Master's Program 2004/2005

European Judicial and Administrative Cooperation

Compendium

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Justice and home affairs: introduction

Over the last fifty years the Member States have increased cooperation in the field of justice and home affairs at various levels: bilaterally, regionally (within the Council of Europe , for example) and globally (thanks to Interpol and the United Nations). Cooperation within the European Union is a more recent development. Although the Treaty of 1957 establishing the European Community (EC Treaty) includes as one of its objectives the free movement of persons within the Community, it does not deal with the crossing of borders, immigration or visa policy. Freedom of movement was viewed in purely economic terms and concerned only workers. Beginning in the seventies, the desire to extend this freedom to everyone and the growing importance of certain problems, such as cross-border organised crime, drug trafficking , illegal immigration and terrorism, encouraged EU Member States to increase ad hoc cooperation in the field of justice and home affairs.

The origins of cooperation

The 1967 Naples Convention on cooperation and mutual assistance between customs administrations provided the first framework for exchanges between Member States. From 1975 onwards, intergovernmental cooperation slowly began to develop outside the Community's legal framework for dealing with immigration, the right of asylum and police and judicial cooperation. Informal arrangements were established for sharing experiences, exchanging information and expertise and setting up networks to facilitate contacts between Member States. With this aim in mind, working parties such as the Trevi Group were set up consisting of officials from the appropriate departments in the Member States. Although the original remit of the Trevi Group covered terrorism and internal security, its scope was extended in 1985 to cover illegal immigration and organised crime.

Meanwhile, beginning in 1984, the Ministers for Justice and Home Affairs were holding regular six-monthly meetings on specific subjects (such as police, judicial and customs cooperation or the free movement of persons).

From the Single Act to the Maastricht Treaty

In 1986 the Single Act marked a turning point in intergovernmental cooperation. Article 8a of the Act (renumbered Article 7a by the Maastricht Treaty and Article 14 by the Treaty of Amsterdam) provides for the creation of a single internal market based on four fundamental freedoms: the free movement of goods, capital, services and persons. The free movement of workers , particularly the right to reside in other Member States, was already well developed. The idea of freedom of movement for all (European citizens and non-European nationals), which entails the abolition of border controls, was more difficult to achieve because of reluctance on the part of some Member States. At the same time, the idea was born that the free movement of persons had to be accompanied by

compensatory measures, such as the strengthening of external border controls and the definition of European asylum and immigration policies.

Following on from the Single Act and as the need arose, the Member States set up new working parties, which were still outside the Community framework. These included the *ad hoc* immigration group in 1986, the European Committee to Combat Drugs (CELAD) in 1989 and the Mutual Assistance Group (MAG), which was set up to deal with customs matters. The structure of these groups reflected the developments brought about by the Single Act. They now included observers from the European Commission and some located their offices on Council premises.

Since progress on the free movement of persons and on cooperation in the field of justice and home affairs was proving difficult to achieve within the Community framework, France, Germany and the Benelux countries concluded an agreement in this area at Schengen in 1985, together with an implementing convention, which was signed in 1990. The aim was to make it easier to abolish internal border checks while improving controls at external borders and to harmonise arrangements relating to visas, asylum and police and judicial cooperation.

While this cooperation has enabled some Member States to forge ahead, this intergovernmental approach raises certain problems, which observers have been careful to point out. Firstly, it is difficult to coordinate the activities of the working parties. The various groups set up over the years deliberate separately and report to different groups of ministers, so that sometimes work is duplicated. Moreover, by the very nature of such cooperation, neither the European Parliament nor the national parliaments can control measures taken in this way. The instruments employed are those of traditional intergovernmental cooperation: agreements and the drafting of resolutions, conclusions and recommendations.

To improve the effectiveness of cooperation in the field of justice and home affairs and to ensure more democratic control, the working parties needed to be brought under one umbrella within the legal framework of the European Union.

Title VI of the Treaty on European Union

The 1993 Union Treaty (TEU) provided a new basis for collaboration between all the Member States in the field of justice and home affairs by adding a third pillar to the structure of the Community (which was also known as Title VI of the TEU, from Articles 29 to 42). The new form of cooperation covered nine areas considered to be of common interest: asylum policy; the crossing of external borders; immigration; combating drug addiction; combating international fraud; judicial cooperation in civil matters ; judicial cooperation in criminal matters; customs cooperation; police cooperation. It incorporated the existing working parties into a complex five-tier structure: specific working parties, steering committees, a Coordinating Committee set up under Article 36 of the Union Treaty, the Committee of Permanent Representatives and the Council of Ministers for Justice and Home Affairs. The Schengen arrangements were kept on the back burner, to a certain extent, as not all the Member States accepted their objectives.

The third pillar's decision-taking mechanisms, which were based on those of the Common Foreign and Security Policy , very quickly created problems. Firstly, the distinction between the provisions contained in the EC Treaty and those in the EU Treaty was often blurred. For example, the matters of common interest under the third pillar include the rules governing the crossing of the Member States' external borders and the fight against drug addiction, while Article 100c of the EC Treaty already lays down measures concerning visa policy and Article 152 (ex-article 129) of the EC Treaty (which relates to health) contains provisions intended to combat drug addiction. Demarcation problems thus arise, which are not conducive to taking action or decisions.

Title VI of the EU Treaty established three legal instruments: joint positions, joint actions and conventions. Joint positions set out the Union's approach towards a particular question (the first joint position adopted by the European Union related to the definition of the term refugee as used in the 1951 Geneva Convention and ensured that the same criteria were applied in all the Member States). Joint actions are employed when "the objectives of the Union can be attained better by joint action than by the Member States acting individually". This enabled a number of programmes to be adopted to further cooperation between police forces, justice departments and customs offices, together with annual arrangements for the intake of refugees. The legal scope of these two novel instruments is unclear, however, and some Member States do not consider them binding. Use of instruments with no legal effect and for which there is no provision in the Treaties (such as resolutions, recommendations or declarations) is also to the detriment of the three main instruments for which Title VI of the EU Treaty provides. The third instrument, the convention, is a classic instrument of international law, but adoption and implementation take a very long time. For example, although the European Police Office (Europol) was first conceived of by the Luxembourg European Council in June 1991, the convention setting up Europol was not signed until July 1995; it entered into force on 1 October 1998 and has been implemented only since 1 July 1999. This means that the authorities had to wait eight years for this coordinating instrument, which is an essential tool in the fight against organised crime in Europe.

Seen from an institutional perspective, the third pillar as constructed by the Maastricht Treaty gives the Community institutions only a limited role and no real opportunity to control decisions taken by the Member States. Some of the most frequently mentioned problems are:

- the limitations on legal control by the Court of Justice, which is permitted to interpret conventions and resolve disputes between Member States only where the possibility is expressly provided for in the text;
- the lack of information reaching the European Parliament, which, under the terms of the Treaty, should be consulted by the Council but is usually informed after the event and is therefore unable to express an opinion on discussions while they are taking place;
- the European Commission's right of initiative is limited to six of the nine areas covered by Title VI of the EU Treaty and is shared with the Member States (the Member States alone can initiate measures in relation to judicial cooperation in criminal, police and customs matters);
- the Council's decisions must be unanimous, which often paralyses decision-taking.

These difficulties facing cooperation in justice and home affairs explain the requests made and criticisms voiced by the Commission, Parliament and other bodies at the discussions held before and during the 1996-97 Intergovernmental Conference which produced the Treaty of Amsterdam.

The amendments made by the Treaty of Amsterdam

The Treaty of Amsterdam changed the nature of cooperation in the field of justice and home affairs by defining the area of freedom, security and justice in more ambitious and more precise terms, by improving its effectiveness, by making it more democratic and by establishing a better balance between the roles of the various institutions. The aim is to establish the free movement of European Union citizens and non-EU nationals throughout the Union within the next five years, while guaranteeing public security by combating all forms of organised crime (trafficking in human beings, sexual exploitation of children, vehicle, arms and drug trafficking, corruption, fraud) and terrorism.

The matters of common interest listed in the Treaty on European Union have been increased in number and divided into two categories. A new Title has been inserted in the EC Treaty entitled "Visas, asylum, immigration and other policies related to the free movement of persons". It covers measures concerning

external border controls, asylum, immigration and judicial cooperation in civil matters, bringing these areas under the first pillar, where they can be the subject of Community directives, regulations, decisions, recommendations and opinions. For the first five years after the Treaty of Amsterdam's entry into force, however, they will be only partly under the Community umbrella, as the Commission continues to share its right of initiative with the Member States, Council decisions still have to be unanimous and the European Parliament is still not directly involved in decision-making (it is simply consulted).

Police and judicial cooperation continue to fall under the reshaped third pillar, to which the Treaty of Amsterdam has added the prevention and combating of racism and xenophobia . Some changes have been made with regard to decision-taking. Joint actions have been replaced by the framework decisions and decisions, which are legal instruments similar in spirit to directives and the corresponding implementing measures. Moreover, all conventions may enter into force once they have been ratified by half of the signatory Member States, which speeds up the process (Article 34 of the EU Treaty). The Commission, together with the Member States, has a right of initiative that has been extended to cover all areas under the third pillar and the procedure for consulting Parliament has been clarified.

The area of freedom, security and justice enables the Schengen agreements to be brought within the framework of the Union; the measures already taken under these agreements have been added to the established body of EU law either in Title IV of the EC Treaty or in Title VI of the EU Treaty in accordance with a decision taken by the Council of Ministers. All initiatives relating to justice and home affairs are now a matter for the EU, which should make it easier to develop clear and consistent European policies. To avoid the repetition of exclusive intergovernmental collaboration on the lines of Schengen, Title VI of the EU Treaty now provides that Member States intending to establish closer cooperation between themselves may be authorised to do so within the EU framework.

The United Kingdom, Ireland and Denmark indicated in various protocols to the Treaty of Amsterdam that they do not wish to participate fully in all the measures relating to the area of freedom, security and justice. Subsequently, during 2000 and 2001 the United Kingdom and Ireland asked to participate in certain Schengen provisions. The Council issued a positive decision in both cases.

Closer cooperation between police forces and judicial authorities on crime

Introduced by the Treaty of Amsterdam, closer cooperation enables the most ambitious Member States to work together more intensively while also leaving the door open to the other Member States. Those Member States wishing to establish closer cooperation can use the institutions, procedures and mechanisms provided for by the Union Treaty and the EC Treaty. The conditions governing closer cooperation between police forces and judicial authorities on crime, and the related procedures are derived from Article 11 of the EC Treaty, read in conjunction with Articles 40, 43, 44 and 45 of the Union Treaty.

In addition to ensuring that the conditions set out in Article 11 of the EC Treaty are complied with, closer cooperation must:

- help to develop an area of freedom, security and justice;
- involve at least a majority of Member States;
- only be used as a last resort;
- be open to all the Member States and allow them to participate at any time.

It is established by the Council, acting on a qualified majority basis, at the request of the Member States following a Commission opinion and transmission of the request to the European Parliament.

The Nice Treaty reviewed the provisions on closer cooperation (minimum number of participating Member States, abolition of the "veto" for each Member States, etc.). The new Article 43 of the Union Treaty consolidates all the relevant conditions, which were previously divided between Article 11 of the EC Treaty and the former Article 43 of the Union Treaty.

The Council and the Commission are no longer required to inform the European Parliament of the development of closer cooperation but they do have to ensure the coherence of actions undertaken (new Article 45 of the Union Treaty). Articles 43a and 43b set out the conditions laid down in the former Article 43.

For further information on closer cooperation, please see the comprehensive guide to the Treaty of Amsterdam .

In July 1998 the European Commission published a communication on the area of freedom, security and justice setting out the basis, form and main objectives. In December 1998 a Council and Commission action plan provided a detailed list of objectives to be achieved in the medium term (two years) and the long term (five years), together with a list of measures to be adopted to attain these goals.

The Vienna European Council of 11-12 December 1998 endorsed the Council and Commission action plan and stressed the need for a European law-enforcement area, improved cooperation between national judicial and police authorities, a more effective Europol and an overall strategy on migration, asylum and the reception of refugees. The Heads of State and Government welcomed the setting-up of the high-level group on asylum and immigration within the Council and the idea of incorporating Schengen into the Union was also discussed.

At the Cologne European Council of 3-4 June 1999, it was decided to draw up a Charter of Fundamental Rights of EU citizens by December 2000. An agreement on the composition, method of work and practical arrangements for the body entrusted with drawing up this charter was approved at the extraordinary meeting of the European Council held at Tampere (Finland) on 15-16 October 1999. On 7 December 2000, during the Nice Intergovernmental Conference, the Presidents of the European Parliament, the Council and the Commission signed and solemnly proclaimed the Charter on behalf of the three institutions.

Tampere

The Tampere summit, devoted to the creation of an area of freedom, security and justice, considered that the establishment of such an area was as important as the establishment of the single market in its day. The Heads of State and Government thus invited the Commission to produce a " scoreboard " listing all the measures to be taken in the next five years and keeping progress under review. The aim is to develop an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and to improve European citizens' access to justice throughout the Union.

The amendments made by the Nice Treaty

At the Intergovernmental Conference held in Nice on 7 and 8 December 2000, the Member States decided to indicate the tasks carried out by Eurojust in Article 31 of the Union Treaty. A Commission proposal to include a reference to the European public prosecutor was discarded. As regards Title IV of the EC Treaty (visas, asylum immigration and other policies related to free movement of persons), the Member States decided that most of those areas would no longer require unanimity but would be subject to the codecision procedure (Article 251 of the EC Treaty). However, the transition to the codecision procedure has been deferred and made subject to certain conditions.

Certain decisions on immigration will be taken under the codecision procedure as from 1 May 2004, whereas in the area of asylum policy the transition is subject to the *sine qua non* condition that the Council has previously adopted common rules and basic principles governing these issues.

As regards judicial cooperation on civil matters, the Nice Treaty provides for the transition to the codecision procedure as soon as it enters into force, with the exception of family law.

The Laeken European Council

Since the 1999 Tampere European Council, the Member States have stated on several occasions that the principle of mutual recognition must be the cornerstone of a European area of freedom, security and justice. To an extent, the terrorist attacks of 11 September 2001 in the United States accelerated the decision-making process in the European Union. At the meetings held in the wake of the attacks (extraordinary JHA Council of 20 September 2001, extraordinary meeting of the European Council in Brussels on 21 September 2001), the Member States undertook to take decisive action against increasingly transnational organised crime.

The Laeken European Council provided an opportunity to assess the progress made and to discuss key issues such as Eurojust , the European arrest warrant and the framework decision on combating terrorism .

In view of the forthcoming enlargement , cooperation in the field of justice and home affairs has assumed ever greater importance in Europe.

See the following sites for further information:

- Justice and Home Affairs Directorate-General;
- European Council on justice and home affairs;
- Nice Treaty ;
- Laeken European Council.

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Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998

ACTION PLAN OF THE COUNCIL AND THE COMMISSION ON HOW BEST TO IMPLEMENT THE PROVISIONS OF THE TREATY OF AMSTERDAM ON AN AREA OF FREEDOM, SECURITY AND JUSTICE Text adopted by the Justice and Home Affairs Council of 3 December 1998 (1999/C 19/01)

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PART I

INTRODUCTION

1. The European Council, meeting at Cardiff called on the Council and the Commission to submit at its meeting in Vienna an action plan on 'how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice`.

Heads of State or Government at Pörtschach further confirmed the importance they attach to this subject by agreeing to hold a special European Council in Tampere in October 1999.

Under the Amsterdam Treaty, the areas of visa, asylum, immigration and other policies related to free movement of persons, like judicial cooperation in civil matters, are transferred from the EU's third pillar to its first pillar (albeit not all of the first pillar procedures will be applicable), whereas provisions on police and judicial cooperation in criminal matters contained in the new Title VI of the Treaty on European Union remain within the EU's third pillar. In addition to these changes in responsibilities, the Amsterdam Treaty also lays down the broad lines of action in the areas currently assigned to the third pillar.

2. When the Cardiff European Council called on the Council and the Commission to present the action plan, it clearly indicated its view that those provisions offer new opportunities to tackle an area of major public concern and thus to bring the European Union closer to the people.

3. Without underestimating what has already been achieved in this area under the EC Treaty, under

the Title VI provisions of the Maastricht Treaty and within Schengen, it is worth recalling the reasons why the new provisions adopted in Amsterdam open up improved possibilities. First, the objective of maintaining and developing the Union as an area of freedom, security and justice is asserted and the various aspects involved are reviewed. Secondly, the Union has been given the necessary framework in which to accommodate it and the instruments required have been strengthened and at the same time, thanks to the enhanced role foreseen for the European Court of Justice and the European Parliament, made subject to tighter judicial and democratic review. The Community method is extended: several of the areas of the current third pillar are brought under Community arrangements and restrictions which used to apply to the Community institutions in the areas of police and criminal justice cooperation have been lifted. Access to the Community budget has been made less cumbersome. Finally, the integration of Schengen recognises the efforts of the Member States which embarked on this cooperation and gives the Union a base on which to build further.

4. In drawing up this action plan, the Council and the Commission take as their starting point that one of the keys to its success lies in ensuring that the spirit of interinstitutional cooperation inherent in the Amsterdam Treaty is translated into reality. This applies in particular to the new responsibilities, including an extended right of initiative, which Amsterdam bestows on the Commission. What is important is not so much where the right of initiative lies, be it shared or exclusive, as the way in which this right is exercised. In any case the Treaty provides that for the five years earmarked for the full attainment of the free movement of persons, the right of initiative will be shared between the Commission and the Member States for matters transferred to the Community framework.

5. Although any action plan drawn up must, in concrete terms, necessarily reflect the priorities and timetable set out in the Amsterdam Treaty itself, it needs to reflect also the general approach and philosophy inherent in the concept of an 'area of freedom, security and justice`. These three notions are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator 'people` and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action. It should be noted in this context that the Treaty establishing the European Communities (Article 61 (ex) Article 73(i)(a), makes a direct link between the measures establishing freedom of movement of persons and the specific measures seeking to combat and prevent crime (Article 31(e) of the Treaty on European Union), thus creating a conditional link between the two areas.

A. AN AREA OF FREEDOM

(a) A wider concept of freedom

6. Freedom in the sense of free movement of people within the European Union remains a fundamental objective of the Treaty, and one to which the flanking measures associated with the concepts of security and justice must make their essential contribution. The Schengen achievement has shown the way and provides the foundation on which to build. However, the Treaty of Amsterdam also opens the way to giving 'freedom` a meaning beyond free movement of people across internal borders. It is also freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom. Freedom must also be complemented by the full range of fundamental human rights, including protection from any form of discrimination as foreseen by Articles 12 and 13 of TEC and 6 of the TEU.

7. Another fundamental freedom deserving special attention in today's fast-developing information society is that of respect for privacy and in particular the protection of personal data. When,

in support of the development of police and judicial cooperation in criminal matters, personal data files are set up and information exchanged, it is indeed essential to strike the right balance between public security and the protection of individuals' privacy.

(b) Immigration and asylum policies

8. When looking at the priorities ahead, different considerations must apply to immigration policy on the one hand and asylum policy on the other. Future work in these areas will essentially be determined by the fact that the new Treaty itself contains an obligation to take action within five years in a wide range of immigration and asylum-related areas involving both substance and procedure. An impressive amount of work has already been carried out. However, the instruments adopted so far often suffer from two weaknesses: they are frequently based on 'soft law`, such as resolutions or recommendations that have no legally binding effect. And they do not have adequate monitoring arrangements. The commitment in the Amsterdam Treaty to use European Community instruments in the future provides the opportunity to correct where necessary these weaknesses. Particular priority needs to be attached to combating illegal immigration on the one hand, while on the other hand ensuring the integration and rights of those third country nationals legally present in the Union as well as the necessary protection for those in need of it even if they do not meet fully the criteria of the Geneva Convention.

B. AN AREA OF SECURITY

9. The full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure.

10. The agreed aim of the Treaty is not to create a European security area in the sense of a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters. Nor do the new provisions affect the exercise of the responsibilities incumbent on Member States to maintain law and order and safeguard internal security.

11. Amsterdam rather provides an institutional framework to develop common action among the Member States in the indissociable fields of police cooperation and judicial cooperation in criminal matters and thus not only to offer enhanced security to their citizens but also to defend the Union's interests, including its financial interests. The declared objective is to prevent and combat crime at the appropriate level, 'organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud`.

(a) Organised crime

12. The Union's response to the challenge posed by organised crime is contained in the action plan endorsed by the Amsterdam European Council, which foresees an integrated approach at each step on the continuum from prevention to repression and prosecution. Important progress has already been made, as the Cardiff European Council recognised, but even when the plan is fully implemented, the opportunities offered by Amsterdam to go further will have to be exploited.

(b) Drugs

13. Drugs deserve a particular mention. They constitute a threat to collective and individual security in numerous ways, often but not always linked to organised crime. It is an area to which Europe has brought a distinctive and influential approach through its insistence on a comprehensive policy based on shared responsibility between consumer and producer countries. Within that comprehensive framework, however, it is clear that a major component will be the mobilisation of the full weight which various law enforcement agencies can collectively bring to bear against the traffickers and

the criminal organisations which lie behind them. The Union's action plan against drugs for the period 2000 to 2004, currently under discussion in the Commission and the Council, will need to be drawn up and implemented in a way which fully exploits the possibilities of the new Treaty.

(c) Europol

14. The new Treaty recognises the essential and central role Europol will play, by requiring that a number of specific measures be adopted within five years of its entry into force. It provides in particular further coordination and support for operational tasks by Europol. It is therefore important to start to work on the implementation of these measures as soon as possible, now that the Europol Convention has at last been ratified by all Member States, so as to allow Europol to play fully its new role as an indispensable European cooperation tool. These developments should build on the 'acquis` of the Europol Drugs Unit which, as a precursor for the future Europol, has gained experience in areas like information exchange, technical and operational support, threat analyses and situation reports.

C. AN AREA OF JUSTICE

15. The new impetus and instruments introduced by Amsterdam provide the opportunity to examine what the area of 'justice` should seek to achieve, while respecting the reality that, for reasons deeply imbedded in history and tradition, judicial systems differ substantially between Member States. The ambition is to give citizens a common sense of justice throughout the Union. Justice must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full judicial cooperation among Member States. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union.

Both in civil and criminal matters speedy ratification and effective implementation of adopted conventions are crucial for achieving an area of Justice.

(a) Judicial cooperation in civil matters

16. Reinforcement of judicial cooperation in civil matters, which many believe has developed too slowly, represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every Union citizen. Law-abiding citizens have a right to look to the Union to simplify and facilitate the judicial environment in which they live in the European Union context. Here principles such as legal certainty and equal access to justice should be a main objective, implying identification of the competent jurisdiction, clear designation of the applicable law, availability of speedy and fair proceedings and effective enforcement procedures.

(b) Judicial cooperation in criminal matters

17. There is a clear need for improving and speeding up judicial cooperation in criminal matters both among Member States and with third countries, specially in view of intensified police cooperation. However effective it may be, judicial cooperation in criminal matters is hard pressed today to deal with phenomena such as organised crime, unless there is facilitation of procedures and where necessary approximation of legislation.

18. In concrete terms this means first of all that criminal behaviour should be approached in an equally efficient way throughout the Union: terrorism, corruption, traffic in human beings, organised crime, should be the subject of minimum common rules relating to the constituent elements of criminal acts, and should be pursued with the same vigour wherever they take place. If serious criminal conduct receives an equivalent response and procedural guarantees are comparable throughout the Union, the possibilities of improving coordination of prosecution, whenever greater efficiency can be reconciled with respect for individual rights, must be examined. This goes in particular

for policy areas where the Union has already developed common policies, and for policy areas with strong cross-border implications such as environmental crime, high-tech crime, corruption and fraud, money laundering, etc. According to the provisions of the Treaty of Amsterdam, the powers of Europol should be developed and the place and the role of judicial authorities in relation to Europol, either at the level of Member State or at the Union level, have to be examined.

(c) Procedures

19. Procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case. In principle, this function of adequate and comparable procedural guarantees is already achieved by the safeguards of the European Convention on Human Rights and Fundamental Freedoms and their dynamic interpretation by the European Court of Human Rights, in particular regarding the rights of the defence in criminal proceedings. It appears useful, however, to complement those basic principles by standards and codes of good practice in areas of transnational relevance and common concern (e.g. interpretation) which may also extend to certain parts of the enforcement of criminal decisions, including, for instance, confiscation of assets and to aspects of offender reintegration and victim support.

(d) Cross-border litigation

20. Difficulties with which citizens are intrinsically confronted in cross-border litigation, be it in civil or in criminal matters, should be neutralised as much as possible. This means, for example, streamlined communication of documents and information, use of multilingual forms, creation of mechanisms or networks to assist and advise in transnational cases and possible legal aid schemes in such cases.

D. ENLARGEMENT

21. There is an important link with the enlargement process, in particular with the preaccession strategy.

The countries applying for membership of the European Union are well aware that Justice and Home Affairs will have a special significance for their applications.

However, the JHA acquis is different in nature from other parts of the Union's acquis. Much still needs to be done and the acquis will therefore constantly develop over the preaccession years.

The adoption of the action plan will have the additional advantage of setting out for the benefit of the applicant countries a clear and comprehensive statement of the Union's priorities in this area.

E. RELATIONS WITH THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS

22. The advances introduced by the Amsterdam Treaty will also enhance the Union's role as a player and partner on the international stage, both bilaterally and in multilateral forums. As a result, and building on the dialogue that it has already started in Justice and Home Affairs cooperation with an increasing number of third countries and international organisations and bodies (e.g. Interpol, UNHCR, Council of Europe, G8 and the OECD), this external aspect of the Union's action can be expected to take on a new and more demanding dimension. Full use will need to be made of the new instruments available under the Treaty. In particular, the 'communautarisation` of the matters relating to asylum, immigration and judicial cooperation in civil matters permit the Community, to the extent permitted by the established case-law of the European Court of Justice related to the external competence of the Community, to exercise its influence internationally in these matters. In those subjects which remain in Title VI of the TEU, the Union can also make use of the possibility for the Council to conclude international agreements in matters relating to Title VI of the Treaty, as well as for the Presidency, assisted by the General Secretariat of the Council and in full

association with the Commission, to represent the Union in these areas.

F. STRUCTURE OF WORK IN THE FIELD OF JUSTICE AND HOME AFFAIRS

23. The new provisions of the Amsterdam Treaty as well as its Protocol integrating the Schengen acquis into the framework of the European Union, with their emphatically cross-pillar characteristic, will need to be reflected also in the working structures of the Council. It was clearly not the intention of the Treaty to compartmentalise the way in which the different components of this area of freedom, security and justice are handled as between the structures of the European Community on the one hand and the European Union on the other, particularly since in both cases the responsibility for taking the objective forward will fall irrespective whether they are first or third pillar competence, to the Council in its composition of Ministers for Justice and Home Affairs. It will therefore be essential to establish before the entry into force of the Treaty of Amsterdam for this purpose appropriate arrangements which both respect the provisions of the Treaty and facilitate the coordinating role of the Committee of Permanent Representatives.

It will also be important to establish the appropriate arrangement to cover the particular case of the Schengen information system in order to ensure smooth transition, with no reduction in the system's efficiency. A discussion could, also, be started in the medium term on the prospects for developing SIS II after it has been expanded.

Work on the necessary structural arrangements, including reflexions on the need for further coordination in the fields of migration and asylum as well as in the area of civil law by committees composed of high officials is already under way within the K4 Committee acting on the basis of Article K4(1) of the TEU.

