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REPORT

on the initiative of the Republic of Finland in view of the adoption of a Council decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (11636/1999 – C5-0330/1999 – 1999/0824(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Klaus-Heiner Lehne

<i>Symbols for procedures</i>	<i>Abbreviations for committees</i>
<p>* Consultation procedure <i>majority of the votes cast</i></p> <p>**I Cooperation procedure (first reading) <i>majority of the votes cast</i></p> <p>**II Cooperation procedure (second reading) <i>majority of the votes cast, to approve the common position</i> <i>majority of Parliament's component Members, to reject or amend the common position</i></p> <p>*** Assent procedure <i>majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty</i></p> <p>***I Codecision procedure (first reading) <i>majority of the votes cast</i></p> <p>***II Codecision procedure (second reading) <i>majority of the votes cast, to approve the common position</i> <i>majority of Parliament's component Members, to reject or amend the common position</i></p> <p>***III Codecision procedure (third reading) <i>majority of the votes cast, to approve the joint text</i></p>	<p>I. AFET Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy</p> <p>II. BUDG Committee on Budgets</p> <p>III. CONT Committee on Budgetary Control</p> <p>IV. LIBE Committee on Citizens' Freedoms and Rights, Justice and Home Affairs</p> <p>V. ECON Committee on Economic and Monetary Affairs</p> <p>VI. JURI Committee on Legal Affairs and the Internal Market</p> <p>VII. INDU Committee on Industry, External Trade, Research and Energy</p> <p>VIII. EMPL Committee on Employment and Social Affairs</p> <p>IX. ENVI Committee on the Environment, Public Health and Consumer Policy</p> <p>X. AGRI Committee on Agriculture and Rural Development</p> <p>XI. PECH Committee on Fisheries</p> <p>XII. REGI Committee on Regional Policy, Transport and Tourism</p> <p>XIII. CULT Committee on Culture, Youth, Education, the Media and Sport</p> <p>XIV. DEVE Committee on Development and Cooperation</p> <p>XV. AFCO Committee on Constitutional Affairs</p> <p>XVI. FEMM Committee on Women's Rights and Equal Opportunities</p> <p>XVII. PETI Committee on Petitions</p>
<p>(The type of procedure depends on the legal basis proposed by the Commission)</p>	

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PROCEDURAL PAGE

By letter of 10 December 1999 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Republic of Finland in view of the adoption of a Council decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (11636/1999 - 1999/0824 (CNS)).

At the sitting of 17 December 1999 the President of Parliament announced that she had referred this initiative to the Committee on Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and to the Committee on Budgetary Control, the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs and the Internal Market for their opinions (C5-0330/1999).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Klaus-Heiner Lehne rapporteur at its meeting of 17 January 2000.

It considered the initiative of the Republic of Finland and the draft report at its meetings of 27 January, 13 March and 4 April 2000.

At the last meeting it decided to apply the procedure without debate pursuant to Rule 114(1) of the Rules of Procedure.

At the last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote: Graham R. Watson, chairman; Klaus-Heiner Lehne, rapporteur; Christian von Boetticher, Alima Boumediene-Thiery, Mogens Camre, Carmen Cerdeira Morterero (for Michael Cashman), Ozan Ceyhun, Carlos Coelho, Gérard M.J. Deprez, Raina A. Mercedes Echerer (for Patsy Sørensen pursuant to Rule 153(2)), Francesco Fiori (for Mary Elizabeth Banotti pursuant to Rule 153(2)), Timothy Kirkhope, Alain Krivine (for Pernille Frahm), Baroness Sarah Ludford, Arie M. Oostlander (for Thierry Cornillet), Elena Ornella Paciotti, Martine Roure (for Gianni Vattimo), Gerhard Schmid, Ingo Schmitt (for Hubert Pirker), Martin Schulz, Joke Swiebel and Jan-Kees Wiebenga.

The opinions of the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs and the Internal Market are attached; the Committee on Budgetary Control decided on 23 February 2000 not to deliver an opinion.

The report was tabled on 4 April 2000.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Initiative of the Republic of Finland in view of the adoption of a Council decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (11636/1999 – C5-0330/1999 – 1999/0824(CNS))

The proposal is amended as follows:

Proposal from the Republic of Finland¹

Amendments by Parliament

(Amendment 1)
Recital 7a (new)

whereas in the event of fraud, corruption or other illegal activities affecting the European Union's financial interests the Commission and the authorities responsible for combating money laundering must cooperate and exchange useful information,

Justification:

The Commission's proposal for the amendment 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 (COM(1999)352 final) contains provisions on an exchange of information of this nature. It is questionable, however, whether it is wise to have a separate legal basis for the exchange of information relating to one area of money-laundering predicate offences, and it remains to be seen what view will prevail during the codecision procedure relating to the amendment of the directive. The possibility of exchanging information with the Commission when the Union's financial interests are affected must therefore be taken into account in this Council decision.

