be found in the local offices of the bank. In some cases, the information sought may be available only in files other than computer files.

Paragraph 2

This paragraph clarifies that the obligation to supply information only applies to the extent the information is available to the bank keeping the account. Accordingly, the Protocol does not put any new obligations on Member States or banks to retain information relating to bank accounts. Provisions relating to retention of such information, which are not to be dealt with within a third pillar instrument, are in particular found in Article 4 of the Money Laundering Directive.

Paragraph 3

Paragraph 3 prescribes that the obligations under Article 1 only apply to certain forms of offences. This is an exception to the normal rule in respect of mutual assistance in criminal matters; the European Mutual assistance Convention and its protocols as well as the 2000 Convention have a general scope of application. The provisions in this paragraph are the result of a compromise between those Member States which were in favour of a general scope of application, those which preferred (different) penalty thresholds and yet others which preferred a list of offences. The final text was agreed in the light of the amount of work that the execution of requests for information on bank accounts may involve and the fact that the measure is a new measure, not provided for in any earlier instruments relating to mutual assistance in criminal matters, and so far not available in certain Member States. The provision in paragraph 6, which includes a reminder that the Council may in the future decide to extend the scope of application to other forms of offences, forms part of the compromise.

The solution chosen is that the offence concerned must be covered by at least one of three alternatives. The first alternative is a combination of penalty thresholds in both States – 4 years in the requesting Member State and 2 years in the requested Member State – (first indent). The second and third alternatives are lists of crimes, namely the list of offences found in the Europol Convention (second indent) or the offences covered by the instruments relating to the protection of the European Communities' financial interests, to the extent they are not already covered by the Europol list (third indent).

The reference to the offences referred to in the Europol Convention - as amended - means that all forms of offences listed in Article 2 of that Convention and in the Annex to the Convention are covered.¹ It should be noted that the reference to the Europol Convention does not include a reference to the qualifications set out in Article 2 relating to factual indications that an organised criminal structure is involved or that a common approach is required.²

The offences referred to in Article 2, of the Europol Convention on the date of publication of the present report are the following:

- terrorism,
- unlawful drug trafficking,³
- trafficking in nuclear and radioactive substances,
- illegal immigrant smuggling,
- trade in human beings,
- motor vehicle crime,
- crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property,
- illegal money-laundering activities in connection with these forms of crime or specific manifestations thereof, and
- related criminal offences.⁴

¹ The reference to the Europol Convention covers Council Decision of 3 December 1998, supplementing the definition of the form of crime "trafficking in human beings" in the Annex to the Europol Convention (OJ C 26, 30.1.1999, p. 21), and the Protocol of 30 November 2000, amending Article 2 and the Annex to the Europol Convention (OJ C 358, 13.12.2000, p. 1).

² The Luxembourg delegation maintained its reservation on the last sentence of the paragraph. All other delegations and the representative of the Legal Service could agree to the sentence. It was pointed out that Article 1(3), second indent, of the Protocol did not refer to Europol's mandate, but to the offences referred to in Article 2 of the Europol Convention and the Annex to that Convention. The parts of Article 2 of the Europol Convention qualifying the objectives of Europol in relation to those offences were therefore not relevant.

³ For the purpose of Article 2 of the Europol Convention, "unlawful trafficking" means the criminal offences listed in Article 3 (1) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the provisions amending or replacing that Convention.

⁴ Criminal offences committed in order to procure the means for perpetrating, to facilitate or carry out or to ensure the impunity of the listed offences (see Article 2(3), second subparagraph, of the Europol Convention).

The offences referred to in the ANNEX to the Europol Convention ¹ are the following:

- murder, grievous bodily injury,
 - illicit trade in human organs and tissue,
 - kidnapping, illegal restraint and hostage-taking,
 - racism and xenophobia,
 - organised robbery,
 - illicit trafficking in cultural goods, including antiquities and works of art,
 - swindling and fraud,
 - racketeering and extortion,
 - counterfeiting and product piracy,
 - forgery of administrative documents and trafficking therein,
 - forgery of money and means of payment,
 - computer crime,
 - corruption,
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- illicit trafficking in arms, ammunition and explosives,
 - illicit trafficking in endangered animal species,
 - illicit trafficking in endangered plant species and varieties,
 - environmental crime, and
 - illicit trafficking in hormonal substances and other growth promoters.

