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**COPEN 4  
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**OUTCOME OF PROCEEDINGS**

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of : Working Party on Cooperation in Criminal Matters

on : 6 and 7 February 2001

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No. prev. doc. : 5268/01 COPEN 2 COMIX 30

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

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The Working Party on Cooperation in Criminal Matters examined the above proposal at its meeting on 6 and 7 February 2001 on the basis of document 5268/01 COPEN 2 COMIX 30. Articles 3, 5, 5c 6 and 7 were examined in the normal formation of the Working Party. Articles 2, 7, 11, 13 and 13a were examined in Mixed Committee procedure with Norway and Iceland.

The text resulting from the discussions is set out in the Annex. The comments made by delegations are set out in footnotes to the text.

The Luxembourg delegation has entered a general reservation on the scope of the draft instrument, which in the view of that delegation should concentrate on organised crime and money laundering.

The United Kingdom delegation has entered a parliamentary scrutiny reservation on the draft. It has also informed the Working Party that it is consulting Gibraltar on the possible application of the instrument to Gibraltar.

**DRAFT 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 <sup>1</sup>**

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

REFERRING to the Council Act of .....

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 Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime <sup>2</sup>,

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,

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<sup>1</sup> The original proposal was a proposal for a Convention. In accordance with the conclusions drawn at the meeting of the Working Party on 9 and 10 January 2001, the text has been turned into a draft Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union. This change is subject to a scrutiny reservation by the French delegation.

<sup>2</sup> OJ L 344, 15.12.1997, p. 7.

HAVE AGREED ON 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,<sup>1</sup> hereinafter called the “2000 Convention”<sup>2</sup>:

*ARTICLE 1*

*Relationship with other Conventions*

(...)<sup>3</sup>

*ARTICLE 2*<sup>4</sup>

*Admissibility of requests for mutual assistance for search or seizure*

1. If the act giving rise to a request for search and seizure is punishable under the law of the requesting Member State by a penalty involving deprivation of liberty or a detention order of a maximum period of at least [six months], the requested Member State may not make the execution of the request dependent on the condition that the act is also punishable under its law.<sup>5</sup>
  
2. If the act giving rise to a request for search or seizure is dealt with under the law of the requesting Member State in administrative proceedings referred to in Article 3 of the 2000 Convention, the requested Member State may make the execution of the request dependent on the condition that the act is punishable under its law by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months.<sup>6</sup>

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<sup>1</sup> OJ C 197, 12.7.2000, page 1.

<sup>2</sup> The intention with the text is that the provisions of the 2000 Convention, including in particular Article 23 thereof on data protection, shall apply in respect of the Protocol. It has been verified with the Legal Service of the Council that this aim has been achieved.

<sup>3</sup> Article 1 has been deleted as a consequence of the fact that the text has been turned from a draft Convention into a draft Protocol to the 2000 Convention.

<sup>4</sup> Article 2 has been reworded by the Presidency in the light of the discussions. In the new text, the provisions relating to administrative proceedings in Article 51 of the Schengen Convention have been incorporated unchanged in substance.

<sup>5</sup> Paragraph 1 corresponds to the paragraph 1 a) in COPEN 83 and COPEN 2.

<sup>6</sup> The new paragraph 2 corresponds to paragraph 1 c) in COPEN 2 and reflects the present legal situation.

3. The following shall apply in respect of declarations made by Member States pursuant to Article 5 of the 1959 Convention:

- a declaration made under paragraph (1)(a) shall not apply between the Member States; however, it shall continue to apply if the act giving rise to the request is punishable by a less severe penalty than provided for in paragraph 1,
- a declaration made under paragraph (1)(b) shall not apply between the Member States,
- a declaration made under paragraph (1)(c) law shall continue to apply.<sup>1</sup>

4. When giving the notification provided for in Article 11(2), any Member State that has made a declaration pursuant to Article 5(1)(a) of the 1959 Convention may declare that it is not bound by paragraph 1, and that it reserves the right to make the execution of such a request dependent on the condition that the act giving rise to the request is also punishable under its law. If the act is dealt with under its law in administrative proceedings referred to in Article 3 of the 2000 Convention that condition shall be deemed to be fulfilled.<sup>2</sup>