(Amendment 2)
Recital 7b (new)

whereas the clause requiring the FIU's prior consent to the disclosure of information and documents forwarded for the purposes of criminal investigations is essential for proper mutual cooperation

¹ OJ C 362, 16.12.1999, p. 6.

between the various bodies concerned,

Justification

Any reservations expressed by Member States about the application of this clause – which, furthermore, is considered essential by the Egmont Group – would merely serve to undermine the future operability of the Council decision.

(Amendment 3)
Recital 7c (new)

whereas the Member States must organise the FIUs in such a way as to ensure that information and documents are submitted within a reasonable space of time,

Justification

Information and documents must be submitted within a reasonable space of time so as to ensure that slow responses do make the stated goal of prevention impossible to achieve.

(Amendment 4)
Article 1(1)

1. Member States shall ensure that Financial Intelligence Units (FIUs), set up or designated to receive disclosures of financial information for the purpose of combating money laundering shall cooperate to assemble, analyse and investigate relevant information.

1. Member States shall designate Financial Intelligence Units (FIUs), set up to receive disclosures of financial information for the sole purpose of combating money laundering as defined by Directive 91/308/EEC as last amended, and shall ensure that they cooperate to assemble, analyse and investigate relevant information. In the event of fraud, corruption or other illegal activities that may affect the European Union's financial interests the Financial Intelligence Units shall also cooperate with the Commission. Information exchanged may not be used for any purpose other than combating

money laundering.

Justification:

There is at present no legal basis requiring the Member States to set up financial intelligence units. The setting up and designation of these units must therefore form an explicit part of this decision.

The Commission's proposal for the amendment 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 (COM(1999)352 final) contains provisions on an exchange of information of this nature. It is questionable, however, whether it is wise to have a separate legal basis for the exchange of information relating to one area of money-laundering predicate offences, and it remains to be seen what view will prevail during the codecision procedure relating to the amendment of the directive. The possibility of exchanging information with the Commission when the Union's financial interests are affected must therefore be taken into account in this Council decision.

It should be made absolutely clear that an initiative which confers potentially extensive powers upon FIUs must remain firmly restricted to the sole purpose of combating money laundering. It would be inappropriate if financial intelligence information were exchanged and/or subsequently used for investigating other fraudulent activities such as tax evasion. The scope of the definition of money laundering depends on the predicate offences to which it relates. Money laundering has been defined in Article 1 of Directive 91/308/EEC. The predicate offence specified therein is drug trafficking and "any other criminal activity designated as such for the purposes of this Directive by the Member States".

(Amendment 5)

Article 1(2)

2. For the purposes of paragraph 1, Member States shall ensure that FIUs exchange, spontaneously or upon request and either in accordance with this Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.

2. For the purposes of paragraph 1, Member States shall ensure that FIUs and the Commission exchange, spontaneously or upon request and either in accordance with this Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the FIU or the Commission regarding financial transactions related to money laundering and the natural or legal persons involved.

Justification:

This amendment arises from the amendment to Article 1(1).

(Amendment 6)
Article 1a (new)

Member States shall ensure that fundamental rights, especially the rights of defence and the right to effective judicial remedies, are guaranteed over the whole scope of this framework decision.

Justification:

The protection of fundamental rights and the rights of defence will play a key role in the implementation of the Finnish initiative. Indeed the initiative can only be justified if fundamental rights and guarantees are not circumvented, but faithfully respected.

(Amendment 7)
Article 4(-1) (new)

-1. Any Financial Intelligence Unit of a Member State and, where applicable, the Commission may, for the purposes of combating money laundering, ask any other Financial Intelligence Unit or the Commission for financial information on the presumed proceeds from criminal acts.

Justification:

This amendment is needed for the logical structure of the text of the decision.

(Amendment 8)
Article 4(1)(2) and (3)

1. Each request made under this Decision shall be accompanied by a brief statement of the underlying facts known to the

1. Each request made under this Decision shall be accompanied by a brief statement of the underlying facts known to the

requesting FIU. The FIU shall specify in the request how the information sought will be used.

2. When a request is made in accordance with this Decision, the requested FIU shall provide all relevant information, including available financial information and relevant law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States.

3. A FIU shall not be obliged to divulge information which could lead to substantial impairment of a criminal investigation being conducted in the requested Member State. Any such refusal shall be appropriately explained to the FIU requesting the information.

requesting FIU or the Commission. The FIU shall specify in the request how the information sought will be used.

2. When a request is made in accordance with this Decision, the requested body shall provide all relevant information, including available financial information and relevant law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States.