This reform of the working structures should be based on the following principles: rationalisation and simplification (an appropriate number of working parties to meet the objectives laid down in the Treaty, no duplication), specialisation and responsibility (working parties to consist of experts having an adequate degree of responsibility in their Member States, appropriate allowance for operational structures - Europol, European judicial network), continuity (permanence of working parties to reflect the permanent objectives of the Treaty, mechanism for following-up all the instruments adopted), transparency (clarity of terms of reference and of relations between working parties) and flexibility (possibility of extremely short-term adjustment of structures to deal with new problems requiring urgent specific handling).

The entry into force of the Treaty of Amsterdam also raises a number of legal questions resulting from the transition of certain policies from the third pillar to the first pillar as well as from the transition to new forms of acts and procedures in the third pillar. This concerns, for example, the question of how to handle conventions in the field to be transferred to Community competence which will be signed but not yet ratified at the time of entry into force of the Treaty of Amsterdam.

PART II

PRIORITIES AND MEASURES

A. SELECTION CRITERIA FOR PRIORITIES

24. A number of principles have determined the way in which the Council and the Commission have identified, and intend to implement, the measures listed in this part:

(i) the Amsterdam Treaty itself has set out some clear guidance on the measures to which priority importance must be attached, particularly during the first five years after its entry into force.

The action plan must respect this guidance;

(ii) the principle of subsidiaritiy, which applies to all aspects of the Union's action, is of particular relevance to the creation of an area of freedom, security and justice;

(iii) the principle of solidarity among Member States and between them and the European institutions, should apply in facing the transnational challenges presented by organised crime and migration movements;

(iv) operational efficiency in implementing the legal framework established by the Treaty is no less important than the legislative framework itself. Measures taken shall meet factual needs and add value in this context, working methods which have proved already their worth, for example in the Schengen context, should find their place in the Union's action plan;

(v) responsibility for safeguarding of internal security rests with Member States. It is therefore important, when developing European cooperation, to take into account national interests and common approaches as well as differences;

(vi) a realistic approach requires, when selecting priorities, the resources and time available to be taken into account.

25. According to Article 2 of the TEU, the Union shall set itself the objective to maintain and develop an area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders, asylum, immigration and the prevention and combating of crime. The mutual interdependence between the different aspects of this overall objective is confirmed by Article 61(a) which mentions Article 31(e) of the TEU. It is therefore in the interest of as high level as possible of security for the public that some activities in one area be meshed in timing and substance with those in the other.

26. Integration of the Schengen acquis into the framework of the European Union will have as a consequence that as from the date of entry into force of the Treaty of Amsterdam the objectives of the Community as set out in the entire Article 62 of the TEC and to a large extent in Article 63(3)(b) of the TEC in their versions of the Treaty of Amsterdam will largely have been realised in respect of 10 Member States, and in respect of 13 Member States as from the date of the decision of the Council referred to in Article 2(2) of the Schengen Protocol. This is to say that much of the substantive work will have been done far in advance of the five years' time limit set by the Articles concerned. It would permit the Council to concentrate initially particularly on other objectives of the Community and the Union in the field of Justice and Home Affairs for the realisation of which a maximum time limit of five years has been determined (Article 63(1)) and (2)(a) of the TEC and Article 30(2) of the TEU, for example and to deal with matters which would require urgent handling or which become politically important.

In order to put the priorities listed in those Articles into practice, efforts will have to be made to adopt measures detailed in the following sections.

27. In the context of the Treaty requirements, account should also be taken of the position of the United Kingdom and Ireland under the Protocols to the Amsterdam Treaty and, in setting priorities, of existing plans and the need to continue taking forward present medium-term work programmes.

28. In establishing substantive and political priorities, first consideration has had to be given in particular to those projects on which work is already in hand at present or for which work is likely still to be in progress at the time of entry into force of the Amsterdam Treaty. It has basically been attempted here, in fully adjusting to the new environment, to ensure maximum continuity.

29. In legislative work, account has also had to be taken of the existing third-pillar acquis; making it necessary to decide which, if any, of the present provisions should be replaced by more

effective ones. Those classifiable as 'soft law` formed the prime candidates for this purpose.

30. The entry into force of the Treaty of Amsterdam is likely to have the effect of increasing the caseload of the European Court of Justice, whereas an area of freedom, security and justice precisely requires judicial proceedings to be as expedient as possible. It is therefore in the interest of both the Member States and the individuals concerned that priority be given to examining jointly with the Court all possible means to shorten the average length of procedures before the Court, in particular of requests for preliminary rulings under Title VI of the TEU and Title IV of the TEC.

31. The levels of priority set out below become effective, logically, on entry into force of the Amsterdam Treaty. The priority measures are to be found in two categories. On the one hand, the actions and measures for which it is important that they are implemented or adopted within two years from the entry into force of the Treaty of Amsterdam (hereinafter referred to as 'measures to be taken within two years`), and on the other hand the actions and measures which must be adopted or implemented within five years following the entry into force of the Treaty or, at least, to commence elaboration of the actions and measures in the area (hereinafter referred to as 'measures to be taken within five years`). However, a start may have to be made on many activities in the first level of priority without delay on adoption of this action plan as they require preparatory work, for example in technical working parties, which should if possible have been completed by the date of the entry into force. Such particularly urgent measures are specifically indicated below.

B. POLICIES RELATED TO FREE MOVEMENT OF PERSONS

I. Measures in the field of asylum, external borders and immigration

32. The objective is to introduce the area of freedom within the next five years. As a result, to ensure increased security for all European citizens, achieving this objective requires accompanying measures to be drawn up, particularly in the areas of external border controls and the combating of illegal immigration while full account is taken of the principles set out in Article 6 of the TEU and Articles 12 and 13 of the TEC. The HCR will be consulted on asylum issues when necessary.

33. The measures to be drawn up must take due account of the fact that the areas of asylum and immigration are separate and require separate approaches and solutions.

34. An overall migration strategy should be established in which a system of European solidarity should figure prominently. The experiences gained and progress achieved through cooperation in the Schengen framework should prove particularly pertinent as regards short-term residence (up to three months), the fight against illegal immigration as well as the controls at external borders.

An overall priority should be to improve the exchange of statistics and information on asylum and immigration. This exchange should include statistics on asylum and immigration, information on the status of third country nationals and national legislation and policy on the basis of the Commission's action plan.

35. In order to complete the area of free movement, it is crucial for there to be a swift and comprehensive extension of the principles of the free movement of persons in accordance with the protocol integrating the Schengen acquis into the framework of the EU.

Measures to be taken within two years

36. The following measures should be taken within two years after the entry into force of the Treaty:

(a) measures in the fields of asylum and immigration,

assessment of countries of origin in order to formulate a country specific integrated approach;

(b) measures in the field of asylum:

(i) effectiveness of the Dublin Convention: continued examination of the criteria and conditions for improving the implementation of the Convention and of the possible transformation of the legal basis to the system of Amsterdam (Article 63(1)(a) of the TEC).

A study should be undertaken to see to what extent the mechanism should be supplemented inter alia by provisions enabling the responsibility for dealing with the members of the same family to be conferred on one Member State where the application of the responsibility criteria would involve a number of States and by provisions whereby the question of protection when a refugee changes his country of residence can be resolved satisfactorily;

(ii) the implementation of Eurodac;

(iii) adoption of minimum standards on procedures in Member States for granting or withdrawing refugee status (Article 63(1)(d) of the TEC) with a view, inter alia, to reducing the duration of asylum procedures. In this context, a special attention shall be paid to the situation of children;

(iv) limit 'secondary movements` by asylum seekers between Member States;

(v) defining minimum standards on the reception of asylum seekers with a particular attention to the situation of children (Article 63(1)(b) of the TEC).

(vi) undertake a study with a view to establishing the merits of a single European asylum procedure;

(c) Measures in the field of immigration:

(i) instrument on the lawful status of legal immigrants;

(ii) establish a coherent EU policy on readmission and return;

(iii) combat illegal immigration (Article 63(3)(b) of the TEC) through, inter alia, information campaigns in transit countries and in the countries of origin.

In line with the priority to be given to controlling migration flows, practical proposals for combating illegal immigration more effectively need to be brought forward swiftly;

(d) Measures in the fields of external borders and free movement of persons:

(i) procedure and conditions for issuing visas by Member States (resources, guarantees of repatriation or accident and health cover) as well as the drawing up of a list of countries whose nationals are subject to an airport transit visa requirement (abolition of the current grey list);

(ii) define the rules on a uniform visa (Article 62(iv) of the TEC);

(iii) draw up a regulation on countries:

- whose nationals are exempt from any visa requirement in the Member States of the European Union,
- whose nationals are subject to a visa requirement in the Member States of the European Union (Article 62(2)(b)(i) of the TEC);

(iv) further harmonising Member States' laws on carriers' liability.

Measures to be taken as quickly as possible in accordance with the provisions of the Treaty of Amsterdam

37. (a) Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin (Article 63(2)(a) of the TEC).

(b) Promoting a balance of effort between Member States in receiving and bearing the consequences

of receiving displaced persons (Article 63(2)(b) of the TEC).

Measures to be taken within five years

38. The following measures should be taken within five years of the entry into force of the Treaty:

(a) measures in the fields of asylum and immigration:

identification and implementation of the measures listed in the European migration strategy;

(b) Measures in the field of asylum:

(i) adoption of minimum standards with respect to the qualification of nationals of third countries as refugees,

(ii) defining minimum standards for subsidiary protection to persons in need of international protection (Article 63(2)(a) second part);

(c) Measures in the field of immigration:

(i) improvement of the possibilities for the removal of persons who have been refused the right to stay through improved EU coordination implementation or readmission clauses and development of European official (Embassy) reports on the situation in countries of origin,

(ii) preparation of rules on the conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purposes of family reunion (Article 63(3)(a) of the TEC).

The question of giving third-country nationals holding residence permits the freedom to settle in any Member State of the Union will shortly be discussed by the relevant working party,

(iii) determination of the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States (Article 63(4) of the TEC).

Within the competent Council bodies discussions could be held, taking account of the consequences for social equilibrium and the labour market, on the conditions under which, like Community nationals and their families, third country nationals could be allowed to settle and work in any Member State of the Union;

in these two last fields, although the Amsterdam Treaty does not request action to be accomplished in a five year period, efforts should be made towards an improvement of the situation in due time;

(d) Measures in the fields of external borders and free movement of persons:

(i) extension of the Schengen representation mechanisms with regard to visas:

a discussion could be initiated on the possibility of establishing an arrangement between the Member States, which will improve the possibility of preventing visa applicants from abusing the foreign representations of one or more Member States in order to gain access to another Member State, which at time of application was the actual intended country of destination,

(ii) attention will be given to new technical developments in order to ensure as appropriate, an even better security of the uniform format for visas (sticker).

II. Judicial cooperation in civil matters

39. The aim is to make life simpler for European citizens by improving and simplifying the rules and procedures on cooperation and communication between authorities and on enforcing decisions, by promoting the compatibility of conflict of law rules and on jurisdiction and by eliminating obstacles

to the good functioning of civil proceedings in a European judicial area. It will be necessary to improve the coordination of Europe's courts and the awareness of Member States' laws, particularly in cases with important human dimensions, having an impact on the everyday life of the citizens.

Measures to be taken within two years

40. The following measures should be taken within two years after the entry into force of the Treaty:

(a) finalisation, if it has not been completed, of work on the revision of the Brussels and Lugano Conventions,

(b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome I),

(c) begin revision, where necessary, of certain provisions of the Convention on the Law applicable to contractual obligations, taking into account special provisions on conflict of law rules in other Community instruments (Rome I),

(d) examine the possibility of extending the concept of the European judicial network in criminal matters to embrace civil proceedings.

Highly individualised contact points in each Member State could permit greater awareness of Member States' laws and ensure better coordination of proceedings in cases with important human dimensions (crossborder parental disputes, for example).

Measures to be taken within five years

41. The following measures should be taken within five years after the entry into force of the Treaty:

(a) examine the possibilities to draw up a legal instrument on the law applicable to divorce (Rome III):

After the first step on divorce matters taken with Brussels II in the field of jurisdiction and the recognition and enforcement of judgments, the possibilities to agree on rules determining the law applicable in order to prevent forum shopping needs to be explored on the basis of an in-depth study,

(b) examine the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined,

(c) examine the possibility of drawing up a legal instruments on international jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes and those relating to succession.

In elaborating such instruments, the connection between matrimonial property and rules relating to succession should be taken into account. Work already undertaken within the framework of the Hague Conference of Private International Law should be taken into account,

(d) identifying the rules on civil procedure having cross-border implications which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and examine the elaboration of additional measures accordingly to improve compatibility of civil procedures.

This could include the examination of the rules on deposition of security for litigation costs and expenses of the defendant in a civil procedure, the granting of legal aid as well as other possible obstacles of an economic nature,

(e) improving and simplifying cooperation between courts in the taking of evidence,

(f) examine the possibility of approximating certain areas of civil law, such as creating uniform private international law applicable to the acquisition in good faith of corporal movables.

C. POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

42. The aim is to give citizens a high level of protection as provided for in the Treaty of Amsterdam and to promote the rule of law. This implies greater cooperation between the authorities responsible for applying the law with due regard for legal certainty. It also implies giving practical form to a judicial area in which judicial authorities cooperate more effectively, more quickly and more flexibly. Encourage an integrated approach, through close cooperation, of judicial, police and other relevant authorities in preventing and combating crime, organised or otherwise.

Measures to be taken within two years

I. Police cooperation

43. The following measures should be taken within two years after the entry into force of the Treaty:

1. as regards Europol cooperation:

(a) improve Europol cooperation in the following areas:

(i) examine the feasibility of setting up a database of pending investigations, within the framework of the provisions of the Europol Convention, allowing the avoidance of any overlap between investigations and the involvement of several European competent authorities in the same investigation, thus combining their knowledge and expertise,

(ii) direct Europol's documentary work towards operational activity.

Wherever possible, its analyses should lead to operational conclusions,

(iii) make the fight against illegal immigration networks one of the priorities of operational cooperation, particularly by using the national units as a network of national contact points responsible for dealing with them,

(iv) combat terrorism: reinforce exchanges of information and the coordination of competent authorities of Member States in the fight against crimes committed or likely to be committed in the course of terrorist activities, using Europol in particular,

(v) extend the competencies of Europol to other activities, as necessary (e.g. falsification of euro and other means of payments);

(b) draw up an adequate legal instrument extending Europol's powers to the activities referred to in Article 30(2) of the TEU and focusing Europol's work on operational cooperation. An important subject is the place and the role of judicial authorities in their relations with Europol.

One of the priorities stated by the Treaty is to determine the nature and scope of the operational powers of Europol, which will have to be able to 'ask the competent authorities of the Member States to conduct and coordinate [their] investigations` and also to act within the framework of 'operational actions of joint teams`,

(c) examine Europol access to SIS or EIS investigation data,

(d) develop the role for Europol concerning the exchange of information in order to implement the Preaccession pact on organised crime;

2. other police cooperation measures:

44. the other police and customs cooperation measures comprise:

(a) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime (Article 30(1)(d) of the TEU);

(b) consideration of the arrangements under which a law enforcement service from one Member State could operate in the territory of another (Article 32 of the TEU) taking into consideration the Schengen acquis.

Consideration should be given to two points in particular:

- the determination of the conditions and limitations under which the competent law enforcement authorities of one Member State may operate in the territory of another Member State, in liaison and in agreement with the latter,
- in return, what types of operation, and under what arrangements, is each Member State willing to accept in its own territory?

The creation of a collective framework for this type of operation is one of the priorities of police cooperation. This framework can be a flexible one;

(c) the development and expansion of operational cooperation between law enforcement services in the Union and the strengthening of technical police cooperation.

The joint action carried out in particular by the Member States' customs administrations should be used where appropriate as a model and should be expanded in cooperation with national police forces and gendarmeries and in close conjunction with the judicial authorities. In the medium term, Europol could serve as a backup for these future initiatives, which it will be possible to activate under what the Amsterdam Treaty has established as 'decisions for any other purpose consistent with` the objectives of Title VI of the TEU;

(d) the development of the annual report on organised crime with a view to defining common strategies.

Harmonisation of the analysis parameters will have to be ensured so that the data collected can be compared;

(e) in the field of customs law enforcement cooperation, the implementation of the CIS and Naples II Conventions.

Europol's powers must be taken into account when points (a) to (e) are implemented.

II. Judicial cooperation in criminal matters

45. The following measures should be taken within two years after the entry into force of the Treaty:

(a) implement effectively and, where appropriate, further develop the European judicial network:

The effective implementation of the European judicial network is a priority matter. It will bring about a practical improvement in cooperation and needs to be equipped with modern tools to enable efficient cooperation. Consideration ought to be given now to making it more operational;

(b) finalise the Convention on Mutual Assistance in Criminal Matters as well as an additional Protocol to the Convention and implement them as soon as possible.

The possibility should be examined to foresee the simplification of the procedures and the limitation of ground for refusal of assistance;

(c) facilitate extradition between Member States by ensuring that the two existing conventions on extradition adopted under the TEU are effectively implemented in law and in practice;

(d) strengthen and develop fight against money laundering;

(e) facilitate and accelerate cross-border cooperation between the competent ministries and judicial or equivalent authorities of the Member States;

(f) initiate a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters;

(g) examine the role and the place of the judicial authorities in the framework of a further development of Europol in accordance with the Amsterdam Treaty, with a view to improving the efficiency of the institution;

(h) consideration of the arrangements under which judicial or equivalent authorities from one Member State may operate in the territory of another Member State (Article 32 of the TEU).

Consideration should be given to two points in particular:

- the determination of the conditions and limitations under which the competent judicial and/or prosecutorial authorities of one Member State may operate in the territory of another Member State, in liaison and in agreement with the latter,
- in return, what types of operation, and under what arrangements, is each Member State willing to accept in its own territory?

The creation of a collective framework for this type of operation is one of the priorities of judicial cooperation. This framework could be a flexible one.

III. Approximate the Member States' rules on criminal matters

46. The following measures should be taken within two years of the entry into force of the Treaty:

(a) identify the behaviour in the field of organised crime, terrorism and drug trafficking, for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly.

Prime candidates for this examination could include, in so far as they relate to organised crime, terrorism and drug trafficking, offenses such as trafficking in human beings and sexual exploitation of children, offences against drug trafficking law, corruption, computer fraud, offences committed by terrorists, offences committed against the environment, offences committed by means of the internet and money laundering in connection with those forms of crime. Parallel work in international organisations like the Council of Europe have to be taken into consideration;

(b) examine the possibility to approximate, where necessary, national legislation on counterfeiting (protection of the euro), fraud and counterfeiting involving means of payment other than currency.

IV. Horizontal problems

47. The following measures should be taken within two years of the entry into force of the Treaty:

(a) examine the possibilities for harmonised rules on data protection,

(b) finalise, if it has not been completed, evaluate the implementation and consider a follow up to the plan of action on organised crime, approved by the European Council at Amsterdam,

(c) continue the process of mutual evaluation under the Joint Action adopted by the Council on 5 December 1997,

(d) continue and develop the work started under the action plan on organised crime on the question of safe havens and fiscal paradises.

Measures to be taken within five years

I. Police cooperation

48. The following measures should be taken within five years after the entry into force of the Treaty:

(a) as regards cooperation within the framework of Europol:

(i) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol (Article 30(2)(c) of the TEU),

(ii) establish a research and documentation network on cross-border crime (Article 30(2)(d) of the TEU),

(iii) improve the statistics on cross-border crime (Article 30(2)(d) of the TEU),

(iv) set up a system for the exchange of information and analysis on money laundering,

(v) examine whether and how Europol could have access to the Customs Information System,

(vi) in cooperation with Europol, elaborate and implement an information strategy in order to make the work and powers of Europol known to the public,

(vii) study the possibility of setting up a system of exchanging fingerprints electronically between Member States;

(b) other police cooperation measures

(i) encourage general policy and operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services and the judicial authorities of the Member States in relation to the prevention, detection and investigation of criminal offences (Article 30(1)(a) of the TEU).

In this context it would be useful to develop and enhance existing bilateral and regional cross-border cooperation, for instance by continuing and extending on a similar basis the experiments with joint police stations.

It would also be desirable to continue the development of customs risk analysis techniques and the improvement of customs control methods such as the implementation of the container control action plan and to consider the new avenues where there is a possibility for fraud, such as internet,

(ii) organise the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subjet to appropriate provisions on the protection of personal data (Article 30(1)(b) of the TEU),

(iii) promote cooperation and joint initiatives in training, the exchange of liaison officers, secondment, the use of equipment, and forensic research (Article 30(1)(c) of the TEU).

II. Judicial cooperation in criminal matters

49. The following measures should be taken within five years of the entry into force of the Treaty:

(a) consider whether substantive and formal improvements can still be made to extradition procedures including rules to reduce delays.

The issue of extradition in relation to procedures in absentia, with the full respect of fundamental rights granted by the European Convention of Human Rights, might also be examined in this context,

(b) further facilitate cross-border cooperation between ministries and judicial authorities in the field of criminal proceedings,

(c) examine the feasibility of improved cross-border cooperation on the transfer of proceedings and the enforcement of sentences,

(d) study the feasibility of extending and possibly formalising the exchange of information on criminal records,

(e) prevent conflicts of jurisdiction between Member States, by, for instance, examining the possibility of registering whether there are proceedings against the same persons on the same offences pending in different Member States.

Establish measures for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the ne bis in idem principle.

III. Approximation of the rules on criminal matters

50. The following measures should be taken within five years of the entry into force of the Treaty:

(a) ensure compatibility of the rules applicable between Member States in so far as necessary to improve judicial cooperation. A reflection should also be started on possibilities for avoiding that abuse of judicial remedies can affect or delay cooperation.

Efficient procedural standards should be sought that will improve mutual assistance in criminal matters while complying with the requirements of fundamental freedoms. Consideration should begin in the field of telecommunication interception and also on civil actions relating to criminal offences. In that connection, compensation for the victims of crime must be an avenue not to be neglected,

(b) improve and approximate, where necessary, national provisions governing seizures and confiscation of the proceeds from crime, taking account of the rights of third parties in bona fide,

(c) continued elaboration of measures establishing minimum rules relating to the constituent elements of behaviour and to penalties in all fields of organised crime, terrorism and drug trafficking.

IV. Horizontal problems

51. The following measures should be taken within five years of the entry into force of the Treaty:

(a) identify which specific forms of crime which can be best combated by a general EU approach, such as computer crime, in particular child pornography on the Internet, racism and xenophobia, drug trafficking and the approximation of offences in that area, taking into account work in other international organisations,

(b) develop cooperation and concerted measures on matters relating to crime prevention,

(c) address the question of victim support by making a comparative survey of victim compensation schemes and assess the feasibility of taking action within the Union,

(d) effectively implement the Preaccession Pact on Organised Crime.

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The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium

The Prevention and Control of Organised Crime:

A European Union Strategy for the beginning of the new Millennium

(2000/C 124/01)

The Amsterdam European Council, meeting on 16 and 17 June 1997, approved an action plan to combat organised crime.

During the brief period the action plan has been in force, substantial progress has been achieved in developing and implementing measures designed to prevent and control organised crime against the European Union and its Member States. Examples of this progress are that a mutual evaluation mechanism has been established to identify problems in implementation of measures and a first round of evaluation has been successfully launched, a European Judical Network, equipped with a telecommunications network, has begun to work to streamline international cooperation, a contact and support network has been established to further improve the annual situation reports on organised crime, joint actions have been adopted on the Falcone programme, on money laundering and asset tracing, on the criminalisation of participation in a criminal organisation and on best practices in mutual assistance, a pre-accession pact has been developed with the candidate countries, and further measures have been identified in respect of, for example, prevention of organised crime and the European Union strategy against high-tech crime. The Union has made its voice heard in the negotiations at the UN on the draft Convention on Transnational Organised Crime and in the Council of Europe on the draft Cyber-Crime Convention.

This substantial progress has to a large extent been due to the specificity of, and timetables contained in, the action plan. The strong consensus reached by Member States on the plan of action helped to create the political and professional climate required at both EU level and national level to take and implement the necessary decisions. National experts attached to the Council Secretariat contributed significantly to the implementation.

The Vienna European Council in December 1998 called for a strengthening of EU action against organised crime in the light of the new possibilities opened by the Amsterdam Treaty. Paragraph 47 of the 1998 Action Plan adopted by the Vienna European Council calls for finalisation of the 1997 action plan, evaluation of its implementation and consideration of a follow-up.

Paragraph 43 and the following paragraphs of the 1998 Action Plan provide some additional elements which have a direct bearing on an EU strategy against organised crime. Further elements are contained in the Council resolution on 21 December 1998 on the prevention of organised crime, or have been brought by other developments (for example the recommendations emerging in connection with the work on the annual situation reports, and the work on joint positions on the proposed UN Convention against Transnational Organised Crime and its Protocols, and on the proposed Council of Europe Cyber-Crime Convention).

The Tampere European Council, meeting on 15 and 16 October 1999, noted that people have the right to expect the European Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the European Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the European Union (Presidency Conclusion No 6.) The Tampere European Council further noted that it was deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient

and comprehensive approach in the fight against all forms of crime. A balanced development of European Unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators (Presidency Conclusion No 40).

The Tampere European Council established milestones for the creation of an area of freedom, security and justice in the European Union. One of the three main issues covered was the European Unionwide fight against crime. A number of the conclusions have a direct impact on further work on the prevention and control of organised crime.

At present, these elements as such remain rather disparate, and do not constitute a clear and coherent strategy for the European Union in this field. In line with the mandate of the Vienna European Council to consider a follow-up to the 1997 Action Plan, the different elements should be brought together into one document, with a specification of what action should be carried out and with what priority, who should have responsibility, and in accordance with what timetable.

In the present document, the various elements have been brought together and grouped by their general purpose. An attempt has also been made to place the draft recommendations in the context of developments within the European Union. The draft recommendations should be assessed in the light of the totality of what should be done, and of the priorities in the light of the available resources. The goal should be an integrated EU strategy to prevent and control organised crime, a strategy that sets priorities and clear target dates for the conclusion of action points, and allocates responsibility for their implementation.

The European Parliament was informed by the Finnish Presidency of the ongoing discussions in the Council through a letter by the President of the Council on 21 December 1999.

PART 1

BACKGROUND

The European Council, meeting at Vienna in December 1998, called for the Union to strengthen EU action against organised crime in the light of the new possibilities opened up by the Amsterdam Treaty. The present document responds to this request.

The level of organised crime in the EU is increasing. The contributions of Member States to the annual organised crime situation report provide evidence of this phenomenon and of the multifaceted way in which organised crime is infiltrating into many aspects of society throughout Europe.

Organised criminal activity is dynamic by nature. It need not be confined to rigid structures. It has shown itself to have the capacity to be entrepreneurial, business-like and highly flexible in responding to changing market forces and situations.

Organised criminal groups are generally not confined by national borders. They often form partnerships within and outside the territory of the European Union, either with individuals or with other networks for the commission of single or multiple offences. These groups appear to be becoming increasingly involved in the licit as well as the illicit market, using non-criminal business specialists and structures to assist them in their criminal activities. Moreover, they are taking advantage of the free movement of money, goods, personnel and services across the European Union.

As a result of the increased sophistication of many organised criminal groups, they are able to utilise legal loopholes and differences between Member States, exploiting the anomalies in the various systems.