The 1995 Convention on the Protection of the European Communities' financial interests and its protocols include offences, which are already to a large extent, if not entirely, covered by the Europol list. They include:

- fraud affecting the European Communities' financial interests,
- the intentional preparation or supply of false, incorrect or incomplete statements or documents having the same effect (if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud),²
- passive corruption which damages or is likely to damage the European Communities' financial interests,
- active corruption which damages or is likely to damage the European Communities' financial interests, and
- money laundering related to the proceeds of fraud as referred to, at least in serious cases, and of active and passive corruption as referred to.

¹ The Annex includes a reminder that, in accordance with Article 2(2), the competence extends to related money-laundering activities and related criminal offences.

² See Article 1(3) of the 1995 Convention.

Paragraph 4

The text in paragraph 4 was included having in mind the amount of work that the execution of requests for information may involve. It establishes certain obligations on the requesting State. The intention is to restrict the request where possible to certain banks and/or accounts and to facilitate the execution of the request. It puts an obligation on the requesting State to consider carefully if the information "is likely to be of substantial value for the purpose of the investigation into the offence" and to state this expressly in its request (first indent), and also to consider carefully to which Member State or States it should send the request (second indent).

Paragraph 4 implies that the requesting Member State may not use this measure as a means to "fish" information from just any – or all – Member States but that it must direct the request to a Member State which is likely to be able to provide the requested information. However, the provision does not allow the requested State to question whether the requested information is likely to be of substantial value for the purpose of the investigation concerned pursuant to the first indent of the paragraph.

The request should also include information relating to the banks it is thought may hold relevant accounts, if such information is available (second indent). From this it follows that the requesting Member State should try to limit its request to certain types of bank accounts only and/or accounts kept by certain banks only. This will enable the requested State to restrict the execution of the request accordingly.

According to the third indent, the requesting State shall also provide the requested State with any other information, which may facilitate the execution of the request. Again, this provision was included having regard to the amount of work that the execution may involve.

Paragraph 5

Paragraph 5 provides that Member States may equate requests under Article 1 with requests for search and seizure and thereby apply the same conditions that they apply in relation to requests for search and seizure. This allows the Member States to require dual criminality and consistency with its law to the same extent that they may apply these requirements in relation to requests for search and seizure. A follow-up mechanism designed to keep track of any refusals related to non-compliance with these conditions is found in Article 10.

The *dual criminality requirement* will normally be fulfilled in respect of offences covered by paragraph 3. If, however, the offence under investigation is not an offence in the requested State the dual criminality requirement may be used as a ground for refusal.

The right for a Member State to make the execution dependent on the condition that the request is *consistent with its law* must be interpreted in the light of the obligations set out in the Article; the requested State must not jeopardise the practical effect of paragraphs 1 to 4 of the Article by applying this condition. The possibilities for a Member State to refuse assistance on the ground that the request is not consistent with its law are therefore limited. This means for example that a Member State cannot refuse a request made under Article 1 solely because its national law does not provide for the production of information relating to the existence of bank accounts in criminal investigations, or because its national provisions on search and seizure normally demands a higher threshold than that set in paragraph 3. On the other hand the provision allows a judicial control in the requested State. Since there are no common rules in this respect, the nature of that control may be different in the different Member States. In general terms it means that the requested State will be able to put the request before a judicial authority for an assessment of the request with regard to national conditions, including constitutional requirements, that are not covered in Article 1. Such conditions might include, for example, privileged information.

Paragraph 6

Paragraph 6 includes a provision that the Council may decide to extend the scope of application of Article 1. The extension of the scope of application can be adopted by the Council in the form of a decision within the meaning of Article 34 (2) of the Treaty on European Union. Under this provision, the Council acts unanimously on the initiative of any Member State or of the Commission and - as results from Article 39 (1) of the Treaty on European Union - after consultation of the European Parliament. The Protocol can thus be amended in this respect without the necessity of an amending Convention.

Article 2: Requests for information on banking transactions

Article 2 contains provisions on assistance relating to the particulars of specified, already identified, bank accounts and to banking operations that have been carried out through them during a specified period. The Article does not introduce a new measure but merely clarifies and elaborates a measure, which is already applied under the European Mutual Assistance Convention.

There is a link between Article 1 and Article 2 in that the requesting State may have obtained the details of the account by means of the measure provided for in Article 1 and subsequently – making use of the system for additional measures provided for in Article 6 – may ask for information on banking operations that have taken place on the account. However, the measure is self-standing and may also be requested in respect of a bank account that has become known to the investigating authorities of the requesting State by any other means or channels.