3. A FIU shall not be obliged to divulge information which could lead to substantial impairment of a criminal investigation being conducted in the requested Member State. Any such refusal shall be appropriately explained to the FIU requesting the information or the Commission.

Justification:

This amendment arises from the amendment to Article 1(1).

(Amendment 9)
Article 4(4) (new)

4. The FIU asked for information or the Commission may attach conditions to the use of the information forwarded.

Justification:

This amendment is needed for the logical structure of the text of the decision.

(Amendment 10)
Article 5

1. Information or documents obtained under the provisions of this Decision may only be used for the purposes of processing and analysing data within FIUs.

1. Information or documents obtained under the provisions of this Decision may only be used for the purposes of processing and analysing data within FIUs or the

2. The use of information or documents referred to in paragraph 1 for criminal investigations or prosecutions shall be subject to the prior consent of the FIU which submitted the information or documents in question.
3. FIUs shall undertake all necessary measures, including security measures to ensure that information submitted under this Decision is not accessible by any other authorities, agencies or departments.
4. The information submitted will be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.
5. The requesting FIU shall comply with any conditions on the use of the information laid down by the requested FIU.

Commission.

2. The use of information or documents referred to in paragraph 1 for purposes other than criminal investigations or prosecutions shall be subject to the prior consent of the body which submitted the information or documents in question.
3. FIUs and the Commission shall undertake all necessary measures, including security measures to ensure that information submitted under this Decision is not accessible by any other authorities, agencies or departments.
4. When submitting information the FIUs and the Commission shall apply in full the relevant provisions of the Council of Europe Convention of 28 January 1981 on for Protection of Individuals with Regard to Automatic Processing of Personal Data and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).
5. The requesting FIU or the Commission shall comply with any conditions on the use of the information laid down by the requested body.

Justification:

This amendment arises partly from the amendment to Article 1(1).

The possibility of using such information in criminal investigations is in keeping with the instruments already adopted or in the process of being adopted in the field of judicial cooperation in criminal matters, which are intended to facilitate the exchange of information for the purpose of combating crime (particularly economic and organised crime). This also ensures that there will be no clash with the constitutional principles of some Member States, which prohibit the obstruction of criminal proceedings.

The proposed amendment prevents such information from being used for other purposes, such as fiscal purposes, without proper authorisation.

In addition, the standard of data protection for which Article 5(4) provides is too low. The Council of Europe Convention, which is already the standard in various agreements relating to cooperation in the fields of justice and home affairs, and the relevant provisions of the European

Communities' directive should also be taken as the basis for this exchange of information.

(Amendment 11)
Article 6

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| 1. FIUs may, within the limits of the applicable national law and without a request to that effect, exchange relevant information. | 1. FIUs <u>and the Commission</u> may, within the limits of the applicable national law and without a request to that effect, exchange relevant information. |
| 2. The forwarding FIU may impose conditions on the use by the receiving FIU of the information referred to in paragraph 1. The receiving FIU shall be bound by those conditions. | 2. The forwarding FIU <u>or the Commission</u> may impose conditions on the use by the receiving FIU <u>or the Commission</u> of the information referred to in paragraph 1. The receiving FIU <u>and the Commission</u> shall be bound by those conditions. |
| 3. Article 5 shall apply in relation to information forwarded under this Article. | 3. Article 5 shall apply in relation to information forwarded under this Article. |

Justification:

This amendment arises from the inclusion of the Commission in the exchange of information in the event of fraud, corruption and other illegal activities affecting the European Union's financial interests.

(Amendment 12)
Article 7

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| Member States shall provide for and agree upon appropriate and protected channels of communication between FIUs. | Member States <u>and the Commission</u> shall provide for and agree upon appropriate and protected channels of communication between FIUs <u>and the Commission</u> . |
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Justification:

This amendment too arises from the inclusion of the Commission in the exchange of information in the event of fraud, corruption and other illegal activities affecting the European Union's financial interests.

DRAFT LEGISLATIVE RESOLUTION

Initiative of the Republic of Finland in view of the adoption of a Council Decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (11636/1999 – C5-0330/1999 – 1999/0824(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Republic of Finland (11636/1999 – 1999/0824(CNS))²,
 - having been consulted by the Council pursuant to Article 39(1) of the EU Treaty (C5-0330/1999),
 - having regard to Rule 67 and Rule 106 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs and the Internal Market (A5-0102/2000),
1. Approves the proposal from the Republic of Finland as amended;
 2. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 3. Asks to be consulted again should the Council intend to modify the proposal from the Republic of Finland substantially;
 4. Instructs its President to forward its position to the Council, the Republic of Finland and the Commission.

² OJ C 362, 16.12.1999, p. 6.