Although the threat from organised crime groups outside the territory of the European Union appears to be increasing, it is the groups that originate and operate throughout Europe, composed predominantly of EU nationals and residents, that appear to pose the significantly greater threat. These groups are strengthening their international criminal contacts and targeting the social und business structure of European society for example through money laundering, drug trafficking and economic crime. They appear to be able to operate easily and effectively both within the European arena and in other parts of the world, responding to illegal demand by acquiring and supplying commodities and services ranging from drugs and arms to stolen vehicles and money laundering. Their concerted efforts to seek to influence and hamper the work of law enforcement and the judicial system illustrate the extent and professional capability of these criminal organisations.

This calls for a dynamic and coordinated response by all Member States, a response that not only takes into account national strategies but also seeks to become an integrated and multidisciplinary European strategy. Addressing the ever-changing face of organised crime requires that this response and strategy remain flexible.

The threat of national and international organised crime requires concerted action by the Member States of the European Union, and by the European Union itself, under the first, second and third pillars. Building on the Action Plan approved by the European Council at Amsterdam in 1997(1), the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, approved by the European Council at Vienna in 1998(2), and the conclusions of the European Council in Tampere held on 15 and 16 October 1999, the attached strategy sets out the framework for the work of the Council, the Commission, Europol, the European Judicial Network and the Member States in responding to this challenge.

PART 2

POLITICAL GUIDELINES AND DETAILED RECOMMENDATIONS

CHAPTER 2.1: Strengthening the collection and analysis of data on organised crime

Political guideline

The EU strategy should be based on reliable and valid data on organised crime and on offenders.

Existing mandates and initiatives

In accordance with recommendation 2 of the Action Plan to combat organised crime (referred to in the following as the 1997 Action Plan), Europol has produced annual reports on organised crime based on data provided by Member States. These have been used by the Council in the formulation of a common policy against organised crime. Paragraph 44(d) of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security und justice (referred to in the following as the 1998 Action Plan), calls for the development of these annual reports on organised crime with a view to defining strategies. Paragraph 48(a)(iii) of the 1998 Action Plan, in turn, calls for the improvement of statistics on cross-border crime.

The mutual evaluation process that is being conducted on the basis of the Joint Action adopted by the Council on 5 December 1997 and of paragraph 47(c) of the 1998 Action Plan should also contribute to this process.

Europol has sought to develop an intelligence model that can be used, inter alia, to identify trends in organised crime.

The Commission has announced its intention to submit a proposal for closer alignment of the data gathered by national law enforcement and security agencies on suspected offences and offenders, including on suspected offences and offenders when there is a reasonable suspicion that organised crime is involved (the Euclid programme). The proposal seeks, in line with recommendation 2 of the 1997 Action Plan, to set out common standards for the collection and analysis of data, identify who should have access to different categories of data, and identify how this data can be used and exchanged between Member States.

The Commission has used the Falcone and other relevant European Union programmes, within the framework of the rules applicable to them, to encourage the closer involvement of the academic and scientific world in the analysis of organised crime. This is also in line with recommendation 2 of the 1997 Action Plan. It can also be seen to be in line with paragraph 22 of the Council Resolution of 21 December 1998 on the prevention of organised crime (referred to in the following as the 1998 Council Resolution on prevention), which encourages Member States and relevant institutions to use appropriate Community programmes also for activities related to the prevention of organised crime.

Analysis

Continued work is needed to improve the validity, reliability and international comparability of data on organised crime, and on the annual situation reports. In this connection, a uniform concept of collection and use of data on organised crime and related phenomena should, to the maximum extent possible, be established so that a practical strategic analysis can be made, leading to the adoption of the most appropriate control measures to combat and prevent organised crime.

A more proactive, intelligence-led approach is needed to detect and interrupt organised criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. The targeting of investigation and the planning of the response of society to organised crime requires knowledge of the profile, motives and modus operandi of the offenders, the scope of and trends in organised crime, the impact of organised crime on society, and the effectiveness of the response to organised crime. This knowledge includes operational data (data related to individual suspected and detected cases) and empirical data (qualitative and quantitative criminological data). The timely and effective exchange of data between the various authorities should be ensured, with due respect to data protection.

Improved data on organised crime can also help Member States and the Council in the planning of crime prevention and, through this, in best protecting the potential victims of crime. Such improved data can be obtained in particular by supplementing the descriptions of the way in which offences were committed and where they were committed, and in general through improvements in the utility of the information processed through the criminal justice system.

Detailed recommendations

Recommendation 1. An evaluation mechanism and time-frame for implementing recommendations should become an integral part of the preparation and consideration of the annual reports on organised crime. One of the main aims of the contact and support network should be to seek to establish a uniform, EU concept of the topics and phenomena relating to organised crime. Attention should also be directed at identifying emerging trends. Further action is needed to encourage the academic and scientific world to contribute by their studies and research to the understanding of the phenomenon of organised crime.

Responsibility: Member States, Europol, Council, Commission

Target date: ongoing activity

Priority: 1(3)

CHAPTER 2.2: Preventing penetration of organised crime in the public and the legitimate private sector

Political guideline

The EU strategy should seek to prevent the penetration of organised crime in the public and legitimate private sector.

Existing mandates and initiatives

Recommendations 7, 8 and 29 of the 1997 Action Plan dealt with the collection and exchange of information in order to prevent the penetration of organised crime in the public and legitimate private sector. These recommendations called, inter alia, for the exclusion of persons who have committed offences connected with organised crime from participation in tender procedures conducted by Member States and the Community, and from receiving subsidies or governmental licences (recommendation 7), the collection of information on the physical persons involved in the creation and direction of legal persons registered in their territory, as well as on their funding (recommendation 8), and various means to prevent fiscal fraud (recommendation 29). All three recommendations stressed that the instruments and relevant legislation should be in conformity with the relevant rules relating to data protection.

All three recommendations were to have been carried out by the end of 1998, but have not yet been implemented. In respect of recommendation 7 on, inter alia, exclusion from public tenders, the results of a questionnaire issued by the Commission have been viewed by the MDG and subsequently a study, co-financed by the Falcone programme has been undertaken. Its recommendations are currently being considered by the Commission in order to present answers for a concrete follow-up.

The Commission has worked closely with the liberal professions on the drafting of a Charter of European professional associations in support of fight against organised crime. The Charter was signed on 27 July 1999.

Recommendation 10 called for regular consultation by Member States with the competent services of the Commission with a view to analysing cases of fraud affecting the financial interests of the Community. To this end, the Member States have met with UCLAF, which has subsequently been replaced by OLAF. Regular consultations would appear to continue to be desirable.

Analysis

Persons engaged in organised crime seek to enter the public and legitimate private sector for a number of reasons. Legitimate business activities can provide cover for criminal activities, and can at the same time offer new criminal opportunities (such as for fraud and embezzlement). Legitimate businesses can also provide a channel for the laundering of criminal proceeds.

Detailed recommendations

Recommendation 2. Member States and the European Commission should ensure that the applicable legislation provides for the possibility that an applicant in a public tender procedure who has committed offences connected with organised crime can be excluded from the participation in tender procedures conducted by Member States and the Community. In this context it should be studied whether and under what conditions persons who are currently under investigation or prosecution for involvement in organised crime could also be excluded. Specific attention should be paid to the illicit origin of funds as a possible reason for exclusion. The decision of exclusion of the person from participation in the tender procedure should be capable of being challenged in court.

Similarly, the Member States and the Commission should ensure that the applicable legislation

provides for the possibility of rejecting, on the basis of the same criteria, applications for subsidies or governmental licences.

Appropriate Community instruments and instruments of the European Union, enabling, inter alia, exchange of information among Member States and between Member States and the Commission, and containing specific provisions relating to the role of the Commission both in administrative cooperation and the setting up of black-lists, should be drawn up to ensure that these commitments can be carried out, while ensuring conformity with the relevant rules relating to data protection.

For the purposes set out in this recommendation, an effective mechanism allowing the early identification of persons who have committed offences connected with organised crime should be established at EU level while taking full account of data protection requirements. This mechanism should comprise the Member States, the Commission and Europol in accordance with rules to be drawn up in consultation with the European Parliament.

Responsibility: Council, Commission, Member States

Target date: 31 December 2002

Priority: 2

Recommendation 3. Member States shall seek to collect information, in compliance with the relevant rules relating to data protection, on physical persons involved in the creation and direction of legal persons registered in the territory of Member States, as a means to prevent the penetration of organised crime in the public and legitimate private sector. A study shall be made of how such data can be systematically compiled and analysed and be available for exchange with other Member States and, where appropriate, with bodies responsible at European Union level for the fight against organised crime, on the basis of appropriate rules to be developed by the Council.

Responsibility: Council, Commission

Target date: 31 December 2000

Priority: 3

Recommendation 4. Legal instruments to combat organised crime in connection with fiscal fraud should be developed in conformity with the relevant rules relating to data protection. To this end the following should be examined so that:

- in cases linked with organised crime, there should be no legal bar to allowing or obliging the fiscal authorities to exchange, at the national level, information with the competent authorities of the Member States concerned, and in particular with the judiciary, while fully respecting fundamental rights,

- fiscal fraud linked with organised crime should be treated as any other form of organised crime, notwithstanding that fiscal laws may contain special rules on recovering the proceeds of fiscal fraud,

- disbursements for criminal purposes, such as corruption, should not be tax deductible, and

- the prevention and control of organised fiscal fraud such as VAT and excise fraud, including its transnational aspects, should be improved at both the national and the European Union level.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 2

Recommendation 5. The Member States should consult regularly with the competent services of the Commission with a view to analysing cases of fraud affecting the financial interests of the Community, and deepening the knowledge and understanding of the complexities of these phenomena within existing mechanisms and frameworks. If necessary, additional mechanisms shall be put in place with a view to arranging such consultations on a regular basis. In this context, relations between Europol and the Commission's anti-fraud unit (OLAF) should be taken into account. The Commission is invited to develop, in close cooperation with the Council and Member States, training programmes for relevant authorities of the Member States to enable them to investigate cases of Community fraud more effectively.

Responsibility: Council, Commission, the Member States

Target date: 31 December 2002

Priority: 3

CHAPTER 2.3: Strengthening the prevention of organised crime and strengthening partnerships between the criminal justice system and civil society

Political guideline

The European Union strategy should emphasise the importance of the prevention of organised crime.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

41. The European Council calls for the integration of crime prevention aspects into actions against crime as well as for the further development of national crime prevention programmes. Common priorities should be developed and identified in crime prevention in the external and internal policy of the European Union and be taken into account when preparing new legislation.

42. The exchange of best practices should be developed, the network of competent national authorities for crime prevention and cooperation between national crime prevention organisations should be strengthened and the possibility of a Community-funded programme should be explored for these purposes. The first priorities for this cooperation could be juvenile, urban and drug-related crime.

Existing mandates and initiatives

Paragraph 51(b) of the 1998 Action Plan calls for the development of cooperation and concerted measures on matters relating to crime prevention.

The framework for prevention measures in respect of organised crime is provided by the Council Resolution of 21 December 1998 on the prevention of organised crime.

Paragraph 33 of the Council Resolution invites the Member States, Europol and the Commission, each within their respective competencies, to study the subject matter of the Resolution and related questions. The Commission and Europol are further invited to cooperate in the preparation of a comprehensive report by the end of 2000, which in particular:

- makes proposals on how prevention measures could be promoted in future work at European level, and in particular how they could be reflected in the legislative process,

- analyses what measures for the prevention of organised crime, by which bodies and at what level, seem appropriate with a view to optimum effectiveness,

- analyses proposals for the encouragement of the evaluation of measures for the prevention of organised crime,

- analyses to what extent prevention measures can be taken at the European level (particularly in the light of the Treaty of Amsterdam),

- makes proposals for drawing up and keeping up to date a repertory of good practice in the area of organised crime prevention,

- analyses to what extent ideas and measures for the prevention of organised crime could be taken into account in the process of enlargement and relations with third States.

Analysis

Organised crime, as is the case with crime in general, does not spread at random. The scope of such offences as drug trafficking, trafficking in persons, corruption and economic crime depends to a great deal on the presence of motivated offenders, on the existence of the opportunity for crime, and on the orientation of the work of those who seek to control organised crime. Member States should explore ways to ensure that committing crime is made more difficult, that committing crime involves greater risks to the offender (in particular the risk of detection and apprehension), and that the possible benefits to the offender of committing crime are decreased or eliminated. Such crime prevention measures should respect fundamental human rights.

It should also be recalled that the prevention of organised crime at the same time contributes to effective prevention and control of crime in general, and the prevention of crime in general conversely contributes to the effective prevention and control of organised crime.

The EU strategy should be designed to reinforce implementation of the Council Resolution on the prevention of organised crime by mobilising all segments of society in order to decrease the demand for illegal goods and services, and to prevent the infiltration of organised crime into society. In this, the principle of subsidiarity should be followed; the EU strategy should seek to reinforce and supplement action taken on the national and the local level.

Local community organisations, the business community and other sectors of society should be encouraged to develop partnerships with one another and with the authorities in preventing and controlling organised crime. Member States should examine whether any tasks related to the prevention and control of organised crime could not, in conformity with basic principles of their legal systems and internal policies, be carried out by non-public bodies at the national, regional and local level. However, public authorities should always be involved when decisions are made regarding the legal rights of individuals, and decisions on the use of coercive measures should be reserved only for criminal justice authorities.

A large number of methods have been shown by studies to be effective, at least in certain situations. An even larger number have been shown to be promising, even though there may not as yet be solid empirical evidence that they have an impact. Many other widely used methods, in turn, have been shown by research not to have a significant impact in crime prevention, at least in certain situations. In addition, more evidence is becoming available about the relative impact of different methods. As called for by the Council Resolution, this information on successful approaches and "best practices" needs to be made more generally available on the local and national level throughout the European Union, and the possibility of adapting successful approaches to different situations needs to be explored.

At the same time, Member States should explore ways to prevent marginalisation, since many criminogenic factors are connected with poor living conditions and marginalisation. This requires attention to fair, comprehensive and effective social security, educational and training systems, measures to combat unemployment and poverty, as well as the strengthening of crime prevention through urban planning.

In addition to general educational measures, special educational measures should be developed to strengthen respect for the law.

Particular attention should be paid to counteracting the development and spread of illegal markets, including the market for illegal drugs, in line with the Communication from the Commission on a European Union Drug Strategy (2000 to 2004) (COM(1999) 239). In line with paragraph 50 of the Presidency Conclusions from the Tampere European Council, this Drugs Strategy was endorsed by the European Council meeting in Helsinki on 10 to 11 December 1999.

In order to prevent recidivism, an attempt should be made to interrupt a developing criminal career at as early a stage as possible. Such attempts should be designed to use, wherever appropriate, diversionary and non-custodial measures in order to enhance social integration. The importance of measures to assist the social reintegration of offenders and the enforcement of sentences for purposes of preventing recidivism should be stressed.

Some opportunity for crime arises because insufficient attention may be given to the effects that decisions made by the authorities of Member States and of the European Union may have on crime, except in the case of decisions that are seen to directly affect the criminal justice system and the activity of criminal justice practitioners. The crime prevention perspective should be mainstreamed into the decision-making of the Member States and of the European Union. This requires recognition of the importance and impact of the crime prevention perspective regardless of the area of administration, sector of policy or Ministry mandate to which the measure belongs.

Detailed recommendations

Recommendation 6. Building on paragraphs 41 and 42 of the Presidency Conclusions from the Tampere European Council, the Commission is invited to cooperate with the Council in the preparation of a proposal for an instrument requiring all committees and other preparatory bodies on both the national and the EU level, when proposing legal reforms (even if these do not directly affect criminal policy), to assess as appropriate the impact of the reforms on crime, for example on fraud and other abuse. If such an assessment is not made, the reason for not doing so should be mentioned.

In respect of the effectiveness of instruments to be adpoted at the level of the European Union, the Council should be assisted, as appropriate, by suitably qualified experts on crime prevention, such as the national focal points, or by establishing a network of experts from national crime prevention organisations.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 1

CHAPTER 2.4: Reviewing and improving legislation as well as control and regulatory policies at the national and the European Union levels

Political guideline

The relevant legislation as well as crime control and regulatory systems should be subjected to regular critical review.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

32. Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

48. Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna

Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, euro counterfeiting), drugs trafficking, trafficking in human beings, particulary exploitation of women, sexual exploitation of children, high tech crime and environmental crime.

Existing mandates and initiatives

A number of existing mandates and initiatives are designed to strengthen the legislative system as well as crime-control and regulatory systems.

Paragraph 46(a) of the 1998 Action Plan (which is to be implemented within two years) calls for the identification of the behaviour in the field of organised crime, terrorism and drug trafficking, for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly. Paragraphs 50(c) and 51(a) (which, in turn, are to be implemented within five years) call, respectively, for continued elaboration of measures establishing minimum rules relating to the constituent elements of behaviour and to penalties in all fields of organised crime, terrorism and drug trafficking, and for identification of which specific forms of crime which can be best combated by a general EU approach.

In line with paragraph 46(b) of the 1998 Action Plan, the Council resolution of 28 May 1999 noted that the Council should adopt an instrument on the prevention, control and approximation of legislation on the counterfeiting of the euro. On 14 September 1999, the Commmission presented a proposal for a framework decision on counterfeiting and on means of payment other than cash.

Recommendation 6 of the 1997 Action Plan calls for the development of a comprehensive policy against corruption, taking into account also the work already carried out in other international forums, in order to enhance the transparency in public administration. The Multidisciplinary Group on Organised Crime (MDG) noted that the May 1997 Commission Communication sets out a basis for a comprehensive policy on corruption, and that in the light of the work that has been completed or initiated under the first and third pillars, the essential elements of the comprehensive policy have been identified and are being taken forward. The progress of the work in this area should be kept under constant review.

Paragraph 47(a) of the 1998 Action Plan invites the Commission to initiate a review of the possibilities for harmonised rules on data protection. Work has already been undertaken in this field.

Recommendation 18(b) of the 1997 Action Plan called for the introduction of the liability of legal persons where the legal person has been involved in organised crime. Although this recommendation was to have been implemented by the end of 1998, this has not yet been done. A paper on the legal liability of legal persons has been considered by the MDG, a seminar on the subject has been held on the basis of Grotius funding, and an additional questionnaire has been issued.

Paragraph 51(c) of the 1998 Action Plan called for the addressing of the question of victim support by making a comparative survey of victim compensation schemes and assessing the feasability of taking action within the European Union. The Commission has undertaken action to this end.

The principal mandate seeking to improve the tools for review of the system in place is paragraph 47(c) of the Action Plan, which calls for the continuation of the process of mutual evaluation under the Joint Action adopted by the Council on 5 December 1997.

Analysis

Considerable progress has been achieved at national and international level in improving the response to organised crime. However, further work is needed to ensure that recommendations, international

undertakings and policies are in fact being implemented, to identify possible problems encountered, and to develop, as appropriate, new mechanisms and methods in order to overcome such problems. Recognition should also be given to the importance of maintaining some degree of flexibility in developing the appropriate response to what is a very multifaceted and continuously evolving phenomenon.

The work of the EU on the review and improvement of legislation and policies should proceed in a programmatic manner, placing the primary focus wherever possible on offences that appear to pose the greatest threat to the Member States and the European Union, and on legislation and policies which appear to hamper the development of a concerted response to organised crime. The focus of this work may well vary with changing circumstances and threats, as suggested for example by the annual situation reports on organised crime.

The work on the review of legislation and policies should utilise in particular the evaluations carried out in accordance with the Joint Action adopted by the Council on 5 December 1997.

Detailed recommendations

Recommendation 7. In line with paragraphs 46(a), 50(c) and 51(a) of the 1998 Action Plan and paragraph 48 of Presidency Conclusions of Tampere European Council, the Council should, where found necessary, adopt instruments with a view to approximate the legislation of Member States. These instruments should take into account minimum standards of the constituent elements of offences and penalties related to organised crime, terrorism and drug trafficking. Noting in particular the conclusions of Tampere, at least the following offences will be considered: high technology crime (computer fraud and offences committed by means of the Internet), drug trafficking related offences, trafficking in human beings (particularly exploitation of women) terrrorism related offences, financial crime (money laundering, corruption, euro counterfeiting) tax fraud, sexual exploitation of children, and environmental crime. Consideration should be given to the opportunity for the development of a more general EU policy towards these specific forms of crime, taking into account as appropriate, work being carried out in other international organisations.

Responsibility: Council

Target date: ongoing activity; different target dates need to be set for each offence. The investigation and examination of the first offence should be completed by 31 December 2000, and further offences should be examined at the rate of at least one per Presidency.

Priority: 2

Recommendation 8. The Council should continue and strengthen the process of mutual evaluation based on the Joint Action of 5 December 1997, with an appropriate balance between law enforcement, prosecutorial and judicial issues. The objective should be to be able to evaluate in an in-depth manner the international undertakings decided under Title VI of the TEU. The Council should consider the possibility of defining common standards for the mutual evaluations made by the different teams of experts, and provide sufficient and permanent resources to be able to undertake such evaluations.

The mutual evaluation mechanism established under the Joint Action of 5 December 1997 should be reserved for the most important activities of interest in the prevention and control of organised crime, such as mutual assistance in criminal matters, drugs and law enforcement aspects and extradition. In addition, the Council should further consider the possibility of supplementing this mutual evaluation mechanism with a simplified and expedited mechanism, to be applied to the implementation by Member States of specific undertakings. The simplified and expedited mechanism could be used for the evaluation of specific areas of implementation or for questions which necessitate rapid evaluation.

Responsibility: Council. Close cooperation, where appropriate, with Commission, Europol or European Judicial Network.

Target date: ongoing activity; supplementary mechanism in place before 31 December 2000

Priority: 1

Recommendation 9. The Commission is invited to prepare a proposal for an instrument on the criminal, civil or administrative liability of legal persons where the legal person has been involved in organised crime.

Responsibility: Commission, Council

Target date: 31 December 2001

Priority: 3

CHAPTER 2.5: Strengthening the investigation of organised crime

Political guideline

The effectiveness of investigative means should be increased, with due respect to fundamental human rights.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

23. The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end. Member States, together with Europol, should direct their efforts to detecting and dismantling the criminal networks involved. The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children.

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union. The principle should apply both to judgements and to other decisions of judicial authorities.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

44. The European Council calls for the establishment of a European police chiefs' operational task force to exchange, in cooperation with Europol, experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions.

47. A European Police College for the training of senior law enforcement officials should be established. It should start as a network of existing national training institutes. It should also be open to the authorities of candidate countries.

Existing mandates and initiatives

Paragraph 44(a) of the 1998 Action Plan calls for the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime (cf. Article 30(1)(d) TEU).

Paragraph 44(b) of the 1998 Action Plan calls for consideration of the arrangements under which a law enforcement service from one Member State could operate in the territory of another (cf.

Article 32 TEU), taking into consideration the Schengen acquis. The 1998 Action Plan further notes that consideration should be given to two points in particular:

- the determination of the conditions and limitations under which the competent law enforcement authorities of one Member State may operate in the territory of another Member State, in liaison and in agreement with the latter,

- in return, what types of operation - and under what arrangements - is each Member State willing to accept in its own territory.

The creation of a collective framework for this type of operation is one of the priorities of police cooperation. This framework can be a flexible one.

Paragraph 43(1)(a)(iii) of the 1998 Action Plan calls for making the fight against illegal immigration networks one of the priorities of operational cooperation, particularly by using the national units as a network of national contact points responsible for dealing with them.

Paragraph 44(c) of the 1998 Action Plan calls for the development and expansion of operational cooperation between law enforcement services in the European Union and the strengthening of technical police cooperation. The joint action carried out in particular by the Member States' customs administrations should be used where appropriate as a model and should be expanded in cooperation with national police forces and gendarmeries and in close conjunction with the judicial authorities. In the medium term, Europol could serve as a backup for these future initiatives, which it will be possible to activate under what that Amsterdam Treaty has established as "decisions for any other purpose consistent with" the objectives of Title VI of the TEU.

Paragraph 44(e) of the 1998 Action Plan calls for the ratification of the CIS and Naples II Conventions by 31 July 2001 and the taking of measures for their effective implementation.

Paragraph 48(a)(vii) calls for a study on the possibility of setting up a system of exchanging fingerprints electronically between Member States.

Paragraph 48(b)(iii) calls for the promotion of cooperation and joint initiatives in the training of law enforcement personnel, the exchange of liaison officers, secondment, the use of equipment and forensic research.

Analysis

Because of the secretive nature of much organised crime, and because there are often no individual victims or the victim has either been coopted or intimidated, attention should be paid to ensuring that sufficient resources are provided to the investigation of organised crime, and that the investigators have at their disposal an appropriate range of legal means to conduct various investigations and to secure the needed evidence. The use of such mechanisms as electronic surveillance, undercover agents, and promises of immunity or reduction of sentences in exchange for cooperation requires finding the proper balance between effectiveness and the protection of fundamental human rights.

Improving the effectiveness of investigations also requires developing new investigative means, providing appropriate training to investigators and judical authorities, providing the requisite resources, and providing the appropriate structure for work, which may sometimes require a high degree of specialisation.

The investigation of the international aspects of organised crime requires closer international cooperation between law enforcement agencies. One possibility is the establishment of international investigative teams.

Detailed recommendations

Recommendation 10. In line with paragraph 43(1)(a)(iii) of the 1998 Action Plan and paragraph 23 of the Presidency Conclusions from the Tampere European Council, combating illegal immigration networks should be a high priority of operational cooperation. With this in mind, Member States shall undertake, in close cooperation with Europol, the Commission and the European Judicial Network, to ensure that clear rules on the coordination of investigations into such networks are laid down at both the law enforcement and the judicial level. Furthermore the Council shall review the operation of investigations in this field with a view to further improving the effectiveness of the prevention and disruption of illegal immigration networks. Guidelines should be prepared, in close cooperation with Europol, the Commission and the European Judicial Network, on the exchange of information between national law enforcement units on illegal immigration networks, and on other forms of cooperation in identifying and responding to such networks. In order to be able to pool resources at the level of the European Union, the possibility of establishing a task force consisting of the competent authorities should be explored.

Responsibility: Member States, Council, Commission, Europol, European Judicial Network

Target date: 31 December 2001

Priority: 1

Recommendation 11. The relevant specialised law enforcement agencies should seek to develop, on the international level, common standards for investigations, and expertise in all Member States on new developments, and promote exchanges of experience and technical equipment. A project-based approach in accordance with already decided standards should be the main driving force in the prevention and control of organised crime within the EU.

Responsibility: Member States, Council, Europol

Target date: 31 December 2002

Priority: 2

CHAPTER 2.6: Strengthening Europol

Political guideline

The potential of Europol to become an effective tool of the Member States in the prevention and control of organised crime should be developed.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

43. Maximum benefit should be derived from cooperation between Member States' authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.

45. Europol has a key role in supporting European Unionwide crime prevention, analyses and investigation. The European Council calls on the Council to provide Europol with the necessary support and resources. In the near future its role should be strengthened by means of receiving operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States.

56. The European Council invites the Council to extend the competence of Europol to money laundering in general, regardless of the type of offence from which the laundered proceeds originate.

