



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.06.2004
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Proposal for a

COUNCIL COMMON POSITION

**on the negotiations in the Council of Europe relating to the 1990 Convention on
Laundering, Search, Seizure and Confiscation of the Proceeds from Crime**

(presented by the Commission)

EXPLANATORY MEMORANDUM

This proposal for a Common Position concerns the prevention of and fight against crime, organised or otherwise, in particular terrorism, to which explicit reference is made in Article 29 of the Treaty on European Union. In these areas the Council may, without prejudice to the competencies of the European Community and acting unanimously on the initiative of any Member State or of the Commission, adopt a common position defining the approach of the Union to a particular matter as set out in Article 34(2) (a) of the Treaty on European Union.

Without prejudice to the increasing competencies of the European Community in this field, in the last years, the EU has developed a comprehensive policy to prevent and combat organised crime and terrorism. This policy is based on a multi-disciplinary approach combining elements of prevention, identification and verification of the identity of persons concerned and suspicious transactions, substantive criminal law, and police and judicial co-operation.

The Joint Action of 3rd December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime¹ complements the Money Laundering Directives by addressing the need for more effective co-operation between Member States in this area. The Framework Decision² on money laundering, dealing with the identification, tracing, freezing, seizing and confiscation of the proceeds of crime partially replaces the above Joint Action. It is intended to ensure that Member States take the necessary steps not to make or uphold reservations in respect of a number of specific articles of the 1990 Strasbourg Convention³ obliging Member States to provide for confiscation measures and to criminalise the laundering of the proceeds of serious offences. The Framework Decision also commits Member States to ensure that their domestic legislation allows for the confiscation of property the value of which corresponds to the proceeds of crime.

A Council Act of 30th November 2000⁴ extends the competence of Europol to money laundering in general regardless of the type of offence from which the laundered proceeds originate.

The Protocol to the Convention on Mutual Assistance in Criminal Matters established by Council Act of 16th October 2001⁵ provides for Member State authorities, to provide details of bank accounts, and banking operations of identified persons. Member States may not rely on rules of banking secrecy as a ground for refusing to co-operate in this context.

¹ Joint Action 98/699 JHA of 9.12.1998.

² 2001/500/JHA OJ L 182 of 5.7.2001 The Commission will produce an implementation report on this Framework Decision before end 2003 to enable the Council to assess to what extent the measures necessary to comply with the Framework Decision have been taken.

³ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council of Europe, November 1990

⁴ Council Act of 30th November 2000, OJ C 358 of 13.12.2000, p. 1.

⁵ OJ C 326 of 21.11.2001, p. 1.

The draft Framework Decision on Confiscation of Crime-related Proceeds Instrumentalities and Property⁶, received political agreement at the Justice and Home Affairs Council of 19 December 2002. The proposal aims to ensure effective rules governing the confiscation of proceeds of crime including in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. The Framework Decision on the execution of orders freezing property or evidence⁷ establishes the rules for recognition and execution of freezing orders issued by the judicial authorities of a Member State in the framework of criminal proceedings. A draft framework decision which received political agreement at the 29th April Justice and Home Affairs Council, establishes a similar approach in connection with the execution in the EU of confiscation orders.⁸ . The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (“the Convention”) was approved by the Committee of Ministers in September 1990 and was opened for signature in November of that year. It entered into force in September 1993 and all EU Member States are now party to the Convention. The Convention seeks to provide a set of rules covering law enforcement investigations leading to imposition and enforcement of confiscation sentences and to provide an effective mechanism of international co-operation to deprive criminals of the instruments and proceeds of their activity. The Convention has achieved recognition as one of the main international instruments in this area. However, due to significant developments which have emerged since 1990 in terms of understanding and addressing the money laundering threat, discussions began in 1998 about possible modifications to the Convention.

The Bureau of the European Committee on crime problems (CDPC) of the Council of Europe decided in November 2000 to set up a Reflection Group on the advisability of drawing up an Additional Protocol to the Convention. The Reflection Group was requested, among other things, to explore issues arising out of developments in the fight against money laundering since the Convention’s approval.

The Final Activity Report of the Reflection Group was submitted to the CDPC at its plenary meeting of June 2002. The Reflection Group concluded there were strong arguments in favour of comprehensively updating the Convention which could be modified by means of an “Additional Protocol to the Convention” (“the Additional Protocol”).