EXPLANATORY STATEMENT

1. Introduction

The 1991 directive on prevention of the use of the financial system for the purpose of money laundering requires credit and financial institutions to inform the 'competent authorities' of all facts that could constitute evidence of money laundering. They must not carry out suspicious transactions until they have apprised these authorities. The directive does not, however, lay down any criteria as regards the authorities responsible for combating money laundering. There may therefore be more than one responsible authority in a Member State, and completely different authorities in the various Member States may be responsible.

The systems in the Member States have developed with a corresponding lack of uniformity. In some Member States, for example, an administrative intermediary agency is responsible, in others a police force, a judicial authority or a combination of the two.

Nor does the directive contain any provisions on cooperation and exchanges of information among the Member States' authorities. Consequently, there is at present no Community-wide basis for such cooperation. Where there is already an exchange of information between Member States, it is based on bilateral agreements. The different legal status of the Member States' competent authorities evidently causes problems for cooperation in this context.

On the other hand, reference is constantly made to the importance of such exchanges of information for an efficient system of combating money laundering. Point 32 of the recommendation of the Financial Action Task Force concerning the fight against money laundering states: 'Each country should make efforts to improve a spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.'

Similarly, the Council calls in its action plan to combat organised crime (Recommendation 26(e)) for an improvement in cooperation among the contact points.

The proposal meanwhile (July 1999) submitted by the Commission for the amendment of the money-laundering directive does not, however, contain any general rules on cooperation among financial intelligence units. The Commission merely proposes an exchange of information between the authorities responsible for combating money laundering and the Commission in the event of fraud, corruption or other illegal activities affecting the European Communities' financial interests.

The Commission clearly assumed that a legal basis in the Treaty establishing the European Communities can be selected only for money laundering based on illegal activities affecting the European Union's financial interests. Given the different forms that legislation takes, cooperation among financial intelligence units in general might be governed only by the Treaty on European Union.

2. The Initiative of the Republic of Finland

The proposal from the Republic of Finland seeks to close this gap. The legal basis of the Finnish proposal is Article 34(2)(c) of the Treaty on European Union. This article forms part of Title VI, Provisions on Police and Judicial Cooperation in Criminal Matters, and permits the Council, acting unanimously on the initiative of any Member State or of the Commission, to adopt decisions consistent with the objectives of this title, the decisions being binding but not entailing direct effect.

The aim of the proposal is to ensure cooperation among financial intelligence units in the assembly, analysis and investigation of relevant information. They are to be able to exchange information on request or spontaneously. The structure of the Financial Intelligence Unit and the nature of the authority (administration, prosecutor's office or judiciary) are not to be allowed to impede this exchange of information.

The way in which the information is to be exchanged is not specified, the Finnish proposal merely requiring the Member States to ensure adequate and secure channels of communication. No central agency at European level is established, nor, it would seem, a central, computer-aided information system. No provision of any kind is made for the Commission to participate in the exchange of information, not even as regards predicate offences relating to fraud, corruption and other activities affecting the Community budget.

The data protection standard is based on the rules of the national legislation of the requesting financial intelligence unit.

The Member States are also required to ensure that their financial intelligence units meet the obligations arising from the Europol Convention and to amend any national legislation incompatible with this decision within three years of its entering into force.

3. Assessment of the Finnish proposal

Regrettably, the European Parliament was consulted only on the draft text as such, an explanatory memorandum being submitted neither by the Republic of Finland nor by the Council Presidency. It is therefore possible to assess the appropriateness of the legal basis, the general contents of the proposal and the wording of the various articles only with qualifications. In various respects at least, the proposal does not appear entirely logical in its structure and choice of words, and amendments are therefore proposed here.

Two aspects in particular require amendment, the first being *the Commission's participation in this exchange of information*. Hitherto the Commission has made provision in the amended money-laundering directive for an exchange of information between itself and the financial intelligence units in the event of fraud, corruption and other illegal activities that may affect the European Unions' financial interests. The current deliberations on the Commission proposal for the amendment of the directive have revealed, however, that even the general inclusion in the directive of these acts in the list of predicate offences relating to money laundering (and thus

cooperation between the Commission and the financial intelligence units in this respect) is contentious. It also seems fundamentally questionable that the exchange of information on one predicate offence should be governed by one instrument, the money-laundering directive, while the exchange of information on all other predicate offences is governed by another instrument, the Council decision now under discussion.

In this situation it is therefore proposed that the exchange of information on fraud, corruption and other illegal activities affecting the European Union's financial interests should be included in this decision since, regardless of the definition of predicate offences accepted during the debate on the money-laundering directive (organised crime or serious offences or a combination of the two), illegal activities affecting the European Union's budget will at least be included in the appropriate framework. And as financial interests are concerned, the Commission must be involved in the exchange of information.

The *data protection standard* taken as the basis, which is restricted to the national legislation of the financial intelligence unit requesting information, also seems unacceptable. The Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data has at least been the minimum standard in agreements in the justice and home affairs sphere for some years. Since 1995 there has also been an EC directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The relevant provisions of these instruments should therefore be applied.