Existing mandates and initiatives

Paragraph 25(a) to (c) of the 1997 Action Plan called for further development of Europol's mandate and tasks, assessment of whether the Europol Convention requires amendment, and an in-depth study with a view to examining the place and role of judicial authorities in their relations with Europol. Along the same lines paragraph 45(g) of the 1998 Action Plan calls for an examination of the role and the place of the judicial authorities in the framework of a further development of Europol in accordance with the Amsterdam Treaty, with a view to improving the efficiency of the institution. Considerable developments have taken place in respect of paragraphs 25(a) and 25(b) of the 1998 Action Plan, and the matter is being kept under continuous review by Member States and the Europol Management Board.

Paragraph 25(d) of the 1997 Action Plan states that full use should be made of the possibilities of Europol in fields of operational techniques and support, analysis and data analysis files (for instance registers on stolen cars or other property).

The development of operational techniques could take the form of studies of practice at national and European Union level and their effectiveness, and the development of common strategies, policies and tactics. The development of operational support could, inter alia, take the form of the organisation of meetings, the development of common action plans and their implementation, strategic analyses, facilitating information and intelligence exchange, analytical support for multilateral national investigations, technical and tactical support, legal support, offering technical facilities, development of common manuals, facilitating training, evaluation of results and giving advice to the competent authorities of the Member States.

Paragraph 43(1)(a)(i) of the 1998 Action Plan calls for an examination of the feasibility of setting up a database of pending investigations, within the framework of the provisions of the Europol Convention, making it possible to avoid any overlap between investigations and to involve several European competent authorities in the same investigation, thus combining their knowledge and expertise.

Paragraph 43(1)(a)(ii) of the 1998 Action Plan (to be implemented within two years), calls for the directing of Europol's documentary work towards operational activity, stating that wherever possible its analyses should lead to operational conclusions. Paragraphs 48(a)(ii) and 48(b)(ii) of the 1998 Action Plan (to be implemented within five years), call, respectively, for the establishment of a research and documentation network on cross-border crime, and for the organisation of the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data.

Paragraph 43(1)(a)(iv) of the 1998 Action Plan added terrorism as one of the offences to be dealt with by Europol, and called for the reinforcement of exchanges of information and the coordination of competent authorities of Member States in the fight against crimes committed or likely to be committed in the course of terrorist activities, using Europol in particular.

Paragraph 43(1)(b) of the 1998 Action Plan called for the drafting of an adequate legal instrument extending Europol's powers to the activities referred to in Article 30(2) TEU and focusing Europol's work on operational cooperation. An important subject is the place and the role of judicial authorities in their relations with Europol. One of the priorities stated by the Treaty is to determine the nature and scope of the operational powers of Europol, which will have to be able to "ask the competent authorities of the Member States to conduct and coordinate [their] investigations" and also to act within the framework of "operational actions of joint teams".

Paragraph 43(1)(c) of the 1998 Action Plan calls for an examintation of Europol access to Schengen information system (SIS) or European information system (EIS) investigation data, and paragraph 48(a)(v) calls for an examination of whether and how Europol could have access to the Customs information

system.

Paragraph 48(a)(vi) of the 1998 Action Plan calls for the elaboration and implementation, in cooperation with Europol, of an information strategy on making the work and powers of Europol known to the public.

Analysis

The entry into force of the Europol Convention has provided the European Union with an important tool in the field of law enforcement of organised crime by developing and strengthening the operative exchange of information and intelligence between law enforcement parties in Member States. It has also provided the European Union with a mechanism of fundamental importance in deepening and strengthening international cooperation in the prevention and control of organised crime.

Detailed recommendations

Recommendation 12. Member States shall ensure that Europol's role as an organ for criminal intelligence is supported and strengthened in order for Europol to fulfil its tasks to provide Member States with information and intelligence leading to the most effective results in preventing and combating organised crime. The study called for by paragraph 43(1)(a)(i) of the 1998 Action Plan should involve also the expertise of judicial authorities. The establishment of compatible criminal intelligence systems among Member States should be a long-term goal.

Responsibility: Council, Europol, European Judicial Network

Target date: 31 July 2001

Priority: 1

Recommendation 13. On-going work relating to the use of Europol in developing and implementing operational techniques, and in support and analysis should be continued. In particular, the possible role of Europol in the coordination of international investigations between the competent authorities of the Member States in order to combat criminal organisations operating in more than one Member State should be explored, including the possibility of operational actions of joint teams that include representatives of Europol in a support capacity, of asking the competent authorities of the Member States to conduct investigations in specific cases, and of developing specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime.

Responsibility: Council, Euopol

Target date: 31 July 2001

Priority: 2

CHAPTER 2.7: Tracing, freezing, seizing and confiscating the proceeds of crime

Political guideline

Particular attention should be devoted to depriving organised crime of its major motivation, the proceeds of crime.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

48. Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as... money laundering...

51. Money laundering is at the very heart of organised crime. It should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.

52. Member States are urged to implement fully the provisions of the Money Laundering Directive, the 1990 Strasbourg Convention and the Financial Action Task Force recommendations also in all their dependent territories.

53. The European Council calls for the Council and the European Parliament to adopt as soon as possible the draft revised directive on money laundering recently proposed by the Commission.

54. With due regard to data protection, the transparency of financial transactions and ownership of corporate entities should be improved and the exchange of information between the existing financial intelligence units (FIU) regarding suspicious transactions expedited. Regardless of secrecy provisions applicable to banking and other commercial activity, judicial authorities as well as FIUs must be entitled, subject to judicial control, to receive information when such information is necessary to investigate money laundering. The European Council calls on the Council to adopt the necessary provisions to this end.

55. The European Council calls for the approximaton of criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds). The scope of criminal activities which constitute predicate offences for money laundering should be uniform and sufficiently broad in all Member States.

57. Common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the European Union in the hiding of criminal proceeds and in money laundering. The European Union and Member States should make arrangements with third-country offshore-centres to ensure efficient and transparent cooperation in mutual legal assistance following the recommendations made in this area by the Financial Action Task Force.

58. The Commission is invited to draw up a report identifying provisions in national banking, financial and corporate legislation which obstruct international cooperation. The Council is invited to draw necessary conclusions on the basis of this report.

Existing mandates and initiatives

Recommendation 26 of the 1997 Action Plan called for a variety of measures in the field of money laundering and confiscation; similarly, paragraph 45(d) of the 1998 Action Plan urges the strengthening and development of the prevention and control of money laundering.

More specifically, recommendation 26(a) of the 1997 Action Plan called for a system for exchanging information concerning suspected money laundering; along the same lines, paragraph 48(a)(iv) of the 1998 Action Plan calls for the setting up of a system for the exchange of information and analysis on money laundering.

Recommendation 26(b) of the 1997 Action Plan calls for making criminalisation of the laundering of the proceeds of crime as general as possible, and the creation of as broad as possible a legal basis for a range of powers of investigation into it.

Recommendation 26(b) of the 1997 Action Plan also called for an examination of the opportunity of extending laundering to negligent behaviour, and for the undertaking of a study with a view to strenghtening the tracing and seizure of illegal assets and of the enforcement of court decisions on the confiscation of assets of organised crime. A Joint Action on laundering and the proceeds of crime was adopted, accordingly, on 3 December 1998, and a questionnaire on negligence has been issued to the MDG.

Recommendation 26(c) calls for the introduction of rules authorising confiscation regardless of the presence of the offender. Recommendation 26(d) calls for a study on the possibility of the international sharing of confiscated assets; a draft Joint Action on asset sharing has been discussed by the MDG. Recommendation 26(e) calls for an extension of the reporting obligation. Recommendation 26(f) calls for the addressing of the issue of money-laundering on the Internet and via electronic money products and requiring, in electronic payment and message systems, that the messages sent give details of the originator and the beneficiary. Recommendation 26(g) deals with the excessive use of cash payments; and recommendation 26(h) calls for a study of economic and commercial counterfeiting.

In general regarding action taken in respect of recommendation 26, it may be noted that the matter has been under constant review by the MDG, and several recommendations are being pursued in conjunction with proposals from Europol. The Commission has submitted a formal proposal to amend the 1991 Directive that deals with several of the points referred to in the recommendation.

Paragraph 47(d) of the 1998 Action Plan calls for continuation and development of the work started under the action plan on organised crime on the question of safe havens and fiscal paradises.

Paragraph 50(b) of the 1998 Action Plan calls for the improvement and approximation, where necessary, of national provisions governing seizures and confiscation of the proceeds from crime, taking account of the rights of third parties in bona fide.

Analysis

The primary motive of much organised crime is financial gain. Effective prevention and control of organised crime, therefore, would focus on tracing, freezing, seizing and confiscating the proceeds of crime. However, this has been hampered for example by the slowness of the exchange of information, the differences in legislation and the cumbersome nature of bureaucratic procedures. Moreover, the legitimate concerns for data protection have made discussions complex.

Means should be found to promote the expedient exchange of information (including details from financial institutions) between financial intelligence units within the European Union regardless of their internal structures. Means should also be found to speed up implementation in another Member State of judicial decisions on the freezing of bank accounts and in general on assistance in tracing illegal assets.

A particular problem is the emergence of those off-shore and on-shore financial centres and "fiscal paradises" that can in effect provide criminals with safe havens and that are used to further criminal ends. Means should be found to ensure that the various international provisions and recommendations regarding money laundering are implemented by Member States in their dependent territories. In this context needs to be taken into account the substantial work that has been carried out within the framework of the FATF on non-cooperative territories.

The possibility of the mitigation of the burden of proof, after the conviction of the offender for a serious offence, concerning the origin of assets held by the offender should be considered. Such mitigation would require that the sentenced person proves that he or she has acquired the assets in question in a legal manner. If this is not done to the satisfaction of the court, the assets can be held to be the illegal proceeds of crime, and confiscated.

Detailed recommendations

Recommendation 14.

(a) In line with paragraph 57 of the Presidency Conclusions from the Tampere European Council, an instrument should be adopted on measures that should be taken by Member States in respect of off-shore and on-shore financial centres and fiscal paradises operating in their territory, and on a common European Union policy towards financial centres and fiscal paradises lying outside

the European Union. The instrument should address the use of trustees and other techniques which can be used to disguise the true ownership of property.

(b) The Council should prepare a model agreement for negotiations, under Article 38 TEU, with off-shore and on-shore financial centres and fiscal paradises with a view to ensuring that they maintain accepted standards and cooperate effectively in the prevention and control of organised crime. Such agreements should further be negotiated with off-shore and on-shore financial centres and fiscal paradises. In this respect, close cooperation should be secured between the JHA Council and the Ecofin Council.

Responsibility: Council, Member States, Commission

Target date: ongoing activity; model agreement to be completed by 31 December 2001

Priority: 2

Recommendation 15. The Council, in cooperation with the Commission, with due regard to data protection issues and following discussions with the relevant banking organisations, should address the issue of money laundering on the Internet and via electronic money products and requiring, in electronic payment and message systems, that the messages sent give details of the originator and the beneficiary.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 2

Recommendation 16. In line with paragraph 36 of the Presidency Conclusions from the Tampere European Council, and in the framework of the programme of measures referred to in paragraph 37 of the Presidency Conclusions, the Council should adopt an instrument calling on the Member States to review their legislation and its application in respect of decisions on the tracing, freezing, seizure and confiscation of assets from crime and, where necessary, subsequently establish minimum standards with a view to allowing mutual recognition and execution of such decisions at as early a stage as possible in the investigation and criminal proceedings, taking into account the rights of third parties in bona fide.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

Recommendation 17.

(a) In line with paragraph 55 of the Presidency Conclusions from the Tampere European Council, criminalisation of the laundering of the proceeds of crime should be made as general as possible, and a legal basis should be created for as broad as possible a range of powers of investigation into it. In line with recommendation 26(b) of the 1997 Action Plan and Article 6(3)(a) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the possibility of extending the criminalisation of laundering to cases where the offender ought to have assumed the property in question was the proceeds of crime should be examined.

(b) Member States should consider according to national law establishing units which are specifically dedicated to the process of tracing, seizure and confiscation of assets derived from offences covered by the Joint Action adopted by the Council on 3 December 1998, taking into account the experience of such units operating successfully in some Member States. Member States should furthermore examine whether their manpower, operational and technical resources are sufficient to combat money laundering. In addition to the evaluation process which is undertaken in the

FATF framework, Member States should examine measures which will further strengthen effective implementation of the FATF recommendations, including the possibility of making specific reports to the Council on the implementation of such measures.

Responsibility: Council, Member States

Target date: 31 December 2000

Priority: 1

Recommendation 18. The Commission is invited to initiate a study on the possibility of preventing the excessive use of cash payments and cash exchanges by natural and legal persons from serving to cover up the conversion of the proceeds of crime into other property. Consideration should be given to setting up an adequate system of declarations which would enable the competent authorities to carry out the appropriate investigations. In its study, the Commission is invited, inter alia, to take account of national legislation relating for instance to the role of professionals, casinos and gambling houses.

Responsibility: Commission

Target date: 31 December 2003

Priority: 3

Recommendation 19. An examination should be made of the possible need for an instrument which, taking into account best practices operating in the Member States and with due respect to fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

Responsibility: Council

Target date: 31 December 2001

Priority: 3

Recommendation 20. An examination should be made of the possible need for an instrument on confiscation regardless of the presence of the offender, to cover cases where the offender has died or absconded.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

Recommendation 21. Consideration should be given to whether an instrument on the sharing of confiscated assets among Member States is compatible with the nature of judicial assistance and with legal traditions of judicial assistance in the Member States. This should take into account recent developments in international criminal law.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

CHAPTER 2.8: Strengthening cooperation between law enforcement and judicial authorities nationally and within the European Union

Political guideline

An integrated, multidisciplinary approach is required in order to be able to prevent and control

organised crime effectively.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen implementing agreement.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European enforcement order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

46. To reinforce the fight against serious organised crime, the European Council has agreed that a unit (Eurojust) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of cooperating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001.

49. Serious economic crime increasingly has tax and duty aspects. The European Council therefore calls upon Member States to provide full mutual legal assistance in the investigation and prosecution of serious economic crime.

Existing mandates and initiatives

Recommendations 13 and 14 of the 1997 Action Plan called upon those Member States that had not yet done so to ratify speedily key conventions that are essential to the prevention and control of organised crime. Some instruments have not yet been ratified by all Member States. Paragraph 45(c) of the 1998 Action Plan, in turn, calls for effective implementation in law and in practice of the two existing conventions on extradition adopted under the TEU.

Recommendation 16 of the 1997 Action Plan urges finalisation of the draft Convention on Mutual Assistance in Criminal Matters before the end of 1997 and, as soon as possible, enlargement of the content of the Convention, while taking into account the necessity to accelerate procedures for judicial cooperation in matters relating to organised crime and considerably reducing delays in transmission and responses to requests. Work on finalisation of the draft Convention, however, is still in progress, with a view towards completion by early 2000.

Recommendation 16 also calls for consideration of instruments adopted by the Council regarding individuals who cooperate with the judicial process and on the protection of witnesses as well as the specific needs of police cooperation connected with pre-trial investigations. Reports on the implementation of this recommendation have been considered by the Council.

Recommendation 16(a) calls for examination of reservations with regard to the 1959 European Convention on Mutual Assistance and its Protocol. This is currently being considered by the Judicial Cooperation Working Group, within the context of the finalisation of the draft Convention on Mutual Assistance in Criminal Matters.

Recommendation 16(b) calls for the creation of a legal basis for the transboundary application of certain modern investigative methods, such as controlled delivery, deployment of undercover agents and the interception of various forms of telecommunications. Also these measures are currently being considered by the Judicial Cooperation Working Group within the context of the draft Convention.

Paragraph 45(a) of the 1998 Action Plan call for the effective implementation and, where appropriate, further development of the European Judicial Network. It also notes that the effective implementation of the European Judicial Network is a priority matter. It will bring about a practical improvement in cooperation and needs to be equipped with modern tools to enable efficient cooperation. Consideration ought to be given now to making it more operational.

Paragraph 45(e) of the 1998 Action Plan calls for the facilitation and acceleration of cross-border cooperation between the competent ministries and judicial or equivalent authorities of the Member States.

Paragraph 45(f) of the 1998 Action Plan calls for the initiation of a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters. A work programme on mutual recognition has been discussed in the MDG, with the immediate priority on the mutual recognition of asset restraint orders and of sentences imposing a fine.

Paragraph 45(g) of the 1998 Action Plan calls for an examination of the role and the place of the judicial authorities in the framework of a further development of Europol in accordance with the Amsterdam Treaty, with a view to improving the efficiency of the institution.

Paragraph 48(a)(i) of the 1998 Action Plan calls for the promotion of liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol (cf. Article 30(2)(c), TEU).

Paragraph 48(b)(i) encourages general policy and operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services and the judicial authorities of the Member States in relation to the prevention, detection and investigation of criminal offences (cf. Article 30(1)(a) of the TEU). The paragraph notes that in this context it would be useful to develop and enhance existing bilateral and regional cross-border cooperation, for instance by continuing and extending on a similar basis the experiments with joint police stations. It would also be desirable to continue the development of customs risk analysis techniques and the improvement of customs control methods such as the implementation of the container control action plan and to consider the new avenues where there is a possibility for fraud, such as Internet.

Paragraph 49(a) calls for a consideration of whether substantive and formal improvements can still be made to extradition procedures, including rules to reduce delay.

Paragraph 49(b) calls for further facilitation of cross-border cooperation between ministries and judicial authorities in the field of criminal proceedings. Paragraph 49(c) calls for an examination of the feasibility of improved cross-border cooperation on the transfer of proceedings and the enforcement of sentences. Paragraph 49(d) calls for a study of the feasibility of extending and possibly formalising the exchange of information on criminal records, and paragraph 49(e) calls for the prevention of conflicts of jurisdiction between Member States, by, for instance, examining the possibility of registering whether there are proceedings against the same persons on the same offences pending in different Member States.

Paragraph 50(a) of the 1998 Action Plan calls for the ensurance of compatibility of the rules applicable between Member States in so far as necessary to improve judicial cooperation. A reflection should also be started on possibilities for avoiding that abuse of judicial remedies that can affect or delay cooperation. The paragraphs notes that efficient procedural standards should be sought

that will improve mutual assistance in criminal matters while complying with the requirements of fundamental freedoms. Consideration should begin in the field of telecommunication interception and also on civil actions relating to criminal offences. In that connection, compensation for the victims of crime must be an avenue not to be neglected.

Analysis

One area of concern is inter-agency cooperation on the national and the international level, including cooperation between fiscal and law enforcement authorities. Many crimes can be prevented or speedily resolved if intelligence available to one agency can be shared with other agencies, nationally and internationally. However, this intelligence may not be recognised as being useful to other agencies, there may not be secure channels through which the intelligence can be passed on, or these other agencies may be distrusted. As a result, investigation, prosecution, adjudication and enforcement do not form a coherent and inter-linked system nationally, much less internationally.

Local, national and international cooperation among law enforcement agencies, and between law enforcement and judicial authorities, should be strengthened. In that context, priority should be given to the question of judicial authorities and Europol.

Detailed recommendations

Recommendation 22. In line with paragraph 45(b) of the Action Plan of freedom, security and justice, and paragraph 37 of the Presidency Conclusions from the Tampere European Council, the Commission is invited to cooperate with the Council in the adoption, by December 2000, of a programme for measures to implement the principle of mutual recognition of judicial decisions in criminal cases.

Responsibility: Council, Commission

Target date: 31 December 2000

Priority: 1

Recommendation 23. In line with paragraph 46 of the Presidency Conclusions from the Tampere European Council, the Council is requested to draw up and adopt, as soon as possible, a legal instrument concerning the establishment of Eurojust specifying its structure, sphere of competence, powers and responsibilities. Particular attention should be given to determining the general framework of the new body's relations with national prosecuting authorities, Europol, Commission (OLAF) and the European Judicial Network.

Responsibility: Council

Target date: 31 December 2001

Priority: 1

Recommendation 24. The European Judicial Network should be implemented effectively and, where appropriate, further developed, for example by exploring ways in which to equip it with modern tools to make efficient cooperation possible, and ways in which to make it more operational. Particular attention should be paid to the development of efficient procedural standards that will improve mutual assistance in criminal matters while complying with the requirements of fundamental rights.

The General Secretariat of the Council serves also as the secretariat of the European Judicial Network, and must therefore be given, on a permanenet basis, the necessary resources to ensure that the European Judicial Network will be able to fulfil its tasks.

Responsibility: Member States, Council

Target date: ongoing activity

Priority: 2

Recommendation 25. A proposal shall be prepared for an instrument on the position and protection of witnesses and of persons who participate or who have participated in criminal organisations, and who are prepared to cooperate with the judicial process by supplying information useful for investigative and evidentiary purposes or by providing information that may contribute to depriving criminal organisations of their resources or of the proceeds of crime. The proposal should consider the possibility, in appropriate cases, inter alia, of mitigating punishment of an accused person who provides substantial cooperation in such cases. An EU model agreement should be developed, taking into account the experiences of Europol, and used on a bilateral basis.

Responsibility: Council, Member States, Commission

Target date: 31 July 2001

Priority: 3

Recommendation 26. The possible need for additional funding, and in particular the possibility of greater flexibility and expedited procedures in the use of EU funding for training and support activities should be explored, in particular in the light of TEU 41(3). Examples include the supporting of interpretation services, the provision of language training, and the acquisition of international experience for specialised law enforcement officers, prosecutors and judges. The possibility of the use of such funds in improving the organisation of meetings of practitioners at the EU level (including meetings related to the use of joint investigative teams) should be considered. The attention of competent authorities should be drawn to the possibility of using three-way conferences between two officials using an interpreter, and the Member States should encourage such use by making available resources to that end. With due regard to the need to safeguard the legitimate interests of control of public funds, the use of such funds to promote judicial cooperation should not impinge on judicial independence.

Responsibility: Commission, Council, European Judicial Network, Europol, Member States

Target date: 31 December 2001

Priority: 2

Recommendation 27. Those States which have not yet ratified(4), the following European Union, Council of Europe and United Nations conventions, which are essential to the prevention and control of organised crime, should make proposals to their Parliaments with a view to speedy ratification within the given timetable. Should any convention not have been ratified by the set target date, they shall report to the Council in writing, on the reasons therefore, every six months until the convention has been ratified. If a Member State has not ratified a convention within a reasonable time for any given reason, the Council shall assess the situation with a view to solving it. As part of the pre-accession pact, undertakings shall be sought from the candidate countries of a similar character. When drawing up new conventions and other instruments, the Council should set a target date for their adoption and implementation in accordance with the constitutional requirements of the Member States and the Treaty of Amsterdam.

1. European Convention on Extradition, Paris 1957 - end 2001

2. Second Protocol to the European Convention in Extradition, Strasbourg 1978 - end 2001

3. Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1978 - end 2001

4. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Strasbourg 1990 - end 2001

5. Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II) - end 2001

6. Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg 1995 - end 2001

7. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna 1988 - end 2001

8. European Convention on the Suppression of Terrorism, Strasbourg 1977 - end 2001

9. Council of Europe Criminal Law Convention on the fight against Corruption, Strasbourg 1999 - end 2001

10. Convention on Simplified Extradition Procedure between the Member States of the European Union - end 2001

11. Convention on the Protection of the European Communities' Financial Interests - mid-2001

12. Convention on the Use of Information Technology for Customs Purposes - end 2000

13. Convention relating to Extradition between the Member States of the European Union - end 2001

14. Protocols to the Convention on the Protection of the European Communities' Financial Interests - end 2001

15. Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of the Member States of the EU - end 2001

Several other Conventions may also be relevant to the fight against organised crime. Among those conventions are the Convention for the Suppression of Counterfeiting Currency, Geneva 1929 as well as the Council of Europe Convention on the Protection of the Environment through Criminal Law, Strasbourg 1998.

Responsibility: Member States, Council

Target date: as noted

Priority: 1

Recommendation 28. Extradition should be facilitated through effective implementation of the two existing conventions on extradition adopted under the TEU. In particular, Member States should take, at the national level, the necessary measures to ensure that extradition requests can be dealt with in the most simple and expeditious manner. As called for by paragraph 35 of the Presidency Conclusions from the Tampere Summit, the Commission is invited to make proposals for expedited extradition of convicted persons fleeing from justice as well as on fast-track extradition procedures. An evaluation of extradition procedures, based on the Joint Action adopted by the Council on 5 December 1997, should begin no later than 30 June 2001. In this respect, consideration should be given to the long-term possibility of the creation of a single European legal area for extradition. The issue of extradition in relation to procedures in absentia, with full respect to fundamental rights granted by the European Convention on Human Rights, might also be examined in this context.

Responsibility: Council, Member States, Commission

Target date: 2002; 2010 for the long-term objective

Priority: 1

Recommendation 29. In accordance with paragraph 36 of the Presidency Conclusions from the Tampere European Council, the Member States shall consider different ways and means, including minimum standards for decisions on the collection of evidence, and the Council should adopt the necessary instrument with a view towards ensuring that evidence lawfully gathered by one Member State's authorities is admissible before the courts of other Member States, subject to the principle of judicial independence and taking into account the standards that apply in such other Member States.

Responsibility: Council

Target date: 31 December 2004

Priority: 4

Recommendation 30: With a view to rendering investigations into cross-border organised crime more efficient, the Council is requested to work towards the approximation of national legislation on criminal procedure governing investigative techniques so as to make their use more compatible.

Responsibility: Council

Target date: December 2002

Priority: 3

CHAPTER 2.9: Strengthening cooperation with the applicant countries

Political guideline

Cooperation with the applicant countries should be strengthened with a view to their gradual incorporation into the EU strategy for the prevention and control of organised crime.

Existing mandates and initiatives

In line with recommendation 3 of the 1997 Action Plan, a pre-accession pact was adopted on 28 May 1998. A pre-accession pact expert group (PAPEG) has been established. The acquis of the European Union has been presented to the candidate countries on a multilateral basis. In addition, a bilateral session has taken place with each candidate country in order to assess its level of preparation for the European Union standards.

The Commission has taken various initiatives through different tools such as the Title VI programmes (such as Phare and TAIEX funds) to strengthen cooperation with candidate countries in the area of the fight against organised crime.

Paragraph 43(d) of the 1998 Action Plan calls for strengthening of the Europol role in information exchange in implementation of the pre-accession pact, and the giving of sufficient resources to Europol for it to be able to meet that goal.

Analysis

Organised crime in the Member States of the European Union is to a large extent indigenous. None the less, a truly effective EU strategy must look beyond the Member States of the EU. This should be done not only in order to promote cooperation in respect of individual offences and offenders, but also in order to exchange information on best practices and on trends in organised crime. In the first instance, using the pre-accession pact on organised crime more effectively, cooperation should be improved with the applicant countries.

This cooperation is mutually advantageous, in that, while the candidate countries can be informed about the acquis of the European Union, they themselves can, building on their extensive experience, contribute to the strengthening of the response to organised crime in the European Union itself.

The role of the pre-accession pact on organised crime of 28 May 1998 in strengthening this cooperation is of particular importance. The Council should consider if additional resources for the implementation of the pact should be provided.

In this work, particular attention should be given to the prevention and control of such offences as money-laundering, illegal immigration networks and financial crime.

Detailed recommendations

Recommendation 31. The European Union and Member States should seek to strengthen practical and direct forms of cooperation in law enforcement and criminal justice with the candidate countries.

Responsibility: Council, Commission, Member States

Target date: ongoing activity

Priority: 3

Recommendation 32. The applicant countries should be integrated into the preparation and analysis of the annual situation reports on organised crime.

Responsibility: Council, Europol

Target date: ongoing activity

Priority: 2

Recommendation 33. The possibility should be explored of cooperation with the applicant countries in the use of the Schengen information system, taking into account the legal and technical feasibility of such cooperation.