5. Article 51 of the 1990 Schengen Implementation Convention is repealed.<sup>3</sup>

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<sup>1</sup> The new paragraph 3 contains provisions corresponding to paragraph 1(b) and paragraphs 2 and 3 (first sentence) in COPEN 2. This paragraph contains provisions regarding the future application between Member States of declarations made under Article 5 of the 1959 Convention. The provisions in the first and third indents are not necessary from a legal point of view but have been included in the interest of clarity. The first indent clarifies that declarations on double criminality will not apply between Member States. However, a declaration on double criminality will continue to apply in respect of offences punishable by a less severe penalty than 6 months imprisonment. The non-application between Member States of declarations relating to whether the offence concerned is extraditable (second indent) follows from Article 51 of the Schengen Convention. The third indent means (in contrast to former paragraph 2) that the requested state may not make the execution dependent on the condition that the execution is consistent with its law unless it has made a declaration to that effect under the 1959 Convention.

<sup>2</sup> Paragraph 4 corresponds to paragraph 4 in COPEN 2. It allows Member States to enter a reservation in respect of paragraph 1 and to continue to apply the principle of double criminality also in respect of offences that are punishable in the requesting state by 6 months imprisonment. The provision has been proposed by the Presidency as a compromise proposal. Several delegations, both delegations in favour of and delegations not in favour of the text in paragraph 1, have expressed doubts about a reservation possibility. The new wording used implies (in contrast to former paragraph 4) that a reservation may only be made by a Member State that has made a reservation under Article 5(1)(a) of the 1959 Convention.

<sup>3</sup> Paragraph 5 corresponds to paragraph 3, second sentence in COPEN 2.

*ARTICLE 3*

*Banking (...) secrecy*

A Member State may not invoke the provisions on banking (...)<sup>1</sup> secrecy in order to refuse to implement a request for mutual assistance from another Member State.<sup>2</sup>

*ARTICLE 4*<sup>3</sup>

*Traceability of the proceeds of crime*

(...)

*ARTICLE 5*<sup>4 5</sup>

*Request for information on bank accounts*

1. Each Member State shall, under the conditions set out in this Article, take the necessary measures to ensure that, at the request of another Member State [...], a list is provided as quickly as possible of the bank accounts of whatever nature of a natural or legal person that is the subject of proceedings [...]:

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<sup>1</sup> Scrutiny reservation by the United Kingdom delegation and reservation by the Luxembourg delegation on the deletion of the reference to “commercial secrecy”. The Luxembourg delegation has explained that it is in favour of covering not only bank secrecy but also secrecy applying to certain other professions.

<sup>2</sup> The explanatory report will explain that the expression “bank secrecy” should be interpreted in a broad way, having in mind Community and national law applicable in the financial sector.

<sup>3</sup> Subject to a scrutiny reservation by the French delegation, it was agreed to delete Article 4.

<sup>4</sup> Article 5 is subject to the following general comments:

- Scrutiny reservation by the United Kingdom, Irish, German and Austrian delegations. These delegations thought that there should be a clearer link in the text between the crime investigated and the accounts, which may be covered by a request for assistance.
- Scrutiny reservation by the Portuguese delegation on the scope of the provision. The delegation thought it might be appropriate to cover only request for information in relation to investigation into money laundering and financial crimes, but was still reflecting on the matter.
- Scrutiny reservation by the Netherlands delegation.

<sup>5</sup> The explanatory report will state that Article 6 also applies in the case of Article 5.

- (a) of which he or she is or has been the holder [...];
- (b) for which he or she has powers of attorney <sup>1</sup>;
- (c) of which he or she is the true economic beneficiary [...] <sup>2 3</sup>
- (d) <sup>4</sup>

2. The obligation set out in this Article only applies if the investigation concerns an offence punishable in the requesting State [...] by a penalty involving deprivation of liberty or a detention order of a maximum period of at least [2] <sup>5</sup> years.

3. Paragraph 1(b) and (c) only applies to the extent the information is in the possession of the bank keeping the account.

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<sup>1</sup> Scrutiny reservation by the French, Spanish and Portuguese delegations on paragraph b.

<sup>2</sup> Scrutiny reservation by the Belgian and Netherlands delegations on paragraph c.

<sup>3</sup> The deleted text “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” shall be included in the explanatory report to the Protocol. The Presidency proposes in addition that the explanatory report shall state that the concept of economic beneficiary should be interpreted accordance with Article 3(5) of the Council Directive of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering and any amendment of that article.