Paragraph 1

Paragraph 1 does not – as does Article 1 – make any references to accounts linked to a person that is the subject of a criminal investigation. There is no need to make a reference to criminal investigations since the instrument builds on the European Mutual Assistance Convention and the 2000 Convention. The Article therefore applies in respect of the same proceedings as those referred to in Article 1 of the European Mutual Assistance Convention and Article 3 of the 2000 Convention. The absence of a reference to a person that is the subject of a criminal investigation clarifies that Member States are obliged to assist also in respect of accounts held by third persons, persons who are not themselves subject of any criminal proceedings but whose accounts are, in one way or another, linked to a criminal investigation. Any such link must be accounted for by the requesting State in the request (see paragraph 3). A practical example provided during the negotiations is the situation where the bank account of an innocent, and totally unaware, person is used as a "means of transport" between two accounts, which are held by the suspect, in order to confuse and hide the transaction. Article 2 allows the requesting State to get information on any transactions to or from such an account.

Paragraph 1 gives provisions on assistance not only relating to the particulars of a specified bank account and to banking operations that have been carried out through it during a specified period but also provides that the requested State shall provide assistance relating to "the particulars of any sending or recipient account". The purpose of this is to clarify that it is not enough that the requested State, in response to a request, provides information that a certain amount of money was sent to/from the account or from/to another account on a certain date but also to provide the requesting State with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the requesting State to proceed with a request for assistance in respect of that account (making use of the simplified procedure provided for in Article 6 if the account is held in the same State or making a new request to another State, as the case may be). This will enable the requesting State to trace the movements of money from account to account. When providing the particulars of any sending or recipient account, as mentioned here, the requested State will take into account, as appropriate, its obligations under the 1981 European Convention for the protection of individuals with regard to automatic processing of personal data.

Paragraph 2

This provision corresponds to Article 1(2). See the comments above on that provision.

Paragraph 3

This provision corresponds to Article 1(4), first indent, but has a less demanding wording, due to the fact that requests under Article 2 represent a well established area of mutual assistance and by nature are more specific than those under Article 1.

Paragraph 4

This provision corresponds to Article 1(5). See the comments above on that provision.

Article 3: Requests for monitoring of banking transactions

This Article provides for a new measure, not provided for in any earlier instruments relating to mutual assistance in criminal matters. This being the case, the Article has been worded in a different manner to Articles 1 and 2 in that Article 3 only obliges Member States to set up the mechanism - Member States shall be able to provide the assistance upon request – but leaves to each Member State to decide if and under what conditions the assistance may be given in a specific case. The result is an Article with very few details. The Article has been modelled on the provision regulating controlled deliveries in Article 12 of the 2000 Convention.

Paragraph 1

This paragraph obliges Member States to set up a mechanism whereby they are able to, upon request, monitor any banking operations that in the future will take place on a specified bank account during a specified period.

Paragraph 2

This provision corresponds to Article 2(3). (...)

Paragraph 3

This provision is a copy of Article 12(2) of the 2000 Convention relating to controlled deliveries.

This means i.a. that the requested Member State may apply conditions, including penalty thresholds and dual criminality, which would have to be observed in a similar domestic case.

Paragraph 4

Paragraph 4 states that the practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and the requested State. This gives the requested State full control of the conditions under which the monitoring shall take place and allows the requesting and requested State to agree for example on monitoring on a day-by-day basis or that monitoring on a weekly basis is enough having regard to the circumstances of the case. It is left to the requested State to decide if real-time monitoring can be provided or not.

Article 4: Confidentiality

This Article is designed to ensure that the holder of the bank account, or any third person, is not informed that any measure provided for in Articles 1–3 is being or has been taken. The wording used is close to the wording of Article 8 of the Money Laundering Directive. It is up to each Member State to decide how to implement Article 4. The provision may for example be implemented by providing a specific ban against disclosure, but may also be implemented by more general measures sanctioning behaviour that may endanger an ongoing investigation.

B. Additional measures and requests

Articles 5 and 6 are designed to speed up and simplify the procedures when, in the course of execution of a request for mutual assistance, it appears that an additional measure may be needed. The Articles will of course be of significant use in respect of assistance relating to bank accounts – where speed often is of utmost importance – but their application is not restricted to such assistance. The provisions apply to any request for mutual assistance.