Responsibility: Council

Target date: ongoing activity

Priority: 3

Recommendation 34. The Member States should explore the appropriateness, on a bilateral basis, of entering into commitments and practical cooperation with the applicant countries relating to cooperation with them in respect of the tracing of stolen property such as motor vehicles, and to the use of investigative techniques such as controlled deliveries and undercover operations.

Responsibility: Member States

Target date: ongoing activity

Priority: 2

Recommendation 35. The European Union and Member States should seek to strengthen technical assistance and expertise to the applicant countries in order to support the development of efficient and democratic law-enforcement systems and appropriate public administration, and the adjustment of institutions and laws to more closely align with European Union legislation. The possibilities of twinning programmes funded under the EU Phare programme should be further encouraged.

Responsibility: Council, Commission, Member States

Target date: ongoing activity

Priority: 1

CHAPTER 2.10: Strengthening cooperation with third countries and other international organisations

Political guideline

The prevention and control of organised crime requires global cooperation, and should be seen in that context.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

7. The area of freedom, security and justice should be based on the principles of transparency and democratic control. We must develop an open dialogue with civil society on the aims and principles of this area in order to strengthen citizens' acceptance and support. In order to maintain confidence in authorities, common standards on the integrity of authorities should be developed.

8. The European Council considers it essential that in these areas the Union should also develop a capacity to act and be regarded as a significant partner on the international scene. This requires close cooperation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.

59. The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and home affairs concerns must be integrated in the definition and implementation of other Union policies and activities.

60. Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of common strategies as well as Community agreements and agreements based on Article 38 TEU.

61. Clear priorities, policy objectives and measures for the Union's external action in justice and home affairs should be defined. Specific recommendations should be drawn up by the Council in close cooperation with the Commission on policy objectives and measures for the Union's external action in justice and home affairs, including questions of working structure, prior to the European Council in June 2000.

62. The European Council expresses its support for regional cooperation against organised crime involving the Member States and third countries bordering on the Union. In this context it notes with satisfaction the concrete and practical results obtained by the surrounding countries in the Baltic Sea region. The European Council attaches particular importance to regional cooperation and development in the Balkan region. The European Union welcomes and intends to participate in a European Conference on Development and Security in the Adriatic and Ionian area, to be organised by the Italian Government in Italy in the first half of the year 2000. This initiative will provide valuable support in the context of the south-eastern Europe stability pact.

Existing mandates and initiatives

Recommendation 4 of the 1997 Action Plan called for closer cooperation with third States and international organisations and bodies involved in the prevention and control of organised crime. The potential for cooperation provided by existing mechanisms, such as the transatlantic partnership, and the Tacis programme and the partnership agreements with the Russian Federation and Ukraine, should be used more effectively. The possibility of the development of corresponding arrangements with other countries should be explored. Specific proposals for closer cooperation, for instance through the intermediary of Europol, should be developed by the Council and the Commission.

Considerable work has been carried out by the Council and the Commission in response to this recommendation (see Crimorg 67). However, the recommendation requires on-going activity.

Analysis

Cooperation should be improved with third countries, including within the framework of the transatlantic dialogue and in cooperation with the Russian Federation and Ukraine. In addition, consideration

should be given to strengthening cooperation with, for example, partners around the Mediterranean and in south-eastern Europe, China, and the Latin American and Caribbean countries.

An effective EU strategy should be tailored so that it can build on and complement the results of successful work that has already been carried out or is being carried out bilaterally or multilaterally, for example within the framework of the Council of Europe, the Group of Eight Industrialised Countries, the Financial Action Task Force, the International Criminal Police Organisation, the Organisation for Economic Cooperation and Development, and the United Nations. Furthermore, the Union should seek to act more coherently to make its voice heard in international forums.

Detailed recommendations

Recommendation 36. Closer cooperation should be developed with third States and international organisations and bodies involved in the prevention and control of organised crime. The potential for cooperation provided by existing mechanisms, such as the transatlantic partnership and the partnership agreements with the Russian Federation and Ukraine, should be used more effectively. The possibility of the development of corresponding arrangements with other countries should be explored. Specific proposals for closer cooperation, for instance in association with Europol, should be developed by the Council and the Commission.

Responsibility: Council, Commission, Europol

Target date: ongoing activity

Priority: 2

Recommendation 37. The full political weight of the European Union should be carried in all forums where all Member States participate, such as the Council of Europe, the Organisation for Economic Cooperation and Development, the Financial Action Task Force, the International Criminal Police Organisation, and the United Nations. This requires effective coordination among European Union Member States in these forums and, where appropriate, the seeking of agreement in a timely manner on joint positions which should then be defended by the Member States in accordance with Article 37 TEU. Where not all Member States participate in meetings in such forums, non-attending Member States should be given full information on discussions which might affect them.

Responsibility: Council, Member States

Target date: ongoing activity

Priority: 1

Recommendation 38. The European Union and Member States, on the entry into force of the United Nations Convention against Transnational Organised Crime and its protocols, should review this strategy in the light of the provisions of the Convention with a view to seeking to assist countries on request in the full implementation of the Convention.

Responsibility: Council, Member States

Target date: ongoing activity

Priority: 2

CHAPTER 2.11. Monitoring the strengthening of the implementation of measures for the prevention and control of organised crime within the European Union

Political guideline

Specific monitoring of the implementation of the European Union strategy against organised crime is essential in order to maintain coherence and follow-up on the national and the EU level.

Existing mandates and initiatives

Document 9239/2/97 CK4 24 (which is based on recommendation 22 of the 1997 Action Plan sets out the mandate of the Multidisciplinary Group on Organised Crime. The MDG is charged with the development of policies to coordinate the prevention and control of organised crime. This development essentially includes (a) direct implementation of mandates principally addressed to the Council, (b) the monitoring of the implementation of other mandates, (c) the assessment of practical cooperation (in particular through evaluation mechanisms), (d) the designing of EU strategies and policies in the prevention and control of organised crime, (e) preparation, in full cooperation with the other relevant Council working groups, of high-level decisions, in particular for the Article 36 Committee, (f) providing the Article 36 Committee with information which is useful for drawing up interim progress reports, and (g) preparation of proposals for increased coordination between the first, second and third pillars in combating organised crime.

Analysis

The European Union strategy against organised crime should be flexible, both so that the lessons learned in the process of implementation can be taken into consideration, and so that crime prevention and control measures can be tailored as appropriate to changes in the phenomenon of organised crime itself.

The detailed recommendation and timetables contained in the 1997 Action Plan have contributed to the success achieved in its implementation. Further impetus has been given by the work of the Multidisciplinary Group on Organised Crime, which consists of senior officials, a group that has benefited from its multidisciplinary approach and the support of specialists.

Detailed recommendations

Recommendation 39. The Multidisciplinary Group on Organised Crime shall prepare regular reports for submission, through the Article 36 Committee, to the Council and the European Council, on the implementation of this strategy.

The Multidisciplinary Group shall, no later than 30 June 2003, submit a comprehensive report on the measures and steps taken with regard to the implementation of each recommendation in this strategy. The Council shall take appropriate measures.

The European Council shall not later than 30 June 2005 receive a general report on the implementation of the EU strategy to combat organised crime and shall take the necessary measures to ensure that where this strategy has not been implemented in full the European Council will give appropriate orientations on further measures to be taken.

Responsibility: Council, Commission

Target date: ongoing activity; general report 30 June 2005

Priority: 1

(1) OJ C 251, 15.8.1997, p. 1.

(2) OJ C 19, 23.1.1999, p. 1.

(3) For each recommendation, a priority of 1 to 5 has tentatively been set. A priority of 1 means that work should begin immediately with a view to rapid finalisation. A priority of 3 means that work may begin if there are resources to do so, or that the recommendation requires ongoing activity. A priority of 5 means that work could be deferred until later, although the recommendation is nonetheless of such importance as to be incorporated in the Action Plan. The level of priority assigned to the various action points may change in time along with circumstances.

(4) All Member States have already ratified the 1959 Convention on Mutual Assistance in Criminal Matters and the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Those Conventions are also of importance in the fight against organised crime.

The Prevention and Control of Organised Crime:

A European Union Strategy for the beginning of the new Millennium

(2000/C 124/01)

The Amsterdam European Council, meeting on 16 and 17 June 1997, approved an action plan to combat organised crime.

During the brief period the action plan has been in force, substantial progress has been achieved in developing and implementing measures designed to prevent and control organised crime against the European Union and its Member States. Examples of this progress are that a mutual evaluation mechanism has been established to identify problems in implementation of measures and a first round of evaluation has been successfully launched, a European Judical Network, equipped with a telecommunications network, has begun to work to streamline international cooperation, a contact and support network has been established to further improve the annual situation reports on organised crime, joint actions have been adopted on the Falcone programme, on money laundering and asset tracing, on the criminalisation of participation in a criminal organisation and on best practices in mutual assistance, a pre-accession pact has been developed with the candidate countries, and further measures have been identified in respect of, for example, prevention of organised crime and the European Union strategy against high-tech crime. The Union has made its voice heard in the negotiations at the UN on the draft Convention on Transnational Organised Crime and in the Council of Europe on the draft Cyber-Crime Convention.

This substantial progress has to a large extent been due to the specificity of, and timetables contained in, the action plan. The strong consensus reached by Member States on the plan of action helped to create the political and professional climate required at both EU level and national level to take and implement the necessary decisions. National experts attached to the Council Secretariat contributed significantly to the implementation.

The Vienna European Council in December 1998 called for a strengthening of EU action against organised crime in the light of the new possibilities opened by the Amsterdam Treaty. Paragraph 47 of the 1998 Action Plan adopted by the Vienna European Council calls for finalisation of the 1997 action plan, evaluation of its implementation and consideration of a follow-up.

Paragraph 43 and the following paragraphs of the 1998 Action Plan provide some additional elements which have a direct bearing on an EU strategy against organised crime. Further elements are contained in the Council resolution on 21 December 1998 on the prevention of organised crime, or have been brought by other developments (for example the recommendations emerging in connection with the work on the annual situation reports, and the work on joint positions on the proposed UN Convention against Transnational Organised Crime and its Protocols, and on the proposed Council of Europe Cyber-Crime Convention).

The Tampere European Council, meeting on 15 and 16 October 1999, noted that people have the right to expect the European Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the European Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the European Union (Presidency Conclusion No 6.) The Tampere European Council further noted

that it was deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime. A balanced development of European Unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators (Presidency Conclusion No 40).

The Tampere European Council established milestones for the creation of an area of freedom, security and justice in the European Union. One of the three main issues covered was the European Unionwide fight against crime. A number of the conclusions have a direct impact on further work on the prevention and control of organised crime.

At present, these elements as such remain rather disparate, and do not constitute a clear and coherent strategy for the European Union in this field. In line with the mandate of the Vienna European Council to consider a follow-up to the 1997 Action Plan, the different elements should be brought together into one document, with a specification of what action should be carried out and with what priority, who should have responsibility, and in accordance with what timetable.

In the present document, the various elements have been brought together and grouped by their general purpose. An attempt has also been made to place the draft recommendations in the context of developments within the European Union. The draft recommendations should be assessed in the light of the totality of what should be done, and of the priorities in the light of the available resources. The goal should be an integrated EU strategy to prevent and control organised crime, a strategy that sets priorities and clear target dates for the conclusion of action points, and allocates responsibility for their implementation.

The European Parliament was informed by the Finnish Presidency of the ongoing discussions in the Council through a letter by the President of the Council on 21 December 1999.

PART 1

BACKGROUND

The European Council, meeting at Vienna in December 1998, called for the Union to strengthen EU action against organised crime in the light of the new possibilities opened up by the Amsterdam Treaty. The present document responds to this request.

The level of organised crime in the EU is increasing. The contributions of Member States to the annual organised crime situation report provide evidence of this phenomenon and of the multifaceted way in which organised crime is infiltrating into many aspects of society throughout Europe.

Organised criminal activity is dynamic by nature. It need not be confined to rigid structures. It has shown itself to have the capacity to be entrepreneurial, business-like and highly flexible in responding to changing market forces and situations.

Organised criminal groups are generally not confined by national borders. They often form partnerships within and outside the territory of the European Union, either with individuals or with other networks for the commission of single or multiple offences. These groups appear to be becoming increasingly involved in the licit as well as the illicit market, using non-criminal business specialists and structures to assist them in their criminal activities. Moreover, they are taking advantage of the free movement of money, goods, personnel and services across the European Union.

As a result of the increased sophistication of many organised criminal groups, they are able to utilise legal loopholes and differences between Member States, exploiting the anomalies in the

various systems.

Although the threat from organised crime groups outside the territory of the European Union appears to be increasing, it is the groups that originate and operate throughout Europe, composed predominantly of EU nationals and residents, that appear to pose the significantly greater threat. These groups are strengthening their international criminal contacts and targeting the social und business structure of European society for example through money laundering, drug trafficking and economic crime. They appear to be able to operate easily and effectively both within the European arena and in other parts of the world, responding to illegal demand by acquiring and supplying commodities and services ranging from drugs and arms to stolen vehicles and money laundering. Their concerted efforts to seek to influence and hamper the work of law enforcement and the judicial system illustrate the extent and professional capability of these criminal organisations.

This calls for a dynamic and coordinated response by all Member States, a response that not only takes into account national strategies but also seeks to become an integrated and multidisciplinary European strategy. Addressing the ever-changing face of organised crime requires that this response and strategy remain flexible.

The threat of national and international organised crime requires concerted action by the Member States of the European Union, and by the European Union itself, under the first, second and third pillars. Building on the Action Plan approved by the European Council at Amsterdam in 1997(1), the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, approved by the European Council at Vienna in 1998(2), and the conclusions of the European Council in Tampere held on 15 and 16 October 1999, the attached strategy sets out the framework for the work of the Council, the Commission, Europol, the European Judicial Network and the Member States in responding to this challenge.

PART 2

POLITICAL GUIDELINES AND DETAILED RECOMMENDATIONS

CHAPTER 2.1: Strengthening the collection and analysis of data on organised crime

Political guideline

The EU strategy should be based on reliable and valid data on organised crime and on offenders.

Existing mandates and initiatives

In accordance with recommendation 2 of the Action Plan to combat organised crime (referred to in the following as the 1997 Action Plan), Europol has produced annual reports on organised crime based on data provided by Member States. These have been used by the Council in the formulation of a common policy against organised crime. Paragraph 44(d) of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security und justice (referred to in the following as the 1998 Action Plan), calls for the development of these annual reports on organised crime with a view to defining strategies. Paragraph 48(a)(iii) of the 1998 Action Plan, in turn, calls for the improvement of statistics on cross-border crime.

The mutual evaluation process that is being conducted on the basis of the Joint Action adopted by the Council on 5 December 1997 and of paragraph 47(c) of the 1998 Action Plan should also contribute to this process.

Europol has sought to develop an intelligence model that can be used, inter alia, to identify trends in organised crime.

The Commission has announced its intention to submit a proposal for closer alignment of the data gathered by national law enforcement and security agencies on suspected offences and offenders, including on suspected offences and offenders when there is a reasonable suspicion that organised crime is involved (the Euclid programme). The proposal seeks, in line with recommendation 2 of the 1997 Action Plan, to set out common standards for the collection and analysis of data, identify who should have access to different categories of data, and identify how this data can be used and exchanged between Member States.

The Commission has used the Falcone and other relevant European Union programmes, within the framework of the rules applicable to them, to encourage the closer involvement of the academic and scientific world in the analysis of organised crime. This is also in line with recommendation 2 of the 1997 Action Plan. It can also be seen to be in line with paragraph 22 of the Council Resolution of 21 December 1998 on the prevention of organised crime (referred to in the following as the 1998 Council Resolution on prevention), which encourages Member States and relevant institutions to use appropriate Community programmes also for activities related to the prevention of organised crime.

Analysis

Continued work is needed to improve the validity, reliability and international comparability of data on organised crime, and on the annual situation reports. In this connection, a uniform concept of collection and use of data on organised crime and related phenomena should, to the maximum extent possible, be established so that a practical strategic analysis can be made, leading to the adoption of the most appropriate control measures to combat and prevent organised crime.

A more proactive, intelligence-led approach is needed to detect and interrupt organised criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. The targeting of investigation and the planning of the response of society to organised crime requires knowledge of the profile, motives and modus operandi of the offenders, the scope of and trends in organised crime, the impact of organised crime on society, and the effectiveness of the response to organised crime. This knowledge includes operational data (data related to individual suspected and detected cases) and empirical data (qualitative and quantitative criminological data). The timely and effective exchange of data between the various authorities should be ensured, with due respect to data protection.

Improved data on organised crime can also help Member States and the Council in the planning of crime prevention and, through this, in best protecting the potential victims of crime. Such improved data can be obtained in particular by supplementing the descriptions of the way in which offences were committed and where they were committed, and in general through improvements in the utility of the information processed through the criminal justice system.

Detailed recommendations

Recommendation 1. An evaluation mechanism and time-frame for implementing recommendations should become an integral part of the preparation and consideration of the annual reports on organised crime. One of the main aims of the contact and support network should be to seek to establish a uniform, EU concept of the topics and phenomena relating to organised crime. Attention should also be directed at identifying emerging trends. Further action is needed to encourage the academic and scientific world to contribute by their studies and research to the understanding of the phenomenon of organised crime.

Responsibility: Member States, Europol, Council, Commission

Target date: ongoing activity

Priority: 1(3)

CHAPTER 2.2: Preventing penetration of organised crime in the public and the legitimate private sector

Political guideline

The EU strategy should seek to prevent the penetration of organised crime in the public and legitimate private sector.

Existing mandates and initiatives

Recommendations 7, 8 and 29 of the 1997 Action Plan dealt with the collection and exchange of information in order to prevent the penetration of organised crime in the public and legitimate private sector. These recommendations called, inter alia, for the exclusion of persons who have committed offences connected with organised crime from participation in tender procedures conducted by Member States and the Community, and from receiving subsidies or governmental licences (recommendation 7), the collection of information on the physical persons involved in the creation and direction of legal persons registered in their territory, as well as on their funding (recommendation 8), and various means to prevent fiscal fraud (recommendation 29). All three recommendations stressed that the instruments and relevant legislation should be in conformity with the relevant rules relating to data protection.

All three recommendations were to have been carried out by the end of 1998, but have not yet been implemented. In respect of recommendation 7 on, inter alia, exclusion from public tenders, the results of a questionnaire issued by the Commission have been viewed by the MDG and subsequently a study, co-financed by the Falcone programme has been undertaken. Its recommendations are currently being considered by the Commission in order to present answers for a concrete follow-up.

The Commission has worked closely with the liberal professions on the drafting of a Charter of European professional associations in support of fight against organised crime. The Charter was signed on 27 July 1999.

Recommendation 10 called for regular consultation by Member States with the competent services of the Commission with a view to analysing cases of fraud affecting the financial interests of the Community. To this end, the Member States have met with UCLAF, which has subsequently been replaced by OLAF. Regular consultations would appear to continue to be desirable.

Analysis

Persons engaged in organised crime seek to enter the public and legitimate private sector for a number of reasons. Legitimate business activities can provide cover for criminal activities, and can at the same time offer new criminal opportunities (such as for fraud and embezzlement). Legitimate businesses can also provide a channel for the laundering of criminal proceeds.

Detailed recommendations

Recommendation 2. Member States and the European Commission should ensure that the applicable legislation provides for the possibility that an applicant in a public tender procedure who has committed offences connected with organised crime can be excluded from the participation in tender procedures conducted by Member States and the Community. In this context it should be studied whether and under what conditions persons who are currently under investigation or prosecution for involvement in organised crime could also be excluded. Specific attention should be paid to the

illicit origin of funds as a possible reason for exclusion. The decision of exclusion of the person from participation in the tender procedure should be capable of being challenged in court.

Similarly, the Member States and the Commission should ensure that the applicable legislation provides for the possibility of rejecting, on the basis of the same criteria, applications for subsidies or governmental licences.

Appropriate Community instruments and instruments of the European Union, enabling, inter alia, exchange of information among Member States and between Member States and the Commission, and containing specific provisions relating to the role of the Commission both in administrative cooperation and the setting up of black-lists, should be drawn up to ensure that these commitments can be carried out, while ensuring conformity with the relevant rules relating to data protection.

For the purposes set out in this recommendation, an effective mechanism allowing the early identification of persons who have committed offences connected with organised crime should be established at EU level while taking full account of data protection requirements. This mechanism should comprise the Member States, the Commission and Europol in accordance with rules to be drawn up in consultation with the European Parliament.

Responsibility: Council, Commission, Member States

Target date: 31 December 2002

Priority: 2

Recommendation 3. Member States shall seek to collect information, in compliance with the relevant rules relating to data protection, on physical persons involved in the creation and direction of legal persons registered in the territory of Member States, as a means to prevent the penetration of organised crime in the public and legitimate private sector. A study shall be made of how such data can be systematically compiled and analysed and be available for exchange with other Member States and, where appropriate, with bodies responsible at European Union level for the fight against organised crime, on the basis of appropriate rules to be developed by the Council.

Responsibility: Council, Commission

Target date: 31 December 2000

Priority: 3

Recommendation 4. Legal instruments to combat organised crime in connection with fiscal fraud should be developed in conformity with the relevant rules relating to data protection. To this end the following should be examined so that:

- in cases linked with organised crime, there should be no legal bar to allowing or obliging the fiscal authorities to exchange, at the national level, information with the competent authorities of the Member States concerned, and in particular with the judiciary, while fully respecting fundamental rights,

- fiscal fraud linked with organised crime should be treated as any other form of organised crime, notwithstanding that fiscal laws may contain special rules on recovering the proceeds of fiscal fraud,

- disbursements for criminal purposes, such as corruption, should not be tax deductible, and

- the prevention and control of organised fiscal fraud such as VAT and excise fraud, including its transnational aspects, should be improved at both the national and the European Union level.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 2

Recommendation 5. The Member States should consult regularly with the competent services of the Commission with a view to analysing cases of fraud affecting the financial interests of the Community, and deepening the knowledge and understanding of the complexities of these phenomena within existing mechanisms and frameworks. If necessary, additional mechanisms shall be put in place with a view to arranging such consultations on a regular basis. In this context, relations between Europol and the Commission's anti-fraud unit (OLAF) should be taken into account. The Commission is invited to develop, in close cooperation with the Council and Member States, training programmes for relevant authorities of the Member States to enable them to investigate cases of Community fraud more effectively.

Responsibility: Council, Commission, the Member States

Target date: 31 December 2002

Priority: 3

CHAPTER 2.3: Strengthening the prevention of organised crime and strengthening partnerships between the criminal justice system and civil society

Political guideline

The European Union strategy should emphasise the importance of the prevention of organised crime.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

41. The European Council calls for the integration of crime prevention aspects into actions against crime as well as for the further development of national crime prevention programmes. Common priorities should be developed and identified in crime prevention in the external and internal policy of the European Union and be taken into account when preparing new legislation.

42. The exchange of best practices should be developed, the network of competent national authorities for crime prevention and cooperation between national crime prevention organisations should be strengthened and the possibility of a Community-funded programme should be explored for these purposes. The first priorities for this cooperation could be juvenile, urban and drug-related crime.

Existing mandates and initiatives

Paragraph 51(b) of the 1998 Action Plan calls for the development of cooperation and concerted measures on matters relating to crime prevention.

The framework for prevention measures in respect of organised crime is provided by the Council Resolution of 21 December 1998 on the prevention of organised crime.

Paragraph 33 of the Council Resolution invites the Member States, Europol and the Commission, each within their respective competencies, to study the subject matter of the Resolution and related questions. The Commission and Europol are further invited to cooperate in the preparation of a comprehensive report by the end of 2000, which in particular:

- makes proposals on how prevention measures could be promoted in future work at European level, and in particular how they could be reflected in the legislative process,

- analyses what measures for the prevention of organised crime, by which bodies and at what level, seem appropriate with a view to optimum effectiveness,

- analyses proposals for the encouragement of the evaluation of measures for the prevention of organised

crime,

- analyses to what extent prevention measures can be taken at the European level (particularly in the light of the Treaty of Amsterdam),

- makes proposals for drawing up and keeping up to date a repertory of good practice in the area of organised crime prevention,

- analyses to what extent ideas and measures for the prevention of organised crime could be taken into account in the process of enlargement and relations with third States.

Analysis

Organised crime, as is the case with crime in general, does not spread at random. The scope of such offences as drug trafficking, trafficking in persons, corruption and economic crime depends to a great deal on the presence of motivated offenders, on the existence of the opportunity for crime, and on the orientation of the work of those who seek to control organised crime. Member States should explore ways to ensure that committing crime is made more difficult, that committing crime involves greater risks to the offender (in particular the risk of detection and apprehension), and that the possible benefits to the offender of committing crime are decreased or eliminated. Such crime prevention measures should respect fundamental human rights.

It should also be recalled that the prevention of organised crime at the same time contributes to effective prevention and control of crime in general, and the prevention of crime in general conversely contributes to the effective prevention and control of organised crime.

The EU strategy should be designed to reinforce implementation of the Council Resolution on the prevention of organised crime by mobilising all segments of society in order to decrease the demand for illegal goods and services, and to prevent the infiltration of organised crime into society. In this, the principle of subsidiarity should be followed; the EU strategy should seek to reinforce and supplement action taken on the national and the local level.

Local community organisations, the business community and other sectors of society should be encouraged to develop partnerships with one another and with the authorities in preventing and controlling organised crime. Member States should examine whether any tasks related to the prevention and control of organised crime could not, in conformity with basic principles of their legal systems and internal policies, be carried out by non-public bodies at the national, regional and local level. However, public authorities should always be involved when decisions are made regarding the legal rights of individuals, and decisions on the use of coercive measures should be reserved only for criminal justice authorities.

A large number of methods have been shown by studies to be effective, at least in certain situations. An even larger number have been shown to be promising, even though there may not as yet be solid empirical evidence that they have an impact. Many other widely used methods, in turn, have been shown by research not to have a significant impact in crime prevention, at least in certain situations. In addition, more evidence is becoming available about the relative impact of different methods. As called for by the Council Resolution, this information on successful approaches and "best practices" needs to be made more generally available on the local and national level throughout the European Union, and the possibility of adapting successful approaches to different situations needs to be explored.

At the same time, Member States should explore ways to prevent marginalisation, since many criminogenic factors are connected with poor living conditions and marginalisation. This requires attention to fair, comprehensive and effective social security, educational and training systems, measures to combat unemployment and poverty, as well as the strengthening of crime prevention through urban

planning.

In addition to general educational measures, special educational measures should be developed to strengthen respect for the law.

Particular attention should be paid to counteracting the development and spread of illegal markets, including the market for illegal drugs, in line with the Communication from the Commission on a European Union Drug Strategy (2000 to 2004) (COM(1999) 239). In line with paragraph 50 of the Presidency Conclusions from the Tampere European Council, this Drugs Strategy was endorsed by the European Council meeting in Helsinki on 10 to 11 December 1999.

In order to prevent recidivism, an attempt should be made to interrupt a developing criminal career at as early a stage as possible. Such attempts should be designed to use, wherever appropriate, diversionary and non-custodial measures in order to enhance social integration. The importance of measures to assist the social reintegration of offenders and the enforcement of sentences for purposes of preventing recidivism should be stressed.