<sup>4</sup> The Italian delegation has proposed the addition of the following paragraph 1(d): “in the case of accounts that do not belong to the person who is under investigation or the subject of an accusation, where there is good reason to believe that the transactions carried out on those accounts are relevant to the offence that gave rise to the request for mutual assistance.”

<sup>5</sup> In the light of the discussions the Presidency proposes a limit of 2 years for the purposes of further discussions. Certain delegations insist on a 4 years limit.

- 4.<sup>1</sup> The authority making the request shall in the request state:
- a) why it considers the requested information relevant for the purpose of the investigation into the offence;
  - b) on what grounds it presumes that the accounts are held by banks in the requested Member State.
5. The requested Member State shall execute the request in the manner provided for by its national law. The requested Member State may not call in question the statement made in accordance with paragraph 4. Article 2 of this Protocol applies. A Member State that makes a declaration foreseen in Article 2(4) shall state if the declaration extends to requests under this Article. <sup>2</sup>

*ARTICLE 5a<sup>3</sup>*

*Requests for information on banking transactions*

1. On request by the requesting State, the requested State shall provide:
  - a) the particulars, in the possession of the bank keeping the account, of bank accounts and banking operations which have been carried out during a specified period through one or more accounts specified in the request.<sup>4</sup>

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<sup>1</sup> This revised version of the former paragraph 2 in COPEN 2 is proposed by the Presidency for further consideration. The Presidency proposes in addition that the explanatory report to the Protocol shall contain explanations on the practical application of Article 5. Having in mind the amount of work that the execution of requests for information may involve, it could in particular be specified that the requesting Member State where appropriate may limit its request to certain types of bank accounts only and/or accounts kept by certain banks only.

<sup>2</sup> First sentence is modelled on Article 3 of the 1959 Convention. A majority of the Member States (A, B, D, DK, E, GR, I, L and NL) insisted on the principle of double criminality in relation to Article 5. In some, but not all, of the Member States, the obligation under this Article is considered as search and seizure.

<sup>3</sup> Scrutiny reservation on Article 5a by the Austrian and Irish delegations.

<sup>4</sup> The United Kingdom delegation thought that paragraph 1 a) only reflected already existing practice and therefore could be deleted.

b) the monitoring, during a specified period, of the banking operations carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.<sup>1</sup>

2. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purposes of ongoing proceedings.<sup>2</sup>

3. The requested Member State may make the execution of the request [referred to in paragraph 1 b)] subject to any condition which would have to be observed in a similar domestic case.<sup>3</sup>

*ARTICLE 5b*  
*Confidentiality*

Each Member State shall take the necessary measures to ensure that banks do not disclose to the bank customer concerned that information has been transmitted to the requesting State in accordance with articles 5 or 5a or that an investigation is being carried out.<sup>4</sup>

*[ARTICLE 5c*  
*Other financial institutions*

Articles (...) [5, 5a and 5b] shall also apply in respect of [insurance companies and other] financial institutions and accounts kept by them.]<sup>5</sup>

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<sup>1</sup> Scrutiny reservation by the Finnish and Netherlands delegations.

<sup>2</sup> At the meeting on 9 and 10 January 2001 it was concluded that the text of Article 5a(2) should be as close as possible to that of Article 5(2). The two paragraphs mentioned need to be further examined.

<sup>3</sup> Scrutiny reservations by some delegations on paragraph 3. The text has been reworded by the Presidency following the meeting for the purpose of further discussions.

<sup>4</sup> The text has been slightly reworded in the light of Article 8 of the 1991 Directive on money laundering.

<sup>5</sup> It was concluded that Article 5c should not contain a reference to Article 3. Apart from that the Article has not yet been examined. The Commission has expressed the view that the text should be in line with the definitions in the draft Directive amending the 1991 Directive on money laundering.



*ARTICLE 6*  
*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 6a<sup>1</sup>*  
*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 Convention, make an additional request directly to the competent authority of the requested Member State while present in that State.

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<sup>1</sup> Scrutiny reservation by the Belgian delegation on the deletion of the second indent of the former Article 6(4).

*ARTICLE 7<sup>1 2</sup>*  
*Fiscal offences*

1. Mutual assistance may not be refused solely on the grounds that the request concerns offences relating to taxes and excise duties, customs or foreign exchange.
2. Article 50 of the Schengen Convention is hereby repealed.