Article 5: Obligation to inform

Article 5 puts an obligation on the competent authority of the *requested State* to inform the requesting authority immediately if it, in the course of executing a request, finds that it may be appropriate to take additional measures which it was not possible for the requesting authority to foresee or to specify in its initial request. This may involve giving information before the formal answer to the request can be made.

The provisions in this Article apply for example if the requested State in the course of the execution of a request pursuant to Article 1 identifies an account and it considers that the requesting State might be interested in getting, as quickly as possible, information on what has happened on the account during the immediate past or will happen on the account in the near future. The obligation to inform is however not limited to requests covered by this Protocol but has a general application and applies, e.g., if the need for additional measures is revealed during the execution of a request for a house search. In such a case the requesting State can, after having been alerted, make an additional request using the simplified procedure provided for in Article 6. Article 5 (but not Article 6) also applies if the additional measure is to be taken by another State, e.g. where, in the course of execution of a request pursuant to article 2, it is found out that money has been paid to a bank account held by a bank in another Member State or by a third State.

Article 6: Additional requests for mutual assistance

This Article includes two paragraphs, which are designed to facilitate and speed up the procedure when additional measures are needed.

Paragraph 1

This provision lays down a procedure which is of great practical importance, namely that the requesting State does not have to make a completely new request when an additional measure is needed in respect of the same investigation or proceedings. It will be enough for it to make a reference to the initial request when requesting the additional measure and add the necessary supplementary information.

Paragraph 2

The rationale behind the provision in paragraph 2 is that experience has shown that not all authorities of the Member States are prepared to accept that an additional request is made directly by e.g. a foreign prosecutor or investigating judge who is present in the requested State when its request is executed. The provision in paragraph 2 will ensure that such an additional request can be made on the spot and that the additional request does not have to be sent from the territory of the requesting State. The application of the provision in the individual case presupposes that the person that is present in the requested State is competent under Article 24 of the European Mutual assistance Convention or Article 24 of the 2000 Convention to make a request for mutual assistance.

Article 6(3) of the 2000 Convention, to which this provision refers, includes special provisions applicable to United Kingdom and Ireland relating to direct communication; since these States may make a provisional reservation preserving communication with their respective central authorities, any additional request must be directed to these authorities as long as the reservation prevail.

C. Grounds for refusals

Articles 7-10 include provisions, which are intended to limit or monitor the application of grounds for refusals. These provisions apply to requests for mutual assistance in criminal matters in general, and not just for cases covered by Articles 1 to 4 of the Protocol.

Article 7: Banking secrecy

The provisions in this Article, which prohibit Member States from invoking bank secrecy as a ground for refusal, are modelled on the first sentence of Article 18(7) of the 1990 Money Laundering Convention. During the negotiations it was agreed that the expression "bank secrecy" should be interpreted in a broad way, having in mind Community and national law applicable in the financial sector.

Since Article 3 of the European Mutual Assistance Convention applies, Member States are allowed to apply formalities and procedures provided for in its domestic law.¹

Article 8: Fiscal offences

Article 8(1) and (2) reproduce the content of Articles 1 and 2 of the 1978 Additional Protocol to the European Mutual Assistance Convention. In contrast to that instrument, the present Protocol does not allow any reservations to this provision (Article 11). Article 8(1) and (2) replace and further develop Article 50 of the Schengen Implementation Convention. The latter provision is therefore repealed by Article 8(3) of the Protocol.

¹ Cf. Article 18, paragraph 7, second sentence, of the 1990 Money Laundering Convention which reads: "Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences".

Article 9: Political offences

This Article is in its entirety modelled on Article 5 of the 1996 EU Extradition Convention. The provisions were not covered by the original draft but were included in the interest of covering all grounds for refusals provided for in Article 2(a) of the European Mutual Assistance Convention; Article 2(b) of that Convention is covered by Article 10 (see below).

Paragraph 1 provides for the principle that for the purpose of mutual legal assistance between the Member States no offence may be regarded as a political offence. Paragraph 2 allows the Member States to derogate from that principle by way of a declaration. However, no derogation is allowed regarding the terrorist offences defined in that paragraph. These offences are:

- (a) The offences referred to in Articles 1 and 2 of the European Convention on Suppression of Terrorism of 27 January 1977.

This covers the most serious offences, such as the taking of hostages, the use of firearms and explosives, acts of violence against the life or liberty of persons or which create collective danger for persons.