1 March 2000

OPINION

of the Committee on Economic and Monetary Affairs

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the initiative of the Republic of Finland in view of the adoption of a Council decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (11636/1999 – C5-0330/1999 – 1999/0824(CNS))

Draftsman: Carles-Alfred Gasòliba i Böhm

PROCEDURE

The Committee on Economic and Monetary Affairs appointed Carles-Alfred Gasòliba i Böhm draftsman at its meeting of 17 January 2000.

It considered the draft opinion at its meetings of 23 February 2000 and 29 February 2000.

At the last meeting it adopted the following conclusions unanimously.

The following were present for the vote: Christa Randzio-Plath, chairman; José Manuel García-Margallo y Marfil, vice-chairman; Carles-Alfred Gasòliba i Böhm, draftsman; Richard A. Balfe, Hans Blokland, Hans Udo Bullmann, Ieke van den Burg (for Luis Berenguer Fuster), Jonathan Evans, Robert Goebbels, Ian Stewart Hudghton (for Pierre Jonckheer), Christopher Huhne, Juan de Dios Izquierdo Collado (for Fernando Pérez Royo), Giorgos Katiforis, Piiia-Noora Kauppi, Gorka Knörr Borràs, Werner Langen (for Christoph Werner Konrad), Astrid Lulling, Jules Maaten (for Karin Riis-Jørgensen), Thomas Mann (for Karl von Wogau), Ioannis Marinos, John Purvis (for Staffan Burenstam Linder), Alexander Radwan, Bernhard Rapkay, Olle Schmidt, Charles Tannock, Marianne L.P. Thyssen, Helena Torres Marques, Bruno Trentin and Theresa Villiers.

SHORT JUSTIFICATION

Council Directive 91/308/EEC of 10 June 1991 (OJ L 166, 28.6.1991, p. 77) on prevention of the use of the financial system for the purpose of money laundering, required that all the Member States should set up Financial Intelligence Units (FIU's) to collect and analyse information received under the provisions of the Directive, with the aim of establishing links between suspicious or unusual financial transactions and any underlying criminal activity.

The Amsterdam European Council of 16-17 June 1997 (OJ C 251, 15.8.1997, p. 1) approved an Action Plan to combat organised crime. One of its recommendations was that there should be an improvement in the cooperation between the FIU's in the different Member States, as well as between the FIU's and the police authorities in their respective Member States. However, successive Commission reports on the implementation of Directive 91/308/EEC have identified difficulties which continue to prevent the communication and exchange of information between certain units having a different legal status.

Against this background, on 25 October 1999 the then President of the EU, the Republic of Finland, took the initiative to propose the present Council Decision concerning arrangements for cooperation between the FIU's of the Member States in respect of exchanging information.

The proposed Decision in its Article 1 requires the Member States to ensure that their FIU's cooperate to assemble, analyse and investigate relevant information. The FIU's are to pass on to other FIU's, spontaneously or upon request, any information that may be relevant to the processing or analysis of information or to an investigation by another FIU into financial transactions related to money laundering.

The proposed Directive then provides a definition of FIU's and a framework procedure for requesting information, which is clearly designed to make the exchange of information as uncomplicated as possible. There are provisions to ensure that no FIU can be obliged to divulge information that could compromise a criminal investigation underway in the requested Member State (Art. 4.3) and that information passed on cannot be used for purposes other than that of processing and analysing data within the FIU's (Art. 5). There are other safeguards, including the provision in Art. 6.2 that the forwarding FIU may impose conditions on the use by the receiving FIU of the information provided.

The Committee on Economic and Monetary Affairs would suggest that there are important confidentiality and protection of personal data implications to the proposed Decision. These are to some extent addressed by provisions such as that in Art. 5.4 to the effect that any information submitted must be protected by at least the same rules on confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU. In any case, these issues fall outside the scope of this opinion and are more properly addressed by the reporting committee, on Citizens' Freedoms and Rights, Justice and Home Affairs.

Conclusions

This opinion will content itself with pointing to the inestimable danger posed to our society by organised crime and the need to combat this crime with all means. One such means is to target the vast sums of money generated by such criminal activity, money being the principal objective of the activity but which needs to be laundered before it can be applied. The EU intends to make solid progress in the liberalisation of financial markets and services: this is apparent from the Commission's Action Plan for Financial Services which was endorsed by the European Council in Cologne in June 1999 (the Action Plan is currently before the European Parliament). But financial market liberalisation must not endanger financial stability; the freedom of capital markets must not be used for the furtherance of undesirable aims such as money laundering. For this reason the Committee on Economic and Monetary Affairs recommends endorsing the draft Council Decision.