*ARTICLE 8<sup>3</sup>*  
*Fundamental interests*

1. With regard to prosecutions of or investigations into serious organised crime or laundering of the proceeds of crime, mutual assistance requested pursuant to the provisions of the applicable cooperation instrument may be refused only where the requested Member State considers that implementation of the request is likely to jeopardise its essential interests <sup>4</sup>.
2. A Member State, which invokes these grounds for refusing mutual assistance, shall give written reasons for its decision and inform the requesting Member State of those reasons. If, however, 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 consideration in the context of a subsequent evaluation at the level of the European Union of the operation of this Convention.

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<sup>1</sup> The Austrian and Luxembourg delegations entered a reservation and thought that the principle of dual criminality should apply in respect of fiscal offences. In the light of the discussion it is clear that the relationship between this Article and Article 2 of the 1978 Additional Protocol needs to be considered.

<sup>2</sup> The text was maintained unchanged with the understanding that it in substance covers the ground of the alternative proposal in footnote 1 on page 12 of 5268/01 COPEN 2. This point will be verified with the Legal Service.

<sup>3</sup> Article 8 was not discussed and will be examined at a forthcoming meeting.

<sup>4</sup> The United Kingdom delegation had earlier proposed the amended wording of paragraph 1 set out in 14425/00 COPEN 84 COMIX 897.

3. Where mutual assistance is refused on those grounds, the Council, at the request of the Member States concerned, shall, within two months of being thus informed and without prejudice to Article 35(7) of the Treaty on European Union, appoint an ad hoc committee to help in finding an amicable settlement of the difficulty.

4. The procedure referred to in paragraph 3 shall be determined by a Council Decision pursuant to Article 34(2)(c) of the Treaty on European Union.

#### *ARTICLE 9*

#### *Multidisciplinary structures*<sup>1</sup>

(...)

#### *ARTICLE 10*

#### *Reservations*

No reservations may be entered in respect of this Protocol [other than those for which it makes express provision].<sup>2</sup>

#### *ARTICLE 11*

#### *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 .

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<sup>1</sup> Subject to a scrutiny reservation by the French delegation, it was agreed to delete Article 9.

<sup>2</sup> The text in square brackets has been inserted in the light of Article 2. It has been worded as in the 2000 Convention.

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 at the time of adoption by the Council of the Act establishing this Protocol which is the eighth to complete that formality. If, however, the 2000 Convention has not entered into force on that date, this Protocol shall enter into force on the date on which the 2000 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.

5a. Notwithstanding paragraphs 3 to 5, the entry into force or application of this Protocol shall not take effect in the relations between any two Member States before the entry into force or application of the 2000 Convention between these Member States.<sup>1</sup>

6. This Protocol shall apply to mutual assistance initiated after the date on which it has entered into force, or is applied pursuant to paragraph 5, between the Member States concerned.

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<sup>1</sup> The new paragraph 5a of Article 11 is proposed by the Presidency on the basis of advice from the Legal Service.

## ARTICLE 12<sup>1</sup>

### *Accession of new Member 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 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 11(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 Convention with respect to this State.

## ARTICLE 13

### *Position of Iceland and Norway*

Articles 2 and 7 shall constitute measures amending or based upon the provisions referred to in Annex 1 to 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.

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<sup>1</sup> The revised paragraph 1 and the new paragraph 6 of Article 12 are proposed by the Presidency on the basis of advice from the Legal Service.

*ARTICLE 13a*

*Entry into force for Iceland and Norway*

1. Without prejudice to Article 8 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 (the "Association Agreement"), the provisions referred to in Article 13 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 11(3) or (4).
  
2. Any entry into force of this Protocol for a Member State after the date of entry into force of the provisions referred to in Article 13 for Iceland and Norway, shall render these provisions also applicable in the mutual relations between that Member State and Iceland and Norway.
  
3. The provisions referred to in Article 13 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 Convention with respect to these two States.<sup>1</sup>
  
4. Without prejudice to paragraphs 1, 2 and 3 above, the provisions referred to in Article 13 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.

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<sup>1</sup> The new wording of paragraph 3 of Article 13a is proposed by the Presidency on the basis of advice from the Legal Service.

*ARTICLE 14*

*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 ...

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