- (b) Offences of conspiracy or association which correspond to the description of behaviour referred to in Article 3(4) of the Convention of 27 September 1996 relating to extradition between the Member States of the European Union¹, to commit one or more of the offences referred to in Articles 1 and 2 of the 1977 Convention.

This goes beyond Article 1(f) of the 1977 Convention, which is limited to an attempt to commit any of the offences of Article 1 of the 1977 Convention or participation as an accomplice of a person who commits or attempts to commit such an offence.

¹ OJ no C 313, 23.10.1996, page 11.

Article 3(4) of the 1996 Convention defines the behaviour concerned as follows: "The behaviour of any person which contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism as in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, drug trafficking and other forms of organised crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or a detention order of a maximum of at least 12 months, even where the person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned."

Finally, Article 9(3) provides that reservations made pursuant to Article 13 of the 1977 Convention shall not apply to mutual legal assistance between Member States. This is valid both for Member States, which fully apply the principle specified in Article 9(1), and for Member States, which make a declaration under Article 9(2).

Article 10: Forwarding refusals to the Council and involvement of Eurojust

Paragraph 1

The first paragraph of Article 10 obliges, in certain situations, a Member State that refuses a request for mutual legal assistance to forward the reasoned decision to refuse to the Council for possible consideration and subsequent evaluation. The obligation only applies when the requested Member State has taken a formal decision to refuse the request and does not, in contrast to the provisions in paragraph 2, apply in pending cases. Therefore, the procedure will not interfere with the independence of the judiciary. In addition, the obligation only applies where the requesting Member State maintains its request and no solution can be found.

The purpose of paragraph 1 is to give the Council a possibility to evaluate and follow-up the functioning of judicial co-operation between the Member States. The information to the Council should of course be limited to facts that are relevant for the purpose of evaluating the functioning of judicial cooperation between Member States. Accordingly, the obligation to inform the Council does not include any confidential or otherwise sensitive information that might be found in the case file.

The procedure is without prejudice to Article 35(7) of the Treaty on European Union. Under this provision, the Court of Justice has jurisdiction, *inter alia*, to rule on certain disputes between the Member States, whenever the Council cannot settle such dispute within six months of it being referred to the Council by one of its members. The procedures that are provided for respectively in Article 35(7) of the EU Treaty and in Article 10(1) of the Protocol are independent one from the other.

The *first indent* refers to refusals related to the sovereignty, security, ordre public or other essential interests.

The *second indent* refers to refusals related to non-compliance with the dual criminality requirement and non-consistency with national law.¹

The *third and last indent* of paragraph 1 was, even though covered by the second indent, introduced primarily for the purpose of high-lighting the need to follow up the application of Article 1(5) and more specifically the application of the condition regarding the consistency with national law. This provision was included because several Member States expressed concerns that the possibility to apply national law otherwise might dilute the obligation provided for in Article 1.

¹ Cf. Council Declaration relating to the dual criminality in footnote to Chapter I.

Paragraph 2

Article 10(2) is a reminder that the competent authorities of a Member State may, once Eurojust has been established, make use of Eurojust in solving any difficulties concerning the execution of a request in relation to the provisions referred to in paragraph 1. The Council adopted on 28 February 2002 Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.¹ Article 10(2) does not provide any competencies for Eurojust – these are laid down in the said Council Decision. Article 10(2) can be used in case the requested State is not able to assist in accordance with the wishes of the requesting State. Eurojust may of course only deal with a case reported to Eurojust to the extent that it falls within the competence of Eurojust. The two national members of Eurojust – the member of the requesting State and the member of the requested State – can in such a case be made aware of the conflict and can assist in finding a solution which is acceptable to both States. The assistance of Eurojust is, in contrast to the provisions in paragraph 1, available in pending cases.

D. Final provisions

Article 11: reservations

This Article prevents Member States from entering reservations to the Protocol other than those expressly provided for in Article 9(2).

¹ OJ no L 63, 6.3.2002, page 1.

Article 12: Territorial application

Article 26 of the 2000 Convention provides that the application of the Convention to Gibraltar will take effect upon extension of the European Mutual Assistance Convention to Gibraltar. In continuation thereof, Article 12 of the Protocol provides that the application of the Protocol to Gibraltar will take effect when the 2000 Convention has taken effect in Gibraltar in accordance with Article 26 of the 2000 Convention.