28 March 2000

OPINION

of the Committee on Legal Affairs and the Internal Market

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Initiative of the Republic of Finland in view of the adoption of a Council Decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information
(11636/1999 – C5-0330/1999 – 1999/0824(CNS))

Draftsman: Diana Paulette Wallis

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Diana Paulette Wallis draftsman at its meeting of 11 January 2000.

It considered the draft opinion at its meetings of 20 Mars 2000 and 28 Mars 2000.

At the last meeting it adopted the amendments below unanimously.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Willi Rothley, vice-chairman; Eduard Beysen, vice-chairman; Diana Paulette Wallis, draftsman; Luis Berenguer Fuster, Enrico Ferri, Janelly Fourtou, Marie-Françoise Garaud, Gerhard Hager, The Lord Inglewood, Othmar Karas, Vincenzo Lavarra (for Enrico Boselli pursuant to Rule 153(2)), Klaus-Heiner Lehne, Donald Neil MacCormick, Toine Manders, Véronique Mathieu, Manuel Medina Ortega, Bill Miller, Feleknaš Uca and Theresa Villiers.

Introduction

In its resolutions of 21 June 1996³ and 9 March 1999⁴, the European Parliament expressed concern about the ever increasing dangers of money laundering, and in particular about the underlying criminal activities which give rise to money laundering, especially drug dealing. According to more recent estimations of the IMF, the annual worldwide volume of money laundered represents 2 to 5 % of the World's total GDP, i.e. approximately US\$ 1000 Billion.⁵ Parliament has thus called for a closer cross-border co-operation.⁶

The overall aim of the Finnish initiative, i.e. establishing closer and smoother co-operation between 'Financial Intelligence Units' (FIUs) of the Member States, should therefore be welcomed. However, it would appear necessary to comment on the legal nature of the proposed decision and to draw some conclusions flowing from this examination. In addition, it should be ensured that information exchanged between FIUs is used for the sole purpose of fighting money laundering and that fundamental rights, in particular the rights of defence, are respected.

The legal nature of the proposed decision

a) The nature of EU-decisions in general

The initiative is based on Article 34(2)(c) of the EU Treaty. According to this Article, Council may "adopt **decisions** for any other purpose consistent with the objectives of this Title, *excluding any approximation the laws and regulations* of the Member States. These decisions *shall be binding* and *shall not entail direct effect*; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;"

By contrast, Article 34(2)(b) permits Council to "adopt **framework decisions** for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;"

Article 34(2)(b) seems to be fairly clear. Article 34 (2)(c) taken by itself is less clear and becomes even more opaque if matched with the proposed decision.

"Decisions shall be binding and shall not entail direct effect." Binding for whom? Not entail direct effect in favour of whom vis-à-vis whom?

³ OJ C 198, 8.7.1996, p. 245

⁴ OJ C 175, 21.6.1999, p. 39

⁵ Source : IMF according to Neue Zürcher Zeitung, 28/29 August 1999 ; see also www.imf.org

⁶ Point 10 of the March 1999 resolution.

The whole concept of direct effect was developed mainly in order to determine the legal effects of *directives* which had not been transposed into national law. Individuals may thus avail themselves of unimplemented directives vis-à-vis a Member State and State entities.⁷ This concept, had it not explicitly been excluded in Article 34(2)(b), would have applied rather to framework decisions.

In contrast, *EC*-decisions, which are binding by nature, regularly and *necessarily* entail direct effect.⁸ *EU*-decisions such as defined in Article 34(2)c) thus seem to be a contradiction in themselves.

The absurd consequence of the absurd wording of Article 34(2)c) is that EU-decisions would be binding upon Member States but that individuals could not rely upon them if a Member State violated the EU-decision. As they must not approximate Member States legislation either, there would also be no directly applicable national piece of legislation upon which the individual could rely. Member States' courts are not allowed to annul community legislation.⁹ To complete the dilemma, the Court of Justice's competences for interpreting and verifying the validity of acts passed under the third pillar are feeble to non-existent (Article 35).

In conclusion, by its very nature a EU-decision seems to be a breach of the fundamental principle of legal certainty and the fundamental right to effective review.

b) Some particular features of the proposed FIU-decision

The proposal very frequently uses terms such as "Member States shall ensure" (e.g. Articles 1, 2, 3, 7, 8). These words are problematic for they necessarily seem to entail implementing legislation. They would have been appropriate in the context of a framework decision.

Article 9(2) can only be accepted in a framework decision for it reads: "Where national legislation is not compatible with this Decision, it shall be changed before..."

On the other hand, some obligations are addressed directly to the FIUs (e.g. Articles 4, 5, 6).

Article 8, phrase 2, is most ambiguous as it states: "The Member States shall ensure that *their FIUs* will give effect to those obligations in accordance with the applicable national law."

