



**COUNCIL OF
THE EUROPEAN UNION**

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**COPEN 53
COMIX 646**

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject : Initiative of the French Republic with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

COUNCIL ACT

of

establishing, in accordance with Article 34 of the Treaty on European Union,
the Protocol to the Convention on Mutual Assistance in Criminal Matters
between the Member States of the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(a) and 34(2)(d)
thereof,

Having regard to the initiative of the French Republic ¹,

Having regard to the Opinion of the European Parliament ²

¹ OJ C 243, 24.8.2000, p. 11.

² Opinion delivered on 4 October 2001 (not yet published in the Official Journal).

Whereas:

- (1) For the purposes of achieving the objectives of the Union the rules on mutual assistance in criminal matters between the Member States of the European Union should be improved and a Protocol, as set out in the Annex hereto, should be established to that end.
- (2) Article 8 of the Protocol falls within the scope of Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis.¹
- (3) The procedures set out in the Agreement concluded by the Council of the European Union with the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis² have been observed in respect of this provision.

¹ OJ L 176, 10.7.1999, p. 31.

² OJ L 176, 10.7.1999, p. 36.

(4) When the adoption of this Act is notified to the Republic of Iceland and the Kingdom of Norway in accordance with Article 8(2)(a) of the aforementioned Agreement, those two States will be informed in particular of the contents of Article 16 on entry into force for Iceland and Norway,

HAS DECIDED that the Protocol, the text of which is given in the Annex and which has been signed today by the Representatives of the Governments of the Member States of the Union, is hereby established,

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional requirements,

INVITES the Member States to begin the procedures applicable for that purpose before 1 July 2002.

Done at

For the Council
The President

PROTOCOL,
ESTABLISHED BY THE COUNCIL
IN ACCORDANCE WITH ARTICLE 34 OF THE TREATY ON EUROPEAN UNION,
TO THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS
BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union,

REFERRING to the Council Act of establishing the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,

TAKING ACCOUNT of the conclusions adopted at the European Council held in Tampere on 15 and 16 October 1999, and of the need to implement them immediately in order to achieve an area of freedom, security and justice,

BEARING IN MIND the recommendations made by the experts when presenting the mutual evaluation reports based on Council Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime,¹

CONVINCED of the need for additional measures in the field of mutual assistance in criminal matters for the purpose of the fight against crime, including in particular organised crime, money laundering and financial crime,

¹ OJ L 344, 15.12.1997, p. 7.

HAVE AGREED UPON THE FOLLOWING PROVISIONS, which shall be annexed to, and form an integral part of, the Convention on mutual assistance in criminal matters between the Member States of the European Union of 29 May 2000, ¹ hereinafter referred to as the "2000 Mutual Assistance Convention":

ARTICLE 1

Request for information on bank accounts

1. Each Member State shall, under the conditions set out in this Article, take the measures necessary to determine, in answer to a request sent by another Member State, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts.

The information shall also, if requested and to the extent that it can be provided within a reasonable time, include accounts for which the person that is the subject of the proceedings has powers of attorney.

2. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank keeping the account.

¹ OJ C 197, 12.7.2000, p. 3.

3. The obligation set out in this Article shall apply only if the investigation concerns
 - an offence punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State, or
 - an offence referred to in Article 2 of the 1995 Convention on the establishment of a European Police Office (Europol Convention), or in the Annex to that Convention, as amended, or
 - to the extent that it may not be covered by the Europol Convention, an offence referred to in the 1995 Convention on the protection of the European Communities' financial interests, the 1996 Protocol thereto, or the 1997 Second Protocol thereto.

4. The authority making the request shall, in the request:
 - state why it considers that the requested information is likely to be of substantial value for the purpose of the investigation into the offence;
 - state on what grounds it presumes that banks in the requested Member State hold the account and, to the extent available, which banks may be involved;
 - include any information available which may facilitate the execution of the request.

5. Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.

6. The Council may decide, pursuant to Article 34(2)(c) of the Treaty of European Union, to extend the scope of paragraph 3.

ARTICLE 2

Requests for information on banking transactions

1. On request by the requesting State, the requested State shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.

2. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.

3. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.

4. Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.

ARTICLE 3

Requests for the monitoring of banking transactions

1. Each Member State shall undertake to ensure that, at the request of another Member State, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.
2. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.
3. The decision to monitor shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that Member State.
4. The practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and requested Member States.

ARTICLE 4

Confidentiality

Each Member State shall take the necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the requesting State in accordance with Articles 1, 2 or 3 or that an investigation is being carried out.

ARTICLE 5

Obligation to inform

If the competent authority of the requested Member State in the course of the execution of a request for mutual assistance considers that it may be appropriate to undertake investigations not initially foreseen, or which could not be specified when the request was made, it shall immediately inform the requesting authority accordingly in order to enable it to take further action.

ARTICLE 6

Additional requests for mutual assistance

1. Where the competent authority of the requesting Member State makes a request for mutual assistance which is additional to an earlier request, it shall not be required to provide information already provided in the initial request. The additional request shall contain information necessary for the purpose of identifying the initial request.
2. Where, in accordance with the provisions in force, the competent authority which has made a request for mutual assistance participates in the execution of the request in the requested Member State, it may, without prejudice to Article 6(3) of the 2000 Mutual Assistance Convention, make an additional request directly to the competent authority of the requested Member State while present in that State.

ARTICLE 7

Banking secrecy

A Member State shall not invoke banking secrecy as a reason for refusing any cooperation regarding a request for mutual assistance from another Member State.