Some opportunity for crime arises because insufficient attention may be given to the effects that decisions made by the authorities of Member States and of the European Union may have on crime, except in the case of decisions that are seen to directly affect the criminal justice system and the activity of criminal justice practitioners. The crime prevention perspective should be mainstreamed into the decision-making of the Member States and of the European Union. This requires recognition of the importance and impact of the crime prevention perspective regardless of the area of administration, sector of policy or Ministry mandate to which the measure belongs.

Detailed recommendations

Recommendation 6. Building on paragraphs 41 and 42 of the Presidency Conclusions from the Tampere European Council, the Commission is invited to cooperate with the Council in the preparation of a proposal for an instrument requiring all committees and other preparatory bodies on both the national and the EU level, when proposing legal reforms (even if these do not directly affect criminal policy), to assess as appropriate the impact of the reforms on crime, for example on fraud and other abuse. If such an assessment is not made, the reason for not doing so should be mentioned.

In respect of the effectiveness of instruments to be adpoted at the level of the European Union, the Council should be assisted, as appropriate, by suitably qualified experts on crime prevention, such as the national focal points, or by establishing a network of experts from national crime prevention organisations.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 1

CHAPTER 2.4: Reviewing and improving legislation as well as control and regulatory policies at the national and the European Union levels

Political guideline

The relevant legislation as well as crime control and regulatory systems should be subjected to regular critical review.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

32. Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should

be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

48. Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, euro counterfeiting), drugs trafficking, trafficking in human beings, particulary exploitation of women, sexual exploitation of children, high tech crime and environmental crime.

Existing mandates and initiatives

A number of existing mandates and initiatives are designed to strengthen the legislative system as well as crime-control and regulatory systems.

Paragraph 46(a) of the 1998 Action Plan (which is to be implemented within two years) calls for the identification of the behaviour in the field of organised crime, terrorism and drug trafficking, for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly. Paragraphs 50(c) and 51(a) (which, in turn, are to be implemented within five years) call, respectively, for continued elaboration of measures establishing minimum rules relating to the constituent elements of behaviour and to penalties in all fields of organised crime, terrorism and drug trafficking, and for identification of which specific forms of crime which can be best combated by a general EU approach.

In line with paragraph 46(b) of the 1998 Action Plan, the Council resolution of 28 May 1999 noted that the Council should adopt an instrument on the prevention, control and approximation of legislation on the counterfeiting of the euro. On 14 September 1999, the Commmission presented a proposal for a framework decision on counterfeiting and on means of payment other than cash.

Recommendation 6 of the 1997 Action Plan calls for the development of a comprehensive policy against corruption, taking into account also the work already carried out in other international forums, in order to enhance the transparency in public administration. The Multidisciplinary Group on Organised Crime (MDG) noted that the May 1997 Commission Communication sets out a basis for a comprehensive policy on corruption, and that in the light of the work that has been completed or initiated under the first and third pillars, the essential elements of the comprehensive policy have been identified and are being taken forward. The progress of the work in this area should be kept under constant review.

Paragraph 47(a) of the 1998 Action Plan invites the Commission to initiate a review of the possibilities for harmonised rules on data protection. Work has already been undertaken in this field.

Recommendation 18(b) of the 1997 Action Plan called for the introduction of the liability of legal persons where the legal person has been involved in organised crime. Although this recommendation was to have been implemented by the end of 1998, this has not yet been done. A paper on the legal liability of legal persons has been considered by the MDG, a seminar on the subject has been held on the basis of Grotius funding, and an additional questionnaire has been issued.

Paragraph 51(c) of the 1998 Action Plan called for the addressing of the question of victim support by making a comparative survey of victim compensation schemes and assessing the feasability of taking action within the European Union. The Commission has undertaken action to this end.

The principal mandate seeking to improve the tools for review of the system in place is paragraph 47(c) of the Action Plan, which calls for the continuation of the process of mutual evaluation under the Joint Action adopted by the Council on 5 December 1997.

Analysis

Considerable progress has been achieved at national and international level in improving the response to organised crime. However, further work is needed to ensure that recommendations, international undertakings and policies are in fact being implemented, to identify possible problems encountered, and to develop, as appropriate, new mechanisms and methods in order to overcome such problems. Recognition should also be given to the importance of maintaining some degree of flexibility in developing the appropriate response to what is a very multifaceted and continuously evolving phenomenon.

The work of the EU on the review and improvement of legislation and policies should proceed in a programmatic manner, placing the primary focus wherever possible on offences that appear to pose the greatest threat to the Member States and the European Union, and on legislation and policies which appear to hamper the development of a concerted response to organised crime. The focus of this work may well vary with changing circumstances and threats, as suggested for example by the annual situation reports on organised crime.

The work on the review of legislation and policies should utilise in particular the evaluations carried out in accordance with the Joint Action adopted by the Council on 5 December 1997.

Detailed recommendations

Recommendation 7. In line with paragraphs 46(a), 50(c) and 51(a) of the 1998 Action Plan and paragraph 48 of Presidency Conclusions of Tampere European Council, the Council should, where found necessary, adopt instruments with a view to approximate the legislation of Member States. These instruments should take into account minimum standards of the constituent elements of offences and penalties related to organised crime, terrorism and drug trafficking. Noting in particular the conclusions of Tampere, at least the following offences will be considered: high technology crime (computer fraud and offences committed by means of the Internet), drug trafficking related offences, trafficking in human beings (particularly exploitation of women) terrrorism related offences, financial crime (money laundering, corruption, euro counterfeiting) tax fraud, sexual exploitation of children, and environmental crime. Consideration should be given to the opportunity for the development of a more general EU policy towards these specific forms of crime, taking into account as appropriate, work being carried out in other international organisations.

Responsibility: Council

Target date: ongoing activity; different target dates need to be set for each offence. The investigation and examination of the first offence should be completed by 31 December 2000, and further offences should be examined at the rate of at least one per Presidency.

Priority: 2

Recommendation 8. The Council should continue and strengthen the process of mutual evaluation based on the Joint Action of 5 December 1997, with an appropriate balance between law enforcement, prosecutorial and judicial issues. The objective should be to be able to evaluate in an in-depth manner the international undertakings decided under Title VI of the TEU. The Council should consider the possibility of defining common standards for the mutual evaluations made by the different teams of experts, and provide sufficient and permanent resources to be able to undertake such evaluations.

The mutual evaluation mechanism established under the Joint Action of 5 December 1997 should be reserved for the most important activities of interest in the prevention and control of organised crime, such as mutual assistance in criminal matters, drugs and law enforcement aspects and extradition. In addition, the Council should further consider the possibility of supplementing this mutual evaluation mechanism with a simplified and expedited mechanism, to be applied to the implementation by Member States of specific undertakings. The simplified and expedited mechanism could be used for the evaluation of specific areas of implementation or for questions which necessitate rapid evaluation.

Responsibility: Council. Close cooperation, where appropriate, with Commission, Europol or European Judicial Network.

Target date: ongoing activity; supplementary mechanism in place before 31 December 2000

Priority: 1

Recommendation 9. The Commission is invited to prepare a proposal for an instrument on the criminal, civil or administrative liability of legal persons where the legal person has been involved in organised crime.

Responsibility: Commission, Council

Target date: 31 December 2001

Priority: 3

CHAPTER 2.5: Strengthening the investigation of organised crime

Political guideline

The effectiveness of investigative means should be increased, with due respect to fundamental human rights.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

23. The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end. Member States, together with Europol, should direct their efforts to detecting and dismantling the criminal networks involved. The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children.

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union. The principle should apply both to judgements and to other decisions of judicial authorities.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

44. The European Council calls for the establishment of a European police chiefs' operational task force to exchange, in cooperation with Europol, experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions.

47. A European Police College for the training of senior law enforcement officials should be established. It should start as a network of existing national training institutes. It should also be open to the authorities of candidate countries.

Existing mandates and initiatives

Paragraph 44(a) of the 1998 Action Plan calls for the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime (cf. Article 30(1)(d) TEU).

Paragraph 44(b) of the 1998 Action Plan calls for consideration of the arrangements under which a law enforcement service from one Member State could operate in the territory of another (cf. Article 32 TEU), taking into consideration the Schengen acquis. The 1998 Action Plan further notes that consideration should be given to two points in particular:

- the determination of the conditions and limitations under which the competent law enforcement authorities of one Member State may operate in the territory of another Member State, in liaison and in agreement with the latter,

- in return, what types of operation - and under what arrangements - is each Member State willing to accept in its own territory.

The creation of a collective framework for this type of operation is one of the priorities of police cooperation. This framework can be a flexible one.

Paragraph 43(1)(a)(iii) of the 1998 Action Plan calls for making the fight against illegal immigration networks one of the priorities of operational cooperation, particularly by using the national units as a network of national contact points responsible for dealing with them.

Paragraph 44(c) of the 1998 Action Plan calls for the development and expansion of operational cooperation between law enforcement services in the European Union and the strengthening of technical police cooperation. The joint action carried out in particular by the Member States' customs administrations should be used where appropriate as a model and should be expanded in cooperation with national police forces and gendarmeries and in close conjunction with the judicial authorities. In the medium term, Europol could serve as a backup for these future initiatives, which it will be possible to activate under what that Amsterdam Treaty has established as "decisions for any other purpose consistent with" the objectives of Title VI of the TEU.

Paragraph 44(e) of the 1998 Action Plan calls for the ratification of the CIS and Naples II Conventions by 31 July 2001 and the taking of measures for their effective implementation.

Paragraph 48(a)(vii) calls for a study on the possibility of setting up a system of exchanging fingerprints electronically between Member States.

Paragraph 48(b)(iii) calls for the promotion of cooperation and joint initiatives in the training of law enforcement personnel, the exchange of liaison officers, secondment, the use of equipment and forensic research.

Analysis

Because of the secretive nature of much organised crime, and because there are often no individual victims or the victim has either been coopted or intimidated, attention should be paid to ensuring that sufficient resources are provided to the investigation of organised crime, and that the investigators have at their disposal an appropriate range of legal means to conduct various investigations and to secure the needed evidence. The use of such mechanisms as electronic surveillance, undercover agents, and promises of immunity or reduction of sentences in exchange for cooperation requires finding the proper balance between effectiveness and the protection of fundamental human rights.

Improving the effectiveness of investigations also requires developing new investigative means, providing appropriate training to investigators and judical authorities, providing the requisite resources, and providing the appropriate structure for work, which may sometimes require a high degree of specialisation.

The investigation of the international aspects of organised crime requires closer international cooperation between law enforcement agencies. One possibility is the establishment of international investigative teams.

Detailed recommendations

Recommendation 10. In line with paragraph 43(1)(a)(iii) of the 1998 Action Plan and paragraph 23 of the Presidency Conclusions from the Tampere European Council, combating illegal immigration networks should be a high priority of operational cooperation. With this in mind, Member States shall undertake, in close cooperation with Europol, the Commission and the European Judicial Network, to ensure that clear rules on the coordination of investigations into such networks are laid down at both the law enforcement and the judicial level. Furthermore the Council shall review the operation of investigations in this field with a view to further improving the effectiveness of the prevention and disruption of illegal immigration networks. Guidelines should be prepared, in close cooperation with Europol, the Commission and the European Judicial Network, on the exchange of information between national law enforcement units on illegal immigration networks, and on other forms of cooperation in identifying and responding to such networks. In order to be able to pool resources at the level of the European Union, the possibility of establishing a task force consisting of the competent authorities should be explored.

Responsibility: Member States, Council, Commission, Europol, European Judicial Network

Target date: 31 December 2001

Priority: 1

Recommendation 11. The relevant specialised law enforcement agencies should seek to develop, on the international level, common standards for investigations, and expertise in all Member States on new developments, and promote exchanges of experience and technical equipment. A project-based approach in accordance with already decided standards should be the main driving force in the prevention and control of organised crime within the EU.

Responsibility: Member States, Council, Europol

Target date: 31 December 2002

Priority: 2

CHAPTER 2.6: Strengthening Europol

Political guideline

The potential of Europol to become an effective tool of the Member States in the prevention and control of organised crime should be developed.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

43. Maximum benefit should be derived from cooperation between Member States' authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.

45. Europol has a key role in supporting European Unionwide crime prevention, analyses and investigation. The European Council calls on the Council to provide Europol with the necessary support and resources. In the near future its role should be strengthened by means of receiving operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States.

56. The European Council invites the Council to extend the competence of Europol to money laundering in general, regardless of the type of offence from which the laundered proceeds originate.

Existing mandates and initiatives

Paragraph 25(a) to (c) of the 1997 Action Plan called for further development of Europol's mandate and tasks, assessment of whether the Europol Convention requires amendment, and an in-depth study with a view to examining the place and role of judicial authorities in their relations with Europol. Along the same lines paragraph 45(g) of the 1998 Action Plan calls for an examination of the role and the place of the judicial authorities in the framework of a further development of Europol in accordance with the Amsterdam Treaty, with a view to improving the efficiency of the institution. Considerable developments have taken place in respect of paragraphs 25(a) and 25(b) of the 1998 Action Plan, and the matter is being kept under continuous review by Member States and the Europol Management Board.

Paragraph 25(d) of the 1997 Action Plan states that full use should be made of the possibilities of Europol in fields of operational techniques and support, analysis and data analysis files (for instance registers on stolen cars or other property).

The development of operational techniques could take the form of studies of practice at national and European Union level and their effectiveness, and the development of common strategies, policies and tactics. The development of operational support could, inter alia, take the form of the organisation of meetings, the development of common action plans and their implementation, strategic analyses, facilitating information and intelligence exchange, analytical support for multilateral national investigations, technical and tactical support, legal support, offering technical facilities, development of common manuals, facilitating training, evaluation of results and giving advice to the competent authorities of the Member States.

Paragraph 43(1)(a)(i) of the 1998 Action Plan calls for an examination of the feasibility of setting up a database of pending investigations, within the framework of the provisions of the Europol Convention, making it possible to avoid any overlap between investigations and to involve several European competent authorities in the same investigation, thus combining their knowledge and expertise.

Paragraph 43(1)(a)(ii) of the 1998 Action Plan (to be implemented within two years), calls for the directing of Europol's documentary work towards operational activity, stating that wherever possible its analyses should lead to operational conclusions. Paragraphs 48(a)(ii) and 48(b)(ii) of the 1998 Action Plan (to be implemented within five years), call, respectively, for the establishment of a research and documentation network on cross-border crime, and for the organisation of the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data.

Paragraph 43(1)(a)(iv) of the 1998 Action Plan added terrorism as one of the offences to be dealt with by Europol, and called for the reinforcement of exchanges of information and the coordination of competent authorities of Member States in the fight against crimes committed or likely to be committed in the course of terrorist activities, using Europol in particular.

Paragraph 43(1)(b) of the 1998 Action Plan called for the drafting of an adequate legal instrument extending Europol's powers to the activities referred to in Article 30(2) TEU and focusing Europol's work on operational cooperation. An important subject is the place and the role of judicial authorities in their relations with Europol. One of the priorities stated by the Treaty is to determine the nature and scope of the operational powers of Europol, which will have to be able to "ask the competent authorities of the Member States to conduct and coordinate [their] investigations" and also to act within the framework of "operational actions of joint teams".

Paragraph 43(1)(c) of the 1998 Action Plan calls for an examintation of Europol access to Schengen information system (SIS) or European information system (EIS) investigation data, and paragraph

48(a)(v) calls for an examination of whether and how Europol could have access to the Customs information system.

Paragraph 48(a)(vi) of the 1998 Action Plan calls for the elaboration and implementation, in cooperation with Europol, of an information strategy on making the work and powers of Europol known to the public.

Analysis

The entry into force of the Europol Convention has provided the European Union with an important tool in the field of law enforcement of organised crime by developing and strengthening the operative exchange of information and intelligence between law enforcement parties in Member States. It has also provided the European Union with a mechanism of fundamental importance in deepening and strengthening international cooperation in the prevention and control of organised crime.

Detailed recommendations

Recommendation 12. Member States shall ensure that Europol's role as an organ for criminal intelligence is supported and strengthened in order for Europol to fulfil its tasks to provide Member States with information and intelligence leading to the most effective results in preventing and combating organised crime. The study called for by paragraph 43(1)(a)(i) of the 1998 Action Plan should involve also the expertise of judicial authorities. The establishment of compatible criminal intelligence systems among Member States should be a long-term goal.

Responsibility: Council, Europol, European Judicial Network

Target date: 31 July 2001

Priority: 1

Recommendation 13. On-going work relating to the use of Europol in developing and implementing operational techniques, and in support and analysis should be continued. In particular, the possible role of Europol in the coordination of international investigations between the competent authorities of the Member States in order to combat criminal organisations operating in more than one Member State should be explored, including the possibility of operational actions of joint teams that include representatives of Europol in a support capacity, of asking the competent authorities of the Member States to conduct investigations in specific cases, and of developing specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime.

Responsibility: Council, Euopol

Target date: 31 July 2001

Priority: 2

CHAPTER 2.7: Tracing, freezing, seizing and confiscating the proceeds of crime

Political guideline

Particular attention should be devoted to depriving organised crime of its major motivation, the proceeds of crime.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

48. Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as... money laundering...

51. Money laundering is at the very heart of organised crime. It should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.

52. Member States are urged to implement fully the provisions of the Money Laundering Directive, the 1990 Strasbourg Convention and the Financial Action Task Force recommendations also in all their dependent territories.

53. The European Council calls for the Council and the European Parliament to adopt as soon as possible the draft revised directive on money laundering recently proposed by the Commission.

54. With due regard to data protection, the transparency of financial transactions and ownership of corporate entities should be improved and the exchange of information between the existing financial intelligence units (FIU) regarding suspicious transactions expedited. Regardless of secrecy provisions applicable to banking and other commercial activity, judicial authorities as well as FIUs must be entitled, subject to judicial control, to receive information when such information is necessary to investigate money laundering. The European Council calls on the Council to adopt the necessary provisions to this end.

55. The European Council calls for the approximaton of criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds). The scope of criminal activities which constitute predicate offences for money laundering should be uniform and sufficiently broad in all Member States.

57. Common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the European Union in the hiding of criminal proceeds and in money laundering. The European Union and Member States should make arrangements with third-country offshore-centres to ensure efficient and transparent cooperation in mutual legal assistance following the recommendations made in this area by the Financial Action Task Force.

58. The Commission is invited to draw up a report identifying provisions in national banking, financial and corporate legislation which obstruct international cooperation. The Council is invited to draw necessary conclusions on the basis of this report.

Existing mandates and initiatives

Recommendation 26 of the 1997 Action Plan called for a variety of measures in the field of money laundering and confiscation; similarly, paragraph 45(d) of the 1998 Action Plan urges the strengthening and development of the prevention and control of money laundering.

More specifically, recommendation 26(a) of the 1997 Action Plan called for a system for exchanging information concerning suspected money laundering; along the same lines, paragraph 48(a)(iv) of the 1998 Action Plan calls for the setting up of a system for the exchange of information and analysis on money laundering.

Recommendation 26(b) of the 1997 Action Plan calls for making criminalisation of the laundering of the proceeds of crime as general as possible, and the creation of as broad as possible a legal basis for a range of powers of investigation into it.

Recommendation 26(b) of the 1997 Action Plan also called for an examination of the opportunity of extending laundering to negligent behaviour, and for the undertaking of a study with a view to strenghtening the tracing and seizure of illegal assets and of the enforcement of court decisions on the confiscation of assets of organised crime. A Joint Action on laundering and the proceeds of crime was adopted, accordingly, on 3 December 1998, and a questionnaire on negligence has been issued to the MDG.

Recommendation 26(c) calls for the introduction of rules authorising confiscation regardless of the presence of the offender. Recommendation 26(d) calls for a study on the possibility of the international sharing of confiscated assets; a draft Joint Action on asset sharing has been discussed by the MDG. Recommendation 26(e) calls for an extension of the reporting obligation. Recommendation 26(f) calls for the addressing of the issue of money-laundering on the Internet and via electronic money products and requiring, in electronic payment and message systems, that the messages sent give details of the originator and the beneficiary. Recommendation 26(g) deals with the excessive use of cash payments; and recommendation 26(h) calls for a study of economic and commercial counterfeiting.

In general regarding action taken in respect of recommendation 26, it may be noted that the matter has been under constant review by the MDG, and several recommendations are being pursued in conjunction with proposals from Europol. The Commission has submitted a formal proposal to amend the 1991 Directive that deals with several of the points referred to in the recommendation.

Paragraph 47(d) of the 1998 Action Plan calls for continuation and development of the work started under the action plan on organised crime on the question of safe havens and fiscal paradises.

Paragraph 50(b) of the 1998 Action Plan calls for the improvement and approximation, where necessary, of national provisions governing seizures and confiscation of the proceeds from crime, taking account of the rights of third parties in bona fide.

Analysis

The primary motive of much organised crime is financial gain. Effective prevention and control of organised crime, therefore, would focus on tracing, freezing, seizing and confiscating the proceeds of crime. However, this has been hampered for example by the slowness of the exchange of information, the differences in legislation and the cumbersome nature of bureaucratic procedures. Moreover, the legitimate concerns for data protection have made discussions complex.

Means should be found to promote the expedient exchange of information (including details from financial institutions) between financial intelligence units within the European Union regardless of their internal structures. Means should also be found to speed up implementation in another Member State of judicial decisions on the freezing of bank accounts and in general on assistance in tracing illegal assets.

A particular problem is the emergence of those off-shore and on-shore financial centres and "fiscal paradises" that can in effect provide criminals with safe havens and that are used to further criminal ends. Means should be found to ensure that the various international provisions and recommendations regarding money laundering are implemented by Member States in their dependent territories. In this context needs to be taken into account the substantial work that has been carried out within the framework of the FATF on non-cooperative territories.

The possibility of the mitigation of the burden of proof, after the conviction of the offender for a serious offence, concerning the origin of assets held by the offender should be considered. Such mitigation would require that the sentenced person proves that he or she has acquired the assets in question in a legal manner. If this is not done to the satisfaction of the court, the assets can be held to be the illegal proceeds of crime, and confiscated.

Detailed recommendations

Recommendation 14.

(a) In line with paragraph 57 of the Presidency Conclusions from the Tampere European Council, an instrument should be adopted on measures that should be taken by Member States in respect of off-shore and on-shore financial centres and fiscal paradises operating in their territory, and on a common European Union policy towards financial centres and fiscal paradises lying outside

the European Union. The instrument should address the use of trustees and other techniques which can be used to disguise the true ownership of property.

(b) The Council should prepare a model agreement for negotiations, under Article 38 TEU, with off-shore and on-shore financial centres and fiscal paradises with a view to ensuring that they maintain accepted standards and cooperate effectively in the prevention and control of organised crime. Such agreements should further be negotiated with off-shore and on-shore financial centres and fiscal paradises. In this respect, close cooperation should be secured between the JHA Council and the Ecofin Council.

Responsibility: Council, Member States, Commission

Target date: ongoing activity; model agreement to be completed by 31 December 2001

Priority: 2

Recommendation 15. The Council, in cooperation with the Commission, with due regard to data protection issues and following discussions with the relevant banking organisations, should address the issue of money laundering on the Internet and via electronic money products and requiring, in electronic payment and message systems, that the messages sent give details of the originator and the beneficiary.

Responsibility: Council, Commission

Target date: 31 December 2001

Priority: 2

Recommendation 16. In line with paragraph 36 of the Presidency Conclusions from the Tampere European Council, and in the framework of the programme of measures referred to in paragraph 37 of the Presidency Conclusions, the Council should adopt an instrument calling on the Member States to review their legislation and its application in respect of decisions on the tracing, freezing, seizure and confiscation of assets from crime and, where necessary, subsequently establish minimum standards with a view to allowing mutual recognition and execution of such decisions at as early a stage as possible in the investigation and criminal proceedings, taking into account the rights of third parties in bona fide.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

Recommendation 17.

(a) In line with paragraph 55 of the Presidency Conclusions from the Tampere European Council, criminalisation of the laundering of the proceeds of crime should be made as general as possible, and a legal basis should be created for as broad as possible a range of powers of investigation into it. In line with recommendation 26(b) of the 1997 Action Plan and Article 6(3)(a) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the possibility of extending the criminalisation of laundering to cases where the offender ought to have assumed the property in question was the proceeds of crime should be examined.

(b) Member States should consider according to national law establishing units which are specifically dedicated to the process of tracing, seizure and confiscation of assets derived from offences covered by the Joint Action adopted by the Council on 3 December 1998, taking into account the experience of such units operating successfully in some Member States. Member States should furthermore examine whether their manpower, operational and technical resources are sufficient to combat money laundering. In addition to the evaluation process which is undertaken in the

FATF framework, Member States should examine measures which will further strengthen effective implementation of the FATF recommendations, including the possibility of making specific reports to the Council on the implementation of such measures.

Responsibility: Council, Member States

Target date: 31 December 2000

Priority: 1

Recommendation 18. The Commission is invited to initiate a study on the possibility of preventing the excessive use of cash payments and cash exchanges by natural and legal persons from serving to cover up the conversion of the proceeds of crime into other property. Consideration should be given to setting up an adequate system of declarations which would enable the competent authorities to carry out the appropriate investigations. In its study, the Commission is invited, inter alia, to take account of national legislation relating for instance to the role of professionals, casinos and gambling houses.

Responsibility: Commission

Target date: 31 December 2003

Priority: 3

Recommendation 19. An examination should be made of the possible need for an instrument which, taking into account best practices operating in the Member States and with due respect to fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

Responsibility: Council

Target date: 31 December 2001

Priority: 3

Recommendation 20. An examination should be made of the possible need for an instrument on confiscation regardless of the presence of the offender, to cover cases where the offender has died or absconded.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

Recommendation 21. Consideration should be given to whether an instrument on the sharing of confiscated assets among Member States is compatible with the nature of judicial assistance and with legal traditions of judicial assistance in the Member States. This should take into account recent developments in international criminal law.

Responsibility: Council

Target date: 31 December 2002

Priority: 3

CHAPTER 2.8: Strengthening cooperation between law enforcement and judicial authorities nationally and within the European Union

Political guideline

An integrated, multidisciplinary approach is required in order to be able to prevent and control

organised crime effectively.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen implementing agreement.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European enforcement order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

46. To reinforce the fight against serious organised crime, the European Council has agreed that a unit (Eurojust) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of cooperating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001.

49. Serious economic crime increasingly has tax and duty aspects. The European Council therefore calls upon Member States to provide full mutual legal assistance in the investigation and prosecution of serious economic crime.

Existing mandates and initiatives

Recommendations 13 and 14 of the 1997 Action Plan called upon those Member States that had not yet done so to ratify speedily key conventions that are essential to the prevention and control of organised crime. Some instruments have not yet been ratified by all Member States. Paragraph 45(c) of the 1998 Action Plan, in turn, calls for effective implementation in law and in practice of the two existing conventions on extradition adopted under the TEU.

Recommendation 16 of the 1997 Action Plan urges finalisation of the draft Convention on Mutual Assistance in Criminal Matters before the end of 1997 and, as soon as possible, enlargement of the content of the Convention, while taking into account the necessity to accelerate procedures for judicial cooperation in matters relating to organised crime and considerably reducing delays in transmission and responses to requests. Work on finalisation of the draft Convention, however, is still in progress, with a view towards completion by early 2000.

Recommendation 16 also calls for consideration of instruments adopted by the Council regarding individuals who cooperate with the judicial process and on the protection of witnesses as well as the specific needs of police cooperation connected with pre-trial investigations. Reports on the implementation of this recommendation have been considered by the Council.

Recommendation 16(a) calls for examination of reservations with regard to the 1959 European Convention on Mutual Assistance and its Protocol. This is currently being considered by the Judicial Cooperation Working Group, within the context of the finalisation of the draft Convention on Mutual Assistance in Criminal Matters.