⁷ Cf. e.g. Judgment of 14.7.1994, Faccini Dori, Case C-91/92, [1994] ECR p. I-3325, points 22 and 23.

⁸ Cf. Judgment of 6.10.1970, Grad, Case 9-70, [1970] ECR p. 825, point 5: "It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision."

⁹ Judgment of 22.10.1987, Foto-Frost, Case 314/85, [1987] ECR p. 4199, point 15.

c) Conclusion

It seems inevitable to vest the suggested content in the form of a framework decision within the meaning of Article 34(2)(b) of the EU Treaty.

Some comments relating to the substance of the initiative

- a) It should be made very clear that an initiative which confers potentially extensive powers upon FIUs must remain firmly restricted to the sole purpose of combating money laundering. It would be inappropriate if financial intelligence information were transmitted e.g. for investigating other fraudulent activities such as tax evasion. This approach corresponds to the stance adopted by the Legal Affairs Committee in the legislative procedure initiated with a view to amending the anti-money laundering directive.
- b) The protection of fundamental rights and the rights of defence will play a key role in the implementation of the Finnish initiative. Indeed the initiative can only be justified if fundamental rights and guarantees are not circumvented, but faithfully respected. The respect of privacy, the presumption of innocence and the right to *effective remedies* of judicial nature¹⁰ could be mentioned in that respect.

Particularly Article 3 gives rise to concern for it provides that "Member States shall ensure that the performance of the functions of the FIUs under this Decision *shall not be affected* by their internal structures...". It should be recalled that some internal structures may precisely reflect existing fundamental rights.

It would seem appropriate to insert a separate Article guaranteeing, for the whole scope of the initiative and in accordance with Member States legal systems, the protection of fundamental rights through effective remedies of judicial nature.

- c) It appears to be necessary to examine the relationship of the Finnish initiative to Europol. Europol is based (a) on the Europol Convention¹¹.

Europol is complemented by the Europol Drugs Unit¹².

Both Europol and the Drugs Unit are active in, *inter alia*, combating illicit drug trafficking and associated money laundering activities.

The major shortcoming of both instruments is that Member States *cannot be obliged* to

¹⁰ Cf. Judgment of 15.10.1987, Heylens, Case 222/86, [1987] ECR p. 4097, point 14.

¹¹ OJ C 316 of 27.11.1995, p. 2) and has taken up its activities on 1 July 1999 (OJ L 185 of 1.7.1999, p. 1.

¹² Joint Action 95/73/JHA, OJ L 62 of 20.3.1995, p. 1 such as amended by Joint Action 96/748/JHA, OJ L 342 of 31.12.1996, p. 4.

supply information to Europol, the Drugs Unit or on a bilateral basis (Article 4(4) and (5) Europol; Article 4(1)2 Drugs Unit).

- d) Article 4(3) permits FIUs not to divulge information which could lead to substantial impairment of a criminal investigation. Here the system might be running the risk that some FIUs would use this clause as a welcome and easy excuse for not providing information sought. Accordingly, there ought to be some objective arbitration on the application of this exception.

As shown under letter c) above, Europol and the Europol Drugs Unit are not yet in a position to contribute to the solution of the problem. What is needed is the *obligation* that FIUs submit information which they consider to be liable of substantially impairing a criminal investigation *to the joint supervisory body of Europol*. The joint supervisory body could then *decide* on the permissibility of the transmission of the information submitted from Europol to the requesting party. It should be recalled that the joint supervisory body is the ideal arbitration authority for it is independent and used to discharging analogous duties in the ambit of the Europol Convention and the procedural framework has already been set up (Article 24 Europol and rules of procedure of the joint supervisory body¹³).

- e) Article 5(2) provides that "the use of information or documents referred to in paragraph 1 for criminal investigations or prosecutions shall be subject to the prior consent of the FIU which submitted the information or documents in question." This provision needs to be completed in order to put in place mechanisms allowing the reviewing and revising of those decisions. Furthermore, it is not clear at all which value of proof may have information, which has been passed on in breach of Article 5(2) or in breach of national rules and procedures. Conversely, it is not clear what should happen in a case where the legislation of a receiving State *requires* the use of specific information which its FIU possesses while the State which has provided it *does not allow* the use of this information.
- f) On other occasions, the wording simply seems too vague for a legal text of this importance. It may be submitted that this is the case of Article 2 ("to the extent permitted") and 6(1) ("FIUs may ... exchange relevant [=?] information.")