Article 13: Entry into force

This Article governs in principle the entry into force of the Protocol in the same way as Article 27 in the 2000 Convention, with the addition that the Protocol does not enter into force or applies before the 2000 Convention has entered into force or has become applicable.

The Protocol comes into force 90 days after completion of the procedures necessary for the adoption of the Protocol by the eighth State which was a Member of the European Union on 16 October 2001 when the Act establishing the Protocol was adopted by the Council. However, if the 2000 Convention is not in force on that date, the Protocol enters into force when the 2000 Convention enters into force. The Protocol will first operate among the eight Member States in question or, if applicable, the eight Member States or more, which have adopted the Protocol at the time when the 2000 Convention enters into force. It will enter into force for each of the other Member States 90 days after they complete their adoption procedures. The entry into force of the Protocol gives rise to the implementation of Article 35 of the Treaty on European Union on the jurisdiction of the Court of Justice of the European Communities.

Paragraph 5 allows for the possibility whereby each Member State, at the time of its adoption of the Protocol or at any time subsequently, can issue a declaration making the Protocol applicable in advance vis-à-vis any other Member States that have made a similar declaration. This will enable the Protocol to be implemented as soon as possible between the Member States concerned. A declaration made under the said paragraph takes effect 90 days after being deposited. However, if the 2000 Convention pursuant to Article 27(5) of that Convention applies between the Member States concerned with effect from a later date, the Protocol also applies between those Member States with effect from that date.

Paragraph 7 is concerned with commencement matters and it restricts the application of the Protocol to mutual assistance proceedings which are initiated after the Protocol has entered into force or has become applicable between the Member States concerned.

Article 14: Acceding States

The provisions relating to acceding States are modelled on the corresponding provisions in Article 28 of the 2000 Convention.

This Article opens the Protocol for accession by any State, which becomes a Member of the European Union, and lays down the arrangements for such accession.

Paragraph 4 provides that where the Protocol is already in force when a new Member State accedes, it will come into force with respect to that Member State 90 days after the deposit of its instrument of accession. However, if the Protocol is still not in force 90 days after that State's accession, it will come into force with respect to that State at the time of entry into force specified in Article 13.

An acceding State will also be able to make a declaration of anticipated application as provided for in Article 13(5).

Following the principle in Article 13(6), Article 14(6) provides that the protocol can not enter into force or apply in relation to an acceding State before the entry into force or application of the 2000 Convention in relation to that State.

Article 15: Position of Iceland and Norway

This provision corresponds to Article 2 of the 2000 Convention. It specifies that Article 8 on fiscal offences is to be regarded as measures amending or based upon the provisions referred to in Annex A to the Agreement concluded by the Council with Iceland and Norway on 18 May 1999 concerning those two countries' association with the implementation, application and development of the Schengen acquis (the "Association Agreement"). Article 2(3) of the Association Agreement makes provision for acts and measures taken by the European Union in that context to be accepted, implemented and applied by Iceland and Norway.

Article 16: Entry into force for Iceland and Norway

This Article corresponds to Article 29 of the 2000 Convention. It contains the arrangements for the entry into force for Iceland and Norway of Article 8 of the Protocol. These arrangements are governed by the Association Agreement (see comments on Article 15).

Essentially, the position, as set out in Article 16(1), is that the provisions of Article 8 of the Protocol will come into operation for Iceland and Norway 90 days after each of those countries provides notification of the fulfilment of its appropriate constitutional requirements. When that happens, the provisions will apply in their mutual assistance arrangements with any Member State for which the Protocol is already in force. It should be noted, however, that anticipated application by Iceland and Norway has not been provided for.

Paragraph 2 covers the situation where the Protocol enters into force for a Member State when the provisions of Article 8 of the Protocol are already in operation in relation to Iceland and/or Norway. Paragraph 3 provides that Article 8 shall not become binding on Iceland and Norway before the entry into force of the provisions referred to in Article 2(1) of the 2000 Convention in relation to those countries. Paragraph 4 ensures that the provisions of Article 8 will enter into force for Iceland and/or Norway at the latest when they become operational for all the fifteen Member States who were members of the Union when the Convention was adopted.

Article 17: Depository

This Article provides that the Secretary-General of the Council is the depository for the Protocol. The Secretary-General will inform the Member States of any notification received from Member States in relation to the Convention. These notifications are to be published in the Official Journal of the European Union as well as relevant information on the progress of adoptions, accessions, declarations and reservations.