The Reflection Group’s Final Activity Report recommended that a modernised Convention should include a broad range of measures such as the identification, seizing and confiscation of criminal assets and international co-operation in criminal matters between law enforcement authorities.

⁶ OJ C 184 of 2.8.2002, p. 3.

⁷ 2003/577/JHA of 22 July 2003, OJ L 196 of 2.8.2003, p. 45.

⁸ 2002/C 184/05, OJ C 184 of 2.8.2002, p. 8.

Against the background of, on the one hand, the Draft Protocol and, on the other hand, EU legislation developed over the last years, EU Member States should follow a coherent and consistent strategy in the negotiations. Frictions, inconsistencies and contradictions between the intended Protocol and different political and legal instruments at EU level should be prevented. As far as an EU acquis has already been established in the area of fight against the financial aspects of organised crime and terrorism, it should not only be implemented in EU Member States but also considered as a guiding principle for negotiations at international level, in particular in a wider European context.

The proposal for a Common Position defining the approach of the Union to the particular matter is necessary.

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THE COUNCIL OF THE EUROPEAN UNION:

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

Having regard to the proposal of the Commission⁹,

Whereas:

- (1) The European Union regards the prevention of and fight against money laundering and terrorist financing as matters of fundamental importance to the establishment of an area of freedom, security and justice;
- (2) The principles and rules in European Union legislation on *inter alia* prevention of and fight against money laundering, the freezing of assets and the fight against terrorism as well as the Financial Action Task Force 40 Recommendations and 8 Special Recommendations relating to the financing of terrorism and other international legal instruments such as the United Nations Convention against Transnational Organised Crime and the United Nations Convention against Corruption, serve as a basis for the current negotiations on an Additional Protocol revising the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Convention") within the framework of the Council of Europe;
- (3) These negotiations will consider modifications of existing provisions of the Convention. In addition, consideration will be given to including measures on prevention of money laundering and financing of terrorism pursuant to the Committee of Experts revised Terms of Reference following the 53rd Plenary Session of the European Committee on Crime Problems;
- (4) The Convention is considered to be an *acquis* of the Union;
- (5) There is a need to co-ordinate the position of the Union in the ongoing negotiations, with a view to achieving an optimum result in the negotiation of an Additional Protocol to the Convention;

⁹ OJ C [...] [...], p. [...]

- (6) The Union, in pursuing its objectives, must at the same time ensure consistency with specific commitments entered into as regards the international community and overall external policy as well as internal decisions;
- (7) The Union desires to protect its interests and to avoid unnecessary incompatibility between European and international instruments drawn up in the Council of Europe or elsewhere,

HAS ADOPTED THIS COMMON POSITION:

Article 1

In the negotiations at the Council of Europe on the Additional Protocol to the 1990 Convention, the Council decides to uphold the following positions:

1. The Union supports the drafting of an Additional Protocol to revise the Convention, currently undertaken within the framework of the Council of Europe, and advocates the rapid completion of the Additional Protocol, in time for the Summit of Heads of State and Government of the Council of Europe in May 2005.
2. As regards terrorist financing, the Additional Protocol should ensure that the Convention's provisions on identification, seizing and confiscation of criminal assets and international co-operation in criminal matters between law enforcement authorities, apply equally to the fight against terrorist financing.
3. The Additional Protocol should address the need to enhance international co-operation in criminal matters regarding the provision of information on bank accounts held by any person who is the subject of a criminal investigation. This should extend to the provision of information on the particulars of specified bank accounts and of banking operations, including the monitoring of banking operations, relevant for the purpose of investigation into one or more offences.

Article 2

The provisions drawn up in the framework of the Council of Europe shall be compatible with instruments drawn up on the basis of Title VI of the EU Treaty.

Article 3

The acting Presidency of the Council, assisted by the Commission, shall, in the negotiations in the Council of Europe, co-ordinate positions of the Member States and seeks to arrive at common standpoints on all issues which fall under Title VI of the EU Treaty.

Article 4

The Member States shall also co-ordinate their positions with work in progress in other international fora, and in particular the FATF.

Article 5

The Presidency of the Council shall request the associated countries Romania, Bulgaria and Turkey and the EFTA countries to align themselves with this Common Position.

Article 6

This Common Position is without prejudice to the authorisation of the Commission to negotiate, on behalf of the European Community, those parts of the Convention, which are covered by Community law.

Article 7

This Common Position shall take effect from the date of its adoption.

Done at Brussels, [...]

*For the Council
The President*