¹³ OJ C 149 of 28.5.1999, p. 1.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Republic of Finland¹

Amendments by Parliament

(Amendment 1)

Title

Council Decision 1999/ /JHA of ... concerning arrangements for co-operation between Financial Intelligence Units of the Member States in respect of exchanging information

Council Framework Decision 1999/ /JHA of ... concerning arrangements for co-operation between Financial Intelligence Units of the Member States in respect of exchanging information

Justification:

The very concept of decisions under Article 34(2)c causes various legal perplexities (cf. explanatory statement). In addition, the Finnish initiative itself requires changes to national legislation (Article 9(2)). This basic idea of adapting national legislation to a EU instrument should better be realised by implementing a framework decision.

Amendment 2

First 'having regard to'

Having regard to the Treaty on European Union, and in particular Article 34(2)c) thereof,

Having regard to the Treaty on European Union, and in particular Article 34(2)b) thereof,

Justification:

The very concept of decisions under Article 34(2)c causes various legal perplexities (cf. explanatory statement). In addition, the Finnish initiative itself requires changes to national legislation (Article 9(2)). This basic idea of adapting national legislation to a EU instrument should better be realised by implementing a framework decision.

¹ OJ C 362, 16.12.1999, p. 6.

(Amendment 3)

Article 1 (1)

1. Member States shall ensure that Financial Intelligence Units (FIUs), set up or designated to receive disclosures of financial information for the purpose of combating money laundering shall cooperate to assemble, analyse and investigate relevant information.

1. Member States shall ensure that Financial Intelligence Units (FIUs), set up or designated to receive disclosures of financial information for the sole purpose of combating money laundering such as defined by Directive 91/308/EEC as last amended shall cooperate to assemble, analyse and investigate relevant information. Information exchanged may not be used for any purpose other than combating money laundering.

Justification:

It should be made absolutely clear that an initiative which confers potentially extensive powers upon FIUs must remain firmly restricted to the sole purpose of combating money laundering. It would be inappropriate if financial intelligence information were exchanged and/or subsequently used for investigating other fraudulent activities such as tax evasion. The scope of the definition of money laundering depends on the predicate offences to which it relates. Money laundering has been defined in Article 1 of Directive 91/308/EEC. The predicate offence specified therein is drug trafficking and “any other criminal activity designated as such for the purposes of this Directive by the Member States”.

(Amendment 4)

Article 1a (new)

Member States shall ensure that fundamental rights, especially the rights of defence and the right to effective judicial remedies, are guaranteed over the whole scope of this framework decision.

Justification:

The protection of fundamental rights and the rights of defence will play a key role in the implementation of the Finnish initiative. Indeed the initiative can only be justified if fundamental rights and guarantees are not circumvented, but faithfully respected.

(Amendment 5)
Article 4(3)

3. A FIU shall not be obliged to divulge information which could lead to substantial impairment of a criminal investigation being conducted in the requested Member State. Any such refusal shall be appropriately explained to the FIU requesting the information.

3. A FIU shall not be obliged to divulge information which could lead to substantial impairment of a criminal investigation being conducted in the requested Member State. Any such refusal shall be appropriately explained to the FIU requesting the information.

The FIU whose request has been turned down may approach the Europol joint supervisory body. Upon request of the joint supervisory body, the requested FIU shall provide all relevant information to the joint supervisory body. The joint supervisory body shall take a decision whether relevant information has to be passed on to the requesting FIU.

Justification:

Article 4(3) permits FIUs not to divulge information, which could lead to substantial impairment of a criminal investigation. There is a risk that some FIUs would use this clause as a welcome and easy excuse for not providing information sought.

FIUs should be obliged to submit information, which they consider to be liable of substantially impairing a criminal investigation to the joint supervisory body of Europol. The joint supervisory body could then decide on the permissibility of the transmission of the information submitted from Europol to the requesting party. It should be recalled that the joint supervisory body is the ideal arbitration authority for it is independent and used to discharging analogous duties in the ambit of the Europol Convention and the procedural framework has already been set up (Article 24 of the Europol Convention and rules of procedure of the joint supervisory body (OJ C 149 of 28.5.1999, p. 1).

(Amendment 6)
Article 5(2)

2. The use of information or documents referred to in paragraph 1 for criminal investigations or prosecutions shall be

2. The use of information or documents referred to in paragraph 1 for criminal investigations or prosecutions shall be

subject to the prior consent of the FIU which submitted the information or documents in question.

subject to the prior consent of the FIU which submitted the information or documents in question.

Refusals may not be based on the sole fact that their use would not be allowed in the Member State who provided them.

Information and documents obtained in breach of this framework decision may not be used.

Decisions refusing use of information or documents for criminal investigations or prosecutions shall be susceptible of effective judicial review. To that end, actions may be brought by the competent authority of the requesting Member State.

Justification:

Article 5(2) needs to be completed in order to put in place mechanisms allowing the review and revision of decisions mentioned therein. Furthermore, it is not clear which value of proof may have information, which has been passed on in breach of the framework decision or in breach of national rules and procedures. The present amendment tries to take a differentiated approach.