ARTICLE 8

Fiscal offences

1. Mutual assistance may not be refused solely on the ground that the request concerns an offence which the requested Member State considers a fiscal offence.
2. If a Member State has made the execution of a request for search and seizure dependent on the condition that the offence giving rise to the request is also punishable under its law, this condition shall be fulfilled, with regard to offences referred to in paragraph 1, if the offence corresponds to an offence of the same nature under its law.

The request may not be refused on the ground that the law of the requested Member State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Member State.

3. Article 50 of the Schengen Implementation Convention is hereby repealed.

ARTICLE 9
Political offences

1. For the purposes of mutual legal assistance between Member States, no offence may be regarded by the requested Member State as a political offence, an offence connected with a political offence or an offence inspired by political motives.

2. Each Member State may, when giving the notification referred to in Article 13(2), declare that it will apply paragraph 1 only in relation to
 - (a) the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism of 27 January 1977;and
 - (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 Union - to commit one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism.

3. Reservations made pursuant to Article 13 of the European Convention on the Suppression of Terrorism shall not apply to mutual legal assistance between Member States.

ARTICLE 10

Forwarding refusals to the Council and involvement of Eurojust

1. If a request is refused on the basis of:

- Article 2(b) of the 2000 Mutual Assistance Convention or Article 22(2)(b) of the Benelux Treaty, or
- Article 51 of the Schengen Implementation Convention or Article 5 of the 2000 Mutual Assistance Convention, or
- Article 1(5) or Article 2(4) of this Protocol,

and the requesting Member State maintains its request, and no solution can be found, the reasoned decision to refuse the request shall be forwarded to the Council for information by the requested Member State, for possible evaluation of the functioning of judicial cooperation between Member States.

2. The competent authorities of the requesting Member State may report to Eurojust, once it has been established, any problem encountered concerning the execution of a request in relation to the provisions referred to in paragraph 1 for a possible practical solution in accordance with the provisions laid down in the instrument establishing Eurojust.

ARTICLE 11

Reservations

No reservations may be entered in respect of this Protocol, other than those provided for in Article 9(2).

ARTICLE 12

Territorial application

The application of this Protocol to Gibraltar will take effect when the 2000 Mutual Assistance Convention has taken effect in Gibraltar, in accordance with Article 26 of that Convention.

ARTICLE 13

Entry into force

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.
2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Protocol.

3. This Protocol shall enter into force in the eight Member States concerned ninety days after the notification referred to in paragraph 2 by that Member State of the European Union which, at the time of adoption by the Council of the Act establishing this Protocol, is the eighth to complete that formality. If, however, the 2000 Mutual Assistance Convention has not entered into force on that date, this Protocol shall enter into force on the date on which that Convention enters into force.
4. Any notification by a Member State subsequent to the entry into force of this Protocol under paragraph 3 shall have the effect that, ninety days after such notification, this Protocol shall enter into force as between that Member State and those Member States for which this Protocol has already entered into force.
5. Before the entry into force of this Protocol pursuant to paragraph 3, any Member State may, when giving the notification referred to in paragraph 2 or at any time thereafter, declare that it will apply this Protocol in its relations with Member States which have made the same declaration. Such declarations shall take effect ninety days after the date of deposit thereof.
6. Notwithstanding paragraphs 3 to 5, the entry into force or application of this Protocol shall not take effect in relations between any two Member States before the entry into force or application of the 2000 Mutual Assistance Convention between these Member States.
7. This Protocol shall apply to mutual assistance initiated after the date on which it enters into force, or is applied pursuant to paragraph 5, between the Member States concerned.

ARTICLE 14
Acceding States

1. This Protocol shall be open to accession by any State which becomes a member of the European Union and which accedes to the 2000 Mutual Assistance Convention.
2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.
3. The instruments of accession shall be deposited with the depositary.
4. This Protocol shall enter into force with respect to any State which accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not already entered into force at the time of expiry of the said period of ninety days.
5. Where this Protocol is not yet in force at the time of the deposit of their instrument of accession, Article 13(5) shall apply to acceding Member States.
6. Notwithstanding paragraphs 4 and 5, the entry into force or application of this Protocol with respect to the acceding State shall not take effect before the entry into force or application of the 2000 Mutual Assistance Convention with respect to that State.

ARTICLE 15

Position of Iceland and Norway

Article 8 shall constitute measures amending or based upon the provisions referred to in Annex A to the Agreement concluded by the Council of the European Union with the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis¹ (hereinafter referred to as the "Association Agreement").

ARTICLE 16

Entry into force for Iceland and Norway

1. Without prejudice to Article 8 of the Association Agreement, the provision referred to in Article 15 shall enter into force for Iceland and Norway 90 days after the receipt by the Council and the Commission of the information pursuant to Article 8(2) of the Association Agreement upon fulfilment of their constitutional requirements, in their mutual relations with any Member State for which this Protocol has already entered into force pursuant to Article 13(3) or (4).
2. Any entry into force of this Protocol for a Member State after the date of entry into force of the provision referred to in Article 15 for Iceland and Norway, shall render that provision also applicable in the mutual relations between that Member State and Iceland and Norway.
3. The provision referred to in Article 15 shall in any event not become binding on Iceland and Norway before the entry into force of the provisions referred to in Article 2(1) of the 2000 Mutual Assistance Convention with respect to those two States.

¹ OJ L 176, 10.7.1999, p. 36.

4. Without prejudice to paragraphs 1, 2 and 3, the provision referred to in Article 15 shall enter into force for Iceland and Norway not later than on the date of entry into force of this Protocol for the fifteenth State, being a member of the European Union at the time of the adoption by the Council of the Act establishing this Protocol.

ARTICLE 17

Depositary

The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.

The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and also any other notification concerning this Protocol.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have hereunto set their hands,

Done at on in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, the original being deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall forward a certified copy thereof to each Member State.

For the Government of ...

For the Government of ...