Recommendation 16(b) calls for the creation of a legal basis for the transboundary application of certain modern investigative methods, such as controlled delivery, deployment of undercover agents and the interception of various forms of telecommunications. Also these measures are currently being considered by the Judicial Cooperation Working Group within the context of the draft Convention.

Paragraph 45(a) of the 1998 Action Plan call for the effective implementation and, where appropriate, further development of the European Judicial Network. It also notes that the effective implementation of the European Judicial Network is a priority matter. It will bring about a practical improvement in cooperation and needs to be equipped with modern tools to enable efficient cooperation. Consideration ought to be given now to making it more operational.

Paragraph 45(e) of the 1998 Action Plan calls for the facilitation and acceleration of cross-border cooperation between the competent ministries and judicial or equivalent authorities of the Member States.

Paragraph 45(f) of the 1998 Action Plan calls for the initiation of a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters. A work programme on mutual recognition has been discussed in the MDG, with the immediate priority on the mutual recognition of asset restraint orders and of sentences imposing a fine.

Paragraph 45(g) of the 1998 Action Plan calls for an examination of the role and the place of the judicial authorities in the framework of a further development of Europol in accordance with the Amsterdam Treaty, with a view to improving the efficiency of the institution.

Paragraph 48(a)(i) of the 1998 Action Plan calls for the promotion of liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol (cf. Article 30(2)(c), TEU).

Paragraph 48(b)(i) encourages general policy and operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services and the judicial authorities of the Member States in relation to the prevention, detection and investigation of criminal offences (cf. Article 30(1)(a) of the TEU). The paragraph notes that in this context it would be useful to develop and enhance existing bilateral and regional cross-border cooperation, for instance by continuing and extending on a similar basis the experiments with joint police stations. It would also be desirable to continue the development of customs risk analysis techniques and the improvement of customs control methods such as the implementation of the container control action plan and to consider the new avenues where there is a possibility for fraud, such as Internet.

Paragraph 49(a) calls for a consideration of whether substantive and formal improvements can still be made to extradition procedures, including rules to reduce delay.

Paragraph 49(b) calls for further facilitation of cross-border cooperation between ministries and judicial authorities in the field of criminal proceedings. Paragraph 49(c) calls for an examination of the feasibility of improved cross-border cooperation on the transfer of proceedings and the enforcement of sentences. Paragraph 49(d) calls for a study of the feasibility of extending and possibly formalising the exchange of information on criminal records, and paragraph 49(e) calls for the prevention of conflicts of jurisdiction between Member States, by, for instance, examining the possibility of registering whether there are proceedings against the same persons on the same offences pending in different Member States.

Paragraph 50(a) of the 1998 Action Plan calls for the ensurance of compatibility of the rules applicable between Member States in so far as necessary to improve judicial cooperation. A reflection should also be started on possibilities for avoiding that abuse of judicial remedies that can affect or delay cooperation. The paragraphs notes that efficient procedural standards should be sought

that will improve mutual assistance in criminal matters while complying with the requirements of fundamental freedoms. Consideration should begin in the field of telecommunication interception and also on civil actions relating to criminal offences. In that connection, compensation for the victims of crime must be an avenue not to be neglected.

Analysis

One area of concern is inter-agency cooperation on the national and the international level, including cooperation between fiscal and law enforcement authorities. Many crimes can be prevented or speedily resolved if intelligence available to one agency can be shared with other agencies, nationally and internationally. However, this intelligence may not be recognised as being useful to other agencies, there may not be secure channels through which the intelligence can be passed on, or these other agencies may be distrusted. As a result, investigation, prosecution, adjudication and enforcement do not form a coherent and inter-linked system nationally, much less internationally.

Local, national and international cooperation among law enforcement agencies, and between law enforcement and judicial authorities, should be strengthened. In that context, priority should be given to the question of judicial authorities and Europol.

Detailed recommendations

Recommendation 22. In line with paragraph 45(b) of the Action Plan of freedom, security and justice, and paragraph 37 of the Presidency Conclusions from the Tampere European Council, the Commission is invited to cooperate with the Council in the adoption, by December 2000, of a programme for measures to implement the principle of mutual recognition of judicial decisions in criminal cases.

Responsibility: Council, Commission

Target date: 31 December 2000

Priority: 1

Recommendation 23. In line with paragraph 46 of the Presidency Conclusions from the Tampere European Council, the Council is requested to draw up and adopt, as soon as possible, a legal instrument concerning the establishment of Eurojust specifying its structure, sphere of competence, powers and responsibilities. Particular attention should be given to determining the general framework of the new body's relations with national prosecuting authorities, Europol, Commission (OLAF) and the European Judicial Network.

Responsibility: Council

Target date: 31 December 2001

Priority: 1

Recommendation 24. The European Judicial Network should be implemented effectively and, where appropriate, further developed, for example by exploring ways in which to equip it with modern tools to make efficient cooperation possible, and ways in which to make it more operational. Particular attention should be paid to the development of efficient procedural standards that will improve mutual assistance in criminal matters while complying with the requirements of fundamental rights.

The General Secretariat of the Council serves also as the secretariat of the European Judicial Network, and must therefore be given, on a permanenet basis, the necessary resources to ensure that the European Judicial Network will be able to fulfil its tasks.

Responsibility: Member States, Council

Target date: ongoing activity

Priority: 2

Recommendation 25. A proposal shall be prepared for an instrument on the position and protection of witnesses and of persons who participate or who have participated in criminal organisations, and who are prepared to cooperate with the judicial process by supplying information useful for investigative and evidentiary purposes or by providing information that may contribute to depriving criminal organisations of their resources or of the proceeds of crime. The proposal should consider the possibility, in appropriate cases, inter alia, of mitigating punishment of an accused person who provides substantial cooperation in such cases. An EU model agreement should be developed, taking into account the experiences of Europol, and used on a bilateral basis.

Responsibility: Council, Member States, Commission

Target date: 31 July 2001

Priority: 3

Recommendation 26. The possible need for additional funding, and in particular the possibility of greater flexibility and expedited procedures in the use of EU funding for training and support activities should be explored, in particular in the light of TEU 41(3). Examples include the supporting of interpretation services, the provision of language training, and the acquisition of international experience for specialised law enforcement officers, prosecutors and judges. The possibility of the use of such funds in improving the organisation of meetings of practitioners at the EU level (including meetings related to the use of joint investigative teams) should be considered. The attention of competent authorities should be drawn to the possibility of using three-way conferences between two officials using an interpreter, and the Member States should encourage such use by making available resources to that end. With due regard to the need to safeguard the legitimate interests of control of public funds, the use of such funds to promote judicial cooperation should not impinge on judicial independence.

Responsibility: Commission, Council, European Judicial Network, Europol, Member States

Target date: 31 December 2001

Priority: 2

Recommendation 27. Those States which have not yet ratified(4), the following European Union, Council of Europe and United Nations conventions, which are essential to the prevention and control of organised crime, should make proposals to their Parliaments with a view to speedy ratification within the given timetable. Should any convention not have been ratified by the set target date, they shall report to the Council in writing, on the reasons therefore, every six months until the convention has been ratified. If a Member State has not ratified a convention within a reasonable time for any given reason, the Council shall assess the situation with a view to solving it. As part of the pre-accession pact, undertakings shall be sought from the candidate countries of a similar character. When drawing up new conventions and other instruments, the Council should set a target date for their adoption and implementation in accordance with the constitutional requirements of the Member States and the Treaty of Amsterdam.

1. European Convention on Extradition, Paris 1957 - end 2001

2. Second Protocol to the European Convention in Extradition, Strasbourg 1978 - end 2001

3. Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1978 - end 2001

4. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Strasbourg 1990 - end 2001

5. Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II) - end 2001

6. Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg 1995 - end 2001

7. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna 1988 - end 2001

8. European Convention on the Suppression of Terrorism, Strasbourg 1977 - end 2001

9. Council of Europe Criminal Law Convention on the fight against Corruption, Strasbourg 1999 - end 2001

10. Convention on Simplified Extradition Procedure between the Member States of the European Union - end 2001

11. Convention on the Protection of the European Communities' Financial Interests - mid-2001

12. Convention on the Use of Information Technology for Customs Purposes - end 2000

13. Convention relating to Extradition between the Member States of the European Union - end 2001

14. Protocols to the Convention on the Protection of the European Communities' Financial Interests - end 2001

15. Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of the Member States of the EU - end 2001

Several other Conventions may also be relevant to the fight against organised crime. Among those conventions are the Convention for the Suppression of Counterfeiting Currency, Geneva 1929 as well as the Council of Europe Convention on the Protection of the Environment through Criminal Law, Strasbourg 1998.

Responsibility: Member States, Council

Target date: as noted

Priority: 1

Recommendation 28. Extradition should be facilitated through effective implementation of the two existing conventions on extradition adopted under the TEU. In particular, Member States should take, at the national level, the necessary measures to ensure that extradition requests can be dealt with in the most simple and expeditious manner. As called for by paragraph 35 of the Presidency Conclusions from the Tampere Summit, the Commission is invited to make proposals for expedited extradition of convicted persons fleeing from justice as well as on fast-track extradition procedures. An evaluation of extradition procedures, based on the Joint Action adopted by the Council on 5 December 1997, should begin no later than 30 June 2001. In this respect, consideration should be given to the long-term possibility of the creation of a single European legal area for extradition. The issue of extradition in relation to procedures in absentia, with full respect to fundamental rights granted by the European Convention on Human Rights, might also be examined in this context.

Responsibility: Council, Member States, Commission

Target date: 2002; 2010 for the long-term objective

Priority: 1

Recommendation 29. In accordance with paragraph 36 of the Presidency Conclusions from the Tampere European Council, the Member States shall consider different ways and means, including minimum standards for decisions on the collection of evidence, and the Council should adopt the necessary instrument with a view towards ensuring that evidence lawfully gathered by one Member State's authorities is admissible before the courts of other Member States, subject to the principle of judicial independence and taking into account the standards that apply in such other Member States.

Responsibility: Council

Target date: 31 December 2004

Priority: 4

Recommendation 30: With a view to rendering investigations into cross-border organised crime more efficient, the Council is requested to work towards the approximation of national legislation on criminal procedure governing investigative techniques so as to make their use more compatible.

Responsibility: Council

Target date: December 2002

Priority: 3

CHAPTER 2.9: Strengthening cooperation with the applicant countries

Political guideline

Cooperation with the applicant countries should be strengthened with a view to their gradual incorporation into the EU strategy for the prevention and control of organised crime.

Existing mandates and initiatives

In line with recommendation 3 of the 1997 Action Plan, a pre-accession pact was adopted on 28 May 1998. A pre-accession pact expert group (PAPEG) has been established. The acquis of the European Union has been presented to the candidate countries on a multilateral basis. In addition, a bilateral session has taken place with each candidate country in order to assess its level of preparation for the European Union standards.

The Commission has taken various initiatives through different tools such as the Title VI programmes (such as Phare and TAIEX funds) to strengthen cooperation with candidate countries in the area of the fight against organised crime.

Paragraph 43(d) of the 1998 Action Plan calls for strengthening of the Europol role in information exchange in implementation of the pre-accession pact, and the giving of sufficient resources to Europol for it to be able to meet that goal.

Analysis

Organised crime in the Member States of the European Union is to a large extent indigenous. None the less, a truly effective EU strategy must look beyond the Member States of the EU. This should be done not only in order to promote cooperation in respect of individual offences and offenders, but also in order to exchange information on best practices and on trends in organised crime. In the first instance, using the pre-accession pact on organised crime more effectively, cooperation should be improved with the applicant countries.

This cooperation is mutually advantageous, in that, while the candidate countries can be informed about the acquis of the European Union, they themselves can, building on their extensive experience, contribute to the strengthening of the response to organised crime in the European Union itself.

The role of the pre-accession pact on organised crime of 28 May 1998 in strengthening this cooperation is of particular importance. The Council should consider if additional resources for the implementation of the pact should be provided.

In this work, particular attention should be given to the prevention and control of such offences as money-laundering, illegal immigration networks and financial crime.

Detailed recommendations

Recommendation 31. The European Union and Member States should seek to strengthen practical and direct forms of cooperation in law enforcement and criminal justice with the candidate countries.

Responsibility: Council, Commission, Member States

Target date: ongoing activity

Priority: 3

Recommendation 32. The applicant countries should be integrated into the preparation and analysis of the annual situation reports on organised crime.

Responsibility: Council, Europol

Target date: ongoing activity

Priority: 2

Recommendation 33. The possibility should be explored of cooperation with the applicant countries in the use of the Schengen information system, taking into account the legal and technical feasibility of such cooperation.

Responsibility: Council

Target date: ongoing activity

Priority: 3

Recommendation 34. The Member States should explore the appropriateness, on a bilateral basis, of entering into commitments and practical cooperation with the applicant countries relating to cooperation with them in respect of the tracing of stolen property such as motor vehicles, and to the use of investigative techniques such as controlled deliveries and undercover operations.

Responsibility: Member States

Target date: ongoing activity

Priority: 2

Recommendation 35. The European Union and Member States should seek to strengthen technical assistance and expertise to the applicant countries in order to support the development of efficient and democratic law-enforcement systems and appropriate public administration, and the adjustment of institutions and laws to more closely align with European Union legislation. The possibilities of twinning programmes funded under the EU Phare programme should be further encouraged.

Responsibility: Council, Commission, Member States

Target date: ongoing activity

Priority: 1

CHAPTER 2.10: Strengthening cooperation with third countries and other international organisations

Political guideline

The prevention and control of organised crime requires global cooperation, and should be seen in that context.

The relevant Presidency Conclusions from the Tampere European Summit are the following:

7. The area of freedom, security and justice should be based on the principles of transparency and democratic control. We must develop an open dialogue with civil society on the aims and principles of this area in order to strengthen citizens' acceptance and support. In order to maintain confidence in authorities, common standards on the integrity of authorities should be developed.

8. The European Council considers it essential that in these areas the Union should also develop a capacity to act and be regarded as a significant partner on the international scene. This requires close cooperation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.

59. The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and home affairs concerns must be integrated in the definition and implementation of other Union policies and activities.

60. Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of common strategies as well as Community agreements and agreements based on Article 38 TEU.

61. Clear priorities, policy objectives and measures for the Union's external action in justice and home affairs should be defined. Specific recommendations should be drawn up by the Council in close cooperation with the Commission on policy objectives and measures for the Union's external action in justice and home affairs, including questions of working structure, prior to the European Council in June 2000.

62. The European Council expresses its support for regional cooperation against organised crime involving the Member States and third countries bordering on the Union. In this context it notes with satisfaction the concrete and practical results obtained by the surrounding countries in the Baltic Sea region. The European Council attaches particular importance to regional cooperation and development in the Balkan region. The European Union welcomes and intends to participate in a European Conference on Development and Security in the Adriatic and Ionian area, to be organised by the Italian Government in Italy in the first half of the year 2000. This initiative will provide valuable support in the context of the south-eastern Europe stability pact.

Existing mandates and initiatives

Recommendation 4 of the 1997 Action Plan called for closer cooperation with third States and international organisations and bodies involved in the prevention and control of organised crime. The potential for cooperation provided by existing mechanisms, such as the transatlantic partnership, and the Tacis programme and the partnership agreements with the Russian Federation and Ukraine, should be used more effectively. The possibility of the development of corresponding arrangements with other countries should be explored. Specific proposals for closer cooperation, for instance through the intermediary of Europol, should be developed by the Council and the Commission.

Considerable work has been carried out by the Council and the Commission in response to this recommendation (see Crimorg 67). However, the recommendation requires on-going activity.

Analysis

Cooperation should be improved with third countries, including within the framework of the transatlantic dialogue and in cooperation with the Russian Federation and Ukraine. In addition, consideration

should be given to strengthening cooperation with, for example, partners around the Mediterranean and in south-eastern Europe, China, and the Latin American and Caribbean countries.

An effective EU strategy should be tailored so that it can build on and complement the results of successful work that has already been carried out or is being carried out bilaterally or multilaterally, for example within the framework of the Council of Europe, the Group of Eight Industrialised Countries, the Financial Action Task Force, the International Criminal Police Organisation, the Organisation for Economic Cooperation and Development, and the United Nations. Furthermore, the Union should seek to act more coherently to make its voice heard in international forums.

Detailed recommendations

Recommendation 36. Closer cooperation should be developed with third States and international organisations and bodies involved in the prevention and control of organised crime. The potential for cooperation provided by existing mechanisms, such as the transatlantic partnership and the partnership agreements with the Russian Federation and Ukraine, should be used more effectively. The possibility of the development of corresponding arrangements with other countries should be explored. Specific proposals for closer cooperation, for instance in association with Europol, should be developed by the Council and the Commission.

Responsibility: Council, Commission, Europol

Target date: ongoing activity

Priority: 2

Recommendation 37. The full political weight of the European Union should be carried in all forums where all Member States participate, such as the Council of Europe, the Organisation for Economic Cooperation and Development, the Financial Action Task Force, the International Criminal Police Organisation, and the United Nations. This requires effective coordination among European Union Member States in these forums and, where appropriate, the seeking of agreement in a timely manner on joint positions which should then be defended by the Member States in accordance with Article 37 TEU. Where not all Member States participate in meetings in such forums, non-attending Member States should be given full information on discussions which might affect them.

Responsibility: Council, Member States

Target date: ongoing activity

Priority: 1

Recommendation 38. The European Union and Member States, on the entry into force of the United Nations Convention against Transnational Organised Crime and its protocols, should review this strategy in the light of the provisions of the Convention with a view to seeking to assist countries on request in the full implementation of the Convention.

Responsibility: Council, Member States

Target date: ongoing activity

Priority: 2

CHAPTER 2.11. Monitoring the strengthening of the implementation of measures for the prevention and control of organised crime within the European Union

Political guideline

Specific monitoring of the implementation of the European Union strategy against organised crime is essential in order to maintain coherence and follow-up on the national and the EU level.

Existing mandates and initiatives

Document 9239/2/97 CK4 24 (which is based on recommendation 22 of the 1997 Action Plan sets out the mandate of the Multidisciplinary Group on Organised Crime. The MDG is charged with the development of policies to coordinate the prevention and control of organised crime. This development essentially includes (a) direct implementation of mandates principally addressed to the Council, (b) the monitoring of the implementation of other mandates, (c) the assessment of practical cooperation (in particular through evaluation mechanisms), (d) the designing of EU strategies and policies in the prevention and control of organised crime, (e) preparation, in full cooperation with the other relevant Council working groups, of high-level decisions, in particular for the Article 36 Committee, (f) providing the Article 36 Committee with information which is useful for drawing up interim progress reports, and (g) preparation of proposals for increased coordination between the first, second and third pillars in combating organised crime.

Analysis

The European Union strategy against organised crime should be flexible, both so that the lessons learned in the process of implementation can be taken into consideration, and so that crime prevention and control measures can be tailored as appropriate to changes in the phenomenon of organised crime itself.

The detailed recommendation and timetables contained in the 1997 Action Plan have contributed to the success achieved in its implementation. Further impetus has been given by the work of the Multidisciplinary Group on Organised Crime, which consists of senior officials, a group that has benefited from its multidisciplinary approach and the support of specialists.

Detailed recommendations

Recommendation 39. The Multidisciplinary Group on Organised Crime shall prepare regular reports for submission, through the Article 36 Committee, to the Council and the European Council, on the implementation of this strategy.

The Multidisciplinary Group shall, no later than 30 June 2003, submit a comprehensive report on the measures and steps taken with regard to the implementation of each recommendation in this strategy. The Council shall take appropriate measures.

The European Council shall not later than 30 June 2005 receive a general report on the implementation of the EU strategy to combat organised crime and shall take the necessary measures to ensure that where this strategy has not been implemented in full the European Council will give appropriate orientations on further measures to be taken.

Responsibility: Council, Commission

Target date: ongoing activity; general report 30 June 2005

Priority: 1

(1) OJ C 251, 15.8.1997, p. 1.

(2) OJ C 19, 23.1.1999, p. 1.

(3) For each recommendation, a priority of 1 to 5 has tentatively been set. A priority of 1 means that work should begin immediately with a view to rapid finalisation. A priority of 3 means that work may begin if there are resources to do so, or that the recommendation requires ongoing activity. A priority of 5 means that work could be deferred until later, although the recommendation is nonetheless of such importance as to be incorporated in the Action Plan. The level of priority assigned to the various action points may change in time along with circumstances.

(4) All Member States have already ratified the 1959 Convention on Mutual Assistance in Criminal Matters and the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Those Conventions are also of importance in the fight against organised crime.

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European Union action plan on common action for the Russian Federation on combating organised crime

European Union action plan on common action for the Russian Federation on combating organised crime

(2000/C 106/02)

The Council of the European Union

IN FULFILMENT of the EU Common Strategy on Russia which was endorsed by the European Council meeting in Cologne in June 1999,

TAKING ACCOUNT of the medium-term strategy for development of relations between the Russian Federation and the EU (2000 to 2010), adopted by the Russian Federation,

TAKING ACCOUNT of the Union's action plan on organised crime, approved by the European Council at Amsterdam in June 1997, and in particular recommendation 4 thereof,

TAKING ACCOUNT of the European Union drug strategy (2000 to 2004) endorsed by the European Council in December 1999,

TAKING FURTHER INTO ACCOUNT that the Agreement on Partnership and Cooperation between the European Communities and their Member States and the Russian Federation entered into force on 1 December 1997,

BEARING IN MIND the special federal programme to intensify the fight against crime 1999 to 2000 approved by the Government of the Russian Federation on 10 March 1999, with particular reference to its aspects concerning organised crime,

EMPHASISING the commitment of the European Union to democracy, human rights and the rule of law and aware that organised crime constitutes a serious threat to these values because it penetrates, contaminates and corrupts the structure of governments, legitimate commercial and financial business and society at all levels,

TAKING ACCOUNT of the requirements of the European Convention on Human Rights and Fundamental Freedoms of 1950 and other international instruments in the field of human rights,

DETERMINED to combat organised crime and to improve international cooperation with the Russian Federation to tackle that phenomenon, while fully respecting human rights and various international conventions relating to the protection of those rights,

TAKING INTO ACCOUNT the discussions on organised crime which have taken place at the meetings of liaison officers from Member States based in Russia,

HAVING CONSIDERED the results of the seminars on EU-Russia cooperation in the fields of migration and judicial cooperation held in Lappeenranta in Juli 1999,

ACKNOWLEDGING the work on organised crime already undertaken by the relevant subcommittee established under the EU-Russia Agreement on Partnership and Cooperation,

TAKING INTO ACCOUNT the conclusions of the conference between the EU and Russia on organised crime in Helsinki on 15 and 16 December 1999,

RECALLING the discussion on organised crime which took place at the EU-Russia Summit in Helsinki on 22 October 1999,

RECOGNISING that important work on combating organised crime is taking place in other international forums, including the United Nations, the Council of Europe and the Baltic Sea Task Force on

Organised Crime,

NOTING the conclusions of the Ministerial Conference of the G 8 countries on combating transnational organised crime in Moscow in October 1999,

ADOPTS this action plan on common action for the Russian Federation in combating organised crime.

A. GENERAL FRAMEWORK

I. Introduction and origin of plan

To strengthen the partnership between the European Union and the Russian Federation, the European Council, meeting in Cologne in June 1999, underlined its commitment to set up durable and effective cooperation with the Russian Federation in the area of justice and home affairs. In that respect it recognised the need to establish an action plan focused on common action with the Russian Federation in the fight against organised crime.

Paragraph 59 of the conclusions of the Tampere European Council on 15 and 16 October 1999 underlined the fact that all competences and instruments, and in particular, in external relations must be used in an integrated and consistent way to build an area of freedom, security and justice throughout the Union.

In addition, the European Union action plan to tackle organised crime, which was approved at the Amsterdam Council in June 1997, acknowledged the need to develop relations and closer cooperation with the Russian Federation. This was confirmed in recommendation 4 which called for the development by the Council and the Commission of concrete proposals to ensure improved cooperation, for instance in cooperation with Europol. Moreover, the Agreement on Partnership and Cooperation (PCA) between the European Communities, their Member States and the Russian Federation made reference to cooperation between the Parties to prevent illegal activities, including money laundering and drug trafficking.

The importance of developing further and more effective cooperation between the EU and the Russian Federation has also been highlighted at numerous international meetings involving law enforcement and other personnel with an active role in the field of organised crime. Similar conclusions have emerged from work undertaken by other international and regional bodies, including the G 8, the Council of Europe and the Baltic Sea Task Force against Organised Crime.

The Russian Federation has adopted a medium term strategy for the development of its relations with the European Union for the period 2000 to 2010. One of the elements of that strategy is concerned with cooperation in the field of law enforcement and it refers specifically to the establishment of operative cooperation with EU bodies in fighting transnational organised crime including money laundering and illegal drug trafficking.

II. Basis for plan

This action plan gives effect, in part, to the common strategy of the European Union on Russia endorsed by the European Council in Cologne. The common strategy confirmed that the Russian Federation and the European Union have a common interest in stepping up their cooperation in the fight against common scourges, including organised crime. In that context the European Union indicated that it proposed to put increased cooperation in place by creating the necessary tools and forms of cooperation between the competent bodies and by developing exchanges of experts. In addition it made clear its readiness to offer relevant expertise, particularly in the development of legislation and competent institutions. The common strategy also stated that a plan should be established to focus on common action with the Russian Federation in the fight against organised crime, including action to combat corruption, money laundering, trafficking in drugs, human beings and illegal immigration. In addition, a non-exhaustive list of specific issues to be covered by the plan was given.

III. General principles

As envisaged in the common strategy, this action plan is designed to promote close cooperation between the European Union and its Member States, and the Russian Federation in the fight against organised crime. This is a process in which the relevant activities should be addressed, in particular judicial and law enforcement cooperation, in order to ensure that organised crime can be tackled at the widest possible level. Particular attention should also be paid to the fact that prevention can play a significant role in combating organised crime by reducing the circumstances in which that phenomenon can operate.

Furthermore, account should be taken of related work already pursued by individual Member States or carried out in other international forums and of the possible need for coordination in that regard. As indicated in the common strategy, existing actions, programmes, instruments and policies are to be reviewed to ensure their consistency with the strategy and to make the necessary adjustments.

Organised crime is increasingly affecting legal business and commercial activities conducted between the Member States and the Russian Federation. In particular, it is using the legitimate commercial environment to conceal its activities, for example through the use of legally registered companies. One tool which it is employing in its activities is double invoicing which causes severe losses to the Russian Federation and at the same time creates conditions for organised crime to infiltrate legitimate businesses both within the European Union and in the Russian Federation. Organised crime groups in the Member States of the European Union and in the Russian Federation are cooperating to a significant extent in all fields of criminal activity and especially in relation to trafficking in people, drugs, arms and stolen property, money laundering, corruption, high-technology crime, financial crime and illegal immigration. This action plan applies, in particular, to these forms of criminal activity.

B. AREAS OF COOPERATION

I. Judicial cooperation

(i) Provision of judicial cooperation

Improving international judicial cooperation is a priority for this plan and a prerequisite for its success. Efforts should be made to ensure that a legislative framework suitable for such cooperation exists. This will require:

(a) adoption of appropriate legislative and other measures for the development of arrangements under which judicial cooperation can be provided for and obtained from other States, and

(b) ratification and full implementation of the international instruments to which States are parties and which are of particular importance in combating organised crime. These instruments include:

- European Convention on Extradition 1957(1) and its additional Protocols from 1975 and 1978

- European Convention on Mutual Assistance in Criminal Matters 1959 and its additional Protocol 1978

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg 1990

- Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg 1995

- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

- European Convention on the Suppression of Terrorism 1977 (signed by the Russian Federation on 7 May 1999)

- Council of Europe Criminal Law Convention on Corruption 1999 (signed by the Russian Federation on 27 January 1999)

- Council of Europe Criminal Law Convention on Corruption 1999

- Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981.

Several other Conventions may also be relevant to the fight against organised crime. Among those conventions are the Convention for the Suppression of Counterfeiting Currency, Geneva 1929 as well as the council of Europe Convention on the Protection of the Environment through Criminal Law, Strasbourg 1998.

The Russian Federation should be encouraged to become a party to each of the instruments with particular priority to be assigned to the conventions relating to extradition, mutual assistance in criminal matters, money laundering and corruption. The Russian Federation authorities should also be assisted so that they will be in a position to cooperate with other countries in conformity with internationally accepted standards such as those laid down in the 40 recommendations of the financial action task force.

(c) ratification and full implementation of international instruments for the protection of human rights.

(ii) Framework for judicial cooperation

To enhance the effectiveness of Russian Federation judicial cooperation in the field of organised crime, the European union will work with the Federation to encourage efforts to ensure that:

(a) special attention can be devoted by the Russian Federation judicial authorities to priority issues. These issues could be identified jointly by the Russian Federation and the European Union, for example on the basis of the EU annual organised crime situation report, and should be reviewed on a regular basis. Examples of possible priority areas include financial crime such as money laundering, trafficking in people for sexual exploitation or other purposes, drugs, arms and explosives, stolen property (including stolen vehicles and works of art), corruption, counterfeiting of money, illegal immigration, high-technology crime such as computer crime, and serious environmental crime;

(b) central Russian Federation contact points are identified and established for judicial cooperation purposes;

(c) links are established by the Russian Federation judicial cooperation authorities with their counterparts in the Member States and, as appropriate, with the European Judicial Network.

The European Union will, in this respect, assist the Russian Federation in:

(d) developing procedures which conform to the best practices in international judicial cooperation;

(e) arranging regular meetings and seminars to promote the adoption of good practice in judicial cooperation;

(f) training judicial cooperation practitioners, for example through exchanges of personnel;

(g) working with the Member States to provide a manual on judicial cooperation between Member States and the Russian Federation and a statement of good practice in relation to such cooperation;

(h) making joint efforts with third country offshore centres to ensure efficient and transparent cooperation in mutual legal assistance on the basis of the relevant recommendations made by the financial action task force.

II. Law enforcement cooperation

(i) Framework for cooperation

For the purpose of further enhancing the training of law enforcement officials and the overall opration of law enforcement, steps will be taken by the European Union to promote the development with the Russian Federation authorities of arrangements under which:

(a) special attention can be devoted by the Russian Federation law enforcement authorities to priority issues. These issues could be identified jointly by the Russian Federation and the European Union, for example on the basis of the EU annual organised crime situation report drafted in cooperation with Europol. these issues should be reviewed on a regular basis. Examples of possible priority areas include financial crime such as money laundering, and trafficking in persons for sexual exploitation or other purposes drugs, arms and explosives, stolen property (including stolen vehicles and works of art), corruption, counterfeiting of money, illegal immigration, high-technology crime such as computer crime, and serious environmental crime;

(b) technical, operational and strategic information and intelligence can be exchanged between Member States of the EU and Russian Federation law enforcement agencies on the widest range of topics in the field of organised crime, taking into account the need to ensure that legislative and other measures are put in place so that appropriate confidentiality and data-protection requirements are satisfied in relation to operational and strategic information provided to the Russian Federation law enforcement authorities;

(c) central Russian Federation contact points will be identified to exchange information with EU Member States law enforcement authorities;

(d) the development of common principles as appropriate, that would permit the authorities of the Russian Federation and the European Union to use special investigative techniques, such as controlled deliveries, in serious cases involving organised crime;

(e) training courses will be held with Russian Federation law enforcement personnel to develop good practice in the field of international cooperation;

(f) joint meetings will take place between law enforcement experts from EU Member States, and the Russian Federation operating in the field of organised crime, for instance to promote exchanges of information on trends in organised crime and other relevant matters or to discuss, in appropriate cases, investigations of common interest in relation to the activities of organised crime groups;

(g) exchange-programmes involving law enforcement cooperation experts will be organised with EU Member States;

(h) border controls should be strengthened to combat illegal trafficking in drugs as effectively as possible;

(i) financial institutions will be provided with appropriate rules and guidelines for reporting suspicious transactions to the competent designated Financial Intelligence Unit and fully support investigations by law enforcement authorities into suspected money laundering;

(j) exchanges of information about suspicious transactions may, in appropriate cases, take place between the Financial Intelligence Units of EU Member States and the corresponding competent Russian Federation authority, taking into account the need to ensure that legislative and other measures are put in places that appropriate confidentiality and data-protection requirements are satisfied in relation to information provided to the Russian Federation law enforcement authorities;

(k) special attention will be devoted to ensuring the integrity of data which can assist law enforcement

authorities in combating organised crime (e.g. registers of vehicle ownership);

(l) appropriate efforts will be made to encourage individuals to break away from criminal organisations and to ensure the protection of individuals who cooperate with the judicial process;

(m) information campaigns and international programmes will be undertaken to promote the prevention and reduction of organised crime, in line with the preparation of the European strategy to prevent organised crime, carried out in cooperation between the European Commission and Europol;

(n) academic studies of problems of mutual interest should be encouraged;

(o) comparable methods of analysis should be developed.

(ii) Liaison officers

To further develop cooperation between the EU Member States' liaison officers in Russia, the European Union will seek to ensure that these officers meet on a regular basis involving Europol and the European Commission as well. Where appropriate, liaison officers from the competent Russian Federation authorities stationed in the EU Member States should be invited to attend such meetings. In addition to exchanging relevant information, the liaison officers should have the opportunity to consider the implementation of the action plan and to put forward proposals for strengthening that process. Favourable consideration should also be given to the deployment of Russian Federation liaison officers in EU Member States.

Independently of this, meetings to promote information exchange should be held between liaison officers of EU Member States and liaison officers from other countries posted to the Russian Federation. When it is appropriate, the authorities of the Russian Federation should be invited to such meetings.

(iii) Europol

As provided for in the EU common strategy on Russia, cooperation between Europol and the competent Russian Federation agencies will be developed in accordance with the Europol Convention and the relevant Council decisions and according to agreed priorities.

III. Cooperation in other forums

The European Union and its Member States should work, in so far as possible, with the Russian Federation authorities to ensure appropriate cooperation in relation to organised crime matters within other international forums. For example, such cooperation could apply in the case of the negotiations on the draft United Nations Convention against Transnational Organised Crime and its protocols and within the Baltic Sea task force on organised crime and the "Budapest Group". It should also apply to possible cooperation in respect of the relevant technical assistance programmes being carried out by other bodies such as the Council of Europe and the United Nations.

C. COORDINATION OF ACTIVITIES UNDER THE ACTION PLAN

To enable this action plan to operate as successfully and effectively as possible, it will be necessary to ensure that appropriate cooperation takes place between the relevant parties, including the EU Member States, the Council, the Commission and the Russian Federation authorities. It will also be essential that, in accordance with the common strategy, the maximum amount of coordination is achieved in relation to Community and Member States' bilateral actions, programmes, instruments and policies which have a bearing on the action plan and that any necessary adjustments are made. In particular, the following measures will be put in place.

(i) Link between Community programmes and the bilateral initiatives of Member States

In the planning of EU (Community and Member State funded) programmes and in order to ensure coherence

and avoid duplication, coordination between the Member States and the Commission must be consolidated. In addition, Member States shall make additional efforts to coordinate their actions vis-à-vis Russia. As a first step, an indicative inventory of all relevant EU and Member State programmes, instruments and resources will be established.

(ii) EU and Russian Federation activities

Steps will be taken to maintain an up-to-date inventory of Community and of Member States' cooperative activities with the Russian Federation in organised crime matters and of the legal instruments concluded in that field. In addition the opportunity will be provided for the Member States to share with the Russian Federation authorities their experience of implementing measures adopted at EU level to combat organised crime. Similarly, the Russian Federation authorities should be encouraged to supply details of relevant developments with particular reference to the implementation of the international cooperation provisions of the special federal programme against organised crime which was approved by Decree of the Government of the Russian Federation on 10 March 1999 and other relevant Russian Federation legislation. An exchange of information on activities conducted in other (non-EU) forums will also be encouraged.

(iii) PCA subcommittee

The subcommittee which addresses the fight against crime under the framework of the EU-Russia Agreement on Partnership and Cooperation should include in its activities exchanges of information concerning ongoing anti-organised crime projects initiated by international organisations and forums other than the EU, for example the United Nations, the Council of Europe and the Baltic Sea task force on organised crime. The subcommittee could also usefully play a role in assessing:

(a) the implementation of projects financed by the European Union, and

(b) elements of future, coordinated, technical assistance.

(iv) Technical programmes

All future technical assistance programmes involving the EU, its Member States and the Russian Federation which are concerned with the fight against organised crime or related issues, including matters arising under the Tacis programme, should take due consideration of the objectives and provisions of this action plan. Efforts should be made to provide mutual practical support, including through Community and Member State assistance programmes, to implement the action plan. All future technical assistance programmes in the field of combating organised crime should be consistent with the action plan.

D. IMPLEMENTATION OF THE ACTION PLAN

The European Union will seek the full and active cooperation of the relevant Russian Federation authorities in the implementation of this action plan. In so far as possible and appropriate, steps will be taken to enable the Russian authorities to be associated with relevant programmes and instruments adopted within the EU. In addition, the countries which are candidates for accession to the EU will be invited to become associated with its provisions.

The European Union will also urgently consider the question of developing an agreement under Article 38 TEU with the Russian Federation for the purpose of implementing this action plan. In addition EU Member States should examine closely the possibility of concluding appropriate multilateral and bilateral agreements with the Russian Federation to improve the fight against organised crime within the framework of the action plan.

E. MONITORING AND EVALUATION OF THE ACTION PLAN

Regular meetings will take place at senior level between the European Union, including the Commission

and the Russian Federation to assess the implementation of the action plan. These meetings should also provide the opportunity for the launch of new initiatives. In addition the operational aspects of the action plan should be periodically considered by the appropriate subcommittee established under the EU-Russia Agreement on Partnership and Cooperation.

Not later than the end of 2001, the European Council will review the operation of this action plan and may decide to carry out further reviews in relation to this matter.

(1) The European Union welcomes the fact that the Russian Federation ratified the Conventions on Extradition and Mutual Assistance and their Protocols on 25 October 1999.

European Union action plan on common action for the Russian Federation on combating organised crime

(2000/C 106/02)

The Council of the European Union

IN FULFILMENT of the EU Common Strategy on Russia which was endorsed by the European Council meeting in Cologne in June 1999,

TAKING ACCOUNT of the medium-term strategy for development of relations between the Russian Federation and the EU (2000 to 2010), adopted by the Russian Federation,

TAKING ACCOUNT of the Union's action plan on organised crime, approved by the European Council at Amsterdam in June 1997, and in particular recommendation 4 thereof,

TAKING ACCOUNT of the European Union drug strategy (2000 to 2004) endorsed by the European Council in December 1999,

TAKING FURTHER INTO ACCOUNT that the Agreement on Partnership and Cooperation between the European Communities and their Member States and the Russian Federation entered into force on 1 December 1997,

BEARING IN MIND the special federal programme to intensify the fight against crime 1999 to 2000 approved by the Government of the Russian Federation on 10 March 1999, with particular reference to its aspects concerning organised crime,

EMPHASISING the commitment of the European Union to democracy, human rights and the rule of law and aware that organised crime constitutes a serious threat to these values because it penetrates, contaminates and corrupts the structure of governments, legitimate commercial and financial business and society at all levels,

TAKING ACCOUNT of the requirements of the European Convention on Human Rights and Fundamental Freedoms of 1950 and other international instruments in the field of human rights,

DETERMINED to combat organised crime and to improve international cooperation with the Russian Federation to tackle that phenomenon, while fully respecting human rights and various international conventions relating to the protection of those rights,

TAKING INTO ACCOUNT the discussions on organised crime which have taken place at the meetings of liaison officers from Member States based in Russia,

HAVING CONSIDERED the results of the seminars on EU-Russia cooperation in the fields of migration and judicial cooperation held in Lappeenranta in Juli 1999,

ACKNOWLEDGING the work on organised crime already undertaken by the relevant subcommittee established under the EU-Russia Agreement on Partnership and Cooperation,

TAKING INTO ACCOUNT the conclusions of the conference between the EU and Russia on organised crime in Helsinki on 15 and 16 December 1999,

RECALLING the discussion on organised crime which took place at the EU-Russia Summit in Helsinki on 22 October 1999,

RECOGNISING that important work on combating organised crime is taking place in other international forums, including the United Nations, the Council of Europe and the Baltic Sea Task Force on Organised Crime,

NOTING the conclusions of the Ministerial Conference of the G 8 countries on combating transnational organised crime in Moscow in October 1999,

ADOPTS this action plan on common action for the Russian Federation in combating organised crime.

A. GENERAL FRAMEWORK

I. Introduction and origin of plan

To strengthen the partnership between the European Union and the Russian Federation, the European Council, meeting in Cologne in June 1999, underlined its commitment to set up durable and effective cooperation with the Russian Federation in the area of justice and home affairs. In that respect it recognised the need to establish an action plan focused on common action with the Russian Federation in the fight against organised crime.

Paragraph 59 of the conclusions of the Tampere European Council on 15 and 16 October 1999 underlined the fact that all competences and instruments, and in particular, in external relations must be used in an integrated and consistent way to build an area of freedom, security and justice throughout the Union.

In addition, the European Union action plan to tackle organised crime, which was approved at the Amsterdam Council in June 1997, acknowledged the need to develop relations and closer cooperation with the Russian Federation. This was confirmed in recommendation 4 which called for the development by the Council and the Commission of concrete proposals to ensure improved cooperation, for instance in cooperation with Europol. Moreover, the Agreement on Partnership and Cooperation (PCA) between the European Communities, their Member States and the Russian Federation made reference to cooperation between the Parties to prevent illegal activities, including money laundering and drug trafficking.

The importance of developing further and more effective cooperation between the EU and the Russian Federation has also been highlighted at numerous international meetings involving law enforcement and other personnel with an active role in the field of organised crime. Similar conclusions have emerged from work undertaken by other international and regional bodies, including the G 8, the Council of Europe and the Baltic Sea Task Force against Organised Crime.

The Russian Federation has adopted a medium term strategy for the development of its relations with the European Union for the period 2000 to 2010. One of the elements of that strategy is concerned with cooperation in the field of law enforcement and it refers specifically to the establishment of operative cooperation with EU bodies in fighting transnational organised crime including money laundering and illegal drug trafficking.

II. Basis for plan

This action plan gives effect, in part, to the common strategy of the European Union on Russia endorsed by the European Council in Cologne. The common strategy confirmed that the Russian Federation and the European Union have a common interest in stepping up their cooperation in the fight against common scourges, including organised crime. In that context the European Union indicated that it proposed to put increased cooperation in place by creating the necessary tools and forms of cooperation

between the competent bodies and by developing exchanges of experts. In addition it made clear its readiness to offer relevant expertise, particularly in the development of legislation and competent institutions. The common strategy also stated that a plan should be established to focus on common action with the Russian Federation in the fight against organised crime, including action to combat corruption, money laundering, trafficking in drugs, human beings and illegal immigration. In addition, a non-exhaustive list of specific issues to be covered by the plan was given.

III. General principles

As envisaged in the common strategy, this action plan is designed to promote close cooperation between the European Union and its Member States, and the Russian Federation in the fight against organised crime. This is a process in which the relevant activities should be addressed, in particular judicial and law enforcement cooperation, in order to ensure that organised crime can be tackled at the widest possible level. Particular attention should also be paid to the fact that prevention can play a significant role in combating organised crime by reducing the circumstances in which that phenomenon can operate.

Furthermore, account should be taken of related work already pursued by individual Member States or carried out in other international forums and of the possible need for coordination in that regard. As indicated in the common strategy, existing actions, programmes, instruments and policies are to be reviewed to ensure their consistency with the strategy and to make the necessary adjustments.

Organised crime is increasingly affecting legal business and commercial activities conducted between the Member States and the Russian Federation. In particular, it is using the legitimate commercial environment to conceal its activities, for example through the use of legally registered companies. One tool which it is employing in its activities is double invoicing which causes severe losses to the Russian Federation and at the same time creates conditions for organised crime to infiltrate legitimate businesses both within the European Union and in the Russian Federation. Organised crime groups in the Member States of the European Union and in the Russian Federation are cooperating to a significant extent in all fields of criminal activity and especially in relation to trafficking in people, drugs, arms and stolen property, money laundering, corruption, high-technology crime, financial crime and illegal immigration. This action plan applies, in particular, to these forms of criminal activity.

B. AREAS OF COOPERATION

I. Judicial cooperation

(i) Provision of judicial cooperation

Improving international judicial cooperation is a priority for this plan and a prerequisite for its success. Efforts should be made to ensure that a legislative framework suitable for such cooperation exists. This will require:

(a) adoption of appropriate legislative and other measures for the development of arrangements under which judicial cooperation can be provided for and obtained from other States, and

(b) ratification and full implementation of the international instruments to which States are parties and which are of particular importance in combating organised crime. These instruments include:

- European Convention on Extradition 1957(1) and its additional Protocols from 1975 and 1978

- European Convention on Mutual Assistance in Criminal Matters 1959 and its additional Protocol 1978

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg 1990

- Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg 1995

- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

- European Convention on the Suppression of Terrorism 1977 (signed by the Russian Federation on 7 May 1999)

- Council of Europe Criminal Law Convention on Corruption 1999 (signed by the Russian Federation on 27 January 1999)

- Council of Europe Criminal Law Convention on Corruption 1999

- Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981.

Several other Conventions may also be relevant to the fight against organised crime. Among those conventions are the Convention for the Suppression of Counterfeiting Currency, Geneva 1929 as well as the council of Europe Convention on the Protection of the Environment through Criminal Law, Strasbourg 1998.

The Russian Federation should be encouraged to become a party to each of the instruments with particular priority to be assigned to the conventions relating to extradition, mutual assistance in criminal matters, money laundering and corruption. The Russian Federation authorities should also be assisted so that they will be in a position to cooperate with other countries in conformity with internationally accepted standards such as those laid down in the 40 recommendations of the financial action task force.

(c) ratification and full implementation of international instruments for the protection of human rights.

(ii) Framework for judicial cooperation

To enhance the effectiveness of Russian Federation judicial cooperation in the field of organised crime, the European union will work with the Federation to encourage efforts to ensure that:

(a) special attention can be devoted by the Russian Federation judicial authorities to priority issues. These issues could be identified jointly by the Russian Federation and the European Union, for example on the basis of the EU annual organised crime situation report, and should be reviewed on a regular basis. Examples of possible priority areas include financial crime such as money laundering, trafficking in people for sexual exploitation or other purposes, drugs, arms and explosives, stolen property (including stolen vehicles and works of art), corruption, counterfeiting of money, illegal immigration, high-technology crime such as computer crime, and serious environmental crime;

(b) central Russian Federation contact points are identified and established for judicial cooperation purposes;

(c) links are established by the Russian Federation judicial cooperation authorities with their counterparts in the Member States and, as appropriate, with the European Judicial Network.

The European Union will, in this respect, assist the Russian Federation in:

(d) developing procedures which conform to the best practices in international judicial cooperation;

(e) arranging regular meetings and seminars to promote the adoption of good practice in judicial cooperation;

(f) training judicial cooperation practitioners, for example through exchanges of personnel;

(g) working with the Member States to provide a manual on judicial cooperation between Member States and the Russian Federation and a statement of good practice in relation to such cooperation;

(h) making joint efforts with third country offshore centres to ensure efficient and transparent cooperation in mutual legal assistance on the basis of the relevant recommendations made by the financial action task force.

II. Law enforcement cooperation

(i) Framework for cooperation

For the purpose of further enhancing the training of law enforcement officials and the overall opration of law enforcement, steps will be taken by the European Union to promote the development with the Russian Federation authorities of arrangements under which:

(a) special attention can be devoted by the Russian Federation law enforcement authorities to priority issues. These issues could be identified jointly by the Russian Federation and the European Union, for example on the basis of the EU annual organised crime situation report drafted in cooperation with Europol. these issues should be reviewed on a regular basis. Examples of possible priority areas include financial crime such as money laundering, and trafficking in persons for sexual exploitation or other purposes drugs, arms and explosives, stolen property (including stolen vehicles and works of art), corruption, counterfeiting of money, illegal immigration, high-technology crime such as computer crime, and serious environmental crime;

(b) technical, operational and strategic information and intelligence can be exchanged between Member States of the EU and Russian Federation law enforcement agencies on the widest range of topics in the field of organised crime, taking into account the need to ensure that legislative and other measures are put in place so that appropriate confidentiality and data-protection requirements are satisfied in relation to operational and strategic information provided to the Russian Federation law enforcement authorities;

(c) central Russian Federation contact points will be identified to exchange information with EU Member States law enforcement authorities;

(d) the development of common principles as appropriate, that would permit the authorities of the Russian Federation and the European Union to use special investigative techniques, such as controlled deliveries, in serious cases involving organised crime;

(e) training courses will be held with Russian Federation law enforcement personnel to develop good practice in the field of international cooperation;

(f) joint meetings will take place between law enforcement experts from EU Member States, and the Russian Federation operating in the field of organised crime, for instance to promote exchanges of information on trends in organised crime and other relevant matters or to discuss, in appropriate cases, investigations of common interest in relation to the activities of organised crime groups;

(g) exchange-programmes involving law enforcement cooperation experts will be organised with EU Member States;

(h) border controls should be strengthened to combat illegal trafficking in drugs as effectively as possible;

(i) financial institutions will be provided with appropriate rules and guidelines for reporting suspicious transactions to the competent designated Financial Intelligence Unit and fully support investigations by law enforcement authorities into suspected money laundering;

(j) exchanges of information about suspicious transactions may, in appropriate cases, take place

between the Financial Intelligence Units of EU Member States and the corresponding competent Russian Federation authority, taking into account the need to ensure that legislative and other measures are put in places that appropriate confidentiality and data-protection requirements are satisfied in relation to information provided to the Russian Federation law enforcement authorities;

(k) special attention will be devoted to ensuring the integrity of data which can assist law enforcement authorities in combating organised crime (e.g. registers of vehicle ownership);

(l) appropriate efforts will be made to encourage individuals to break away from criminal organisations and to ensure the protection of individuals who cooperate with the judicial process;

(m) information campaigns and international programmes will be undertaken to promote the prevention and reduction of organised crime, in line with the preparation of the European strategy to prevent organised crime, carried out in cooperation between the European Commission and Europol;

(n) academic studies of problems of mutual interest should be encouraged;

(o) comparable methods of analysis should be developed.

(ii) Liaison officers

To further develop cooperation between the EU Member States' liaison officers in Russia, the European Union will seek to ensure that these officers meet on a regular basis involving Europol and the European Commission as well. Where appropriate, liaison officers from the competent Russian Federation authorities stationed in the EU Member States should be invited to attend such meetings. In addition to exchanging relevant information, the liaison officers should have the opportunity to consider the implementation of the action plan and to put forward proposals for strengthening that process. Favourable consideration should also be given to the deployment of Russian Federation liaison officers in EU Member States.

Independently of this, meetings to promote information exchange should be held between liaison officers of EU Member States and liaison officers from other countries posted to the Russian Federation. When it is appropriate, the authorities of the Russian Federation should be invited to such meetings.

(iii) Europol

As provided for in the EU common strategy on Russia, cooperation between Europol and the competent Russian Federation agencies will be developed in accordance with the Europol Convention and the relevant Council decisions and according to agreed priorities.

III. Cooperation in other forums

The European Union and its Member States should work, in so far as possible, with the Russian Federation authorities to ensure appropriate cooperation in relation to organised crime matters within other international forums. For example, such cooperation could apply in the case of the negotiations on the draft United Nations Convention against Transnational Organised Crime and its protocols and within the Baltic Sea task force on organised crime and the "Budapest Group". It should also apply to possible cooperation in respect of the relevant technical assistance programmes being carried out by other bodies such as the Council of Europe and the United Nations.

C. COORDINATION OF ACTIVITIES UNDER THE ACTION PLAN

To enable this action plan to operate as successfully and effectively as possible, it will be necessary to ensure that appropriate cooperation takes place between the relevant parties, including the EU Member States, the Council, the Commission and the Russian Federation authorities. It will also be essential that, in accordance with the common strategy, the maximum amount of coordination is

achieved in relation to Community and Member States' bilateral actions, programmes, instruments and policies which have a bearing on the action plan and that any necessary adjustments are made. In particular, the following measures will be put in place.

(i) Link between Community programmes and the bilateral initiatives of Member States

In the planning of EU (Community and Member State funded) programmes and in order to ensure coherence and avoid duplication, coordination between the Member States and the Commission must be consolidated. In addition, Member States shall make additional efforts to coordinate their actions vis-à-vis Russia. As a first step, an indicative inventory of all relevant EU and Member State programmes, instruments and resources will be established.

(ii) EU and Russian Federation activities

Steps will be taken to maintain an up-to-date inventory of Community and of Member States' cooperative activities with the Russian Federation in organised crime matters and of the legal instruments concluded in that field. In addition the opportunity will be provided for the Member States to share with the Russian Federation authorities their experience of implementing measures adopted at EU level to combat organised crime. Similarly, the Russian Federation authorities should be encouraged to supply details of relevant developments with particular reference to the implementation of the international cooperation provisions of the special federal programme against organised crime which was approved by Decree of the Government of the Russian Federation on 10 March 1999 and other relevant Russian Federation legislation. An exchange of information on activities conducted in other (non-EU) forums will also be encouraged.

(iii) PCA subcommittee

The subcommittee which addresses the fight against crime under the framework of the EU-Russia Agreement on Partnership and Cooperation should include in its activities exchanges of information concerning ongoing anti-organised crime projects initiated by international organisations and forums other than the EU, for example the United Nations, the Council of Europe and the Baltic Sea task force on organised crime. The subcommittee could also usefully play a role in assessing:

(a) the implementation of projects financed by the European Union, and

(b) elements of future, coordinated, technical assistance.

(iv) Technical programmes

All future technical assistance programmes involving the EU, its Member States and the Russian Federation which are concerned with the fight against organised crime or related issues, including matters arising under the Tacis programme, should take due consideration of the objectives and provisions of this action plan. Efforts should be made to provide mutual practical support, including through Community and Member State assistance programmes, to implement the action plan. All future technical assistance programmes in the field of combating organised crime should be consistent with the action plan.

D. IMPLEMENTATION OF THE ACTION PLAN

The European Union will seek the full and active cooperation of the relevant Russian Federation authorities in the implementation of this action plan. In so far as possible and appropriate, steps will be taken to enable the Russian authorities to be associated with relevant programmes and instruments adopted within the EU. In addition, the countries which are candidates for accession to the EU will be invited to become associated with its provisions.

The European Union will also urgently consider the question of developing an agreement under Article 38 TEU with the Russian Federation for the purpose of implementing this action plan. In addition

EU Member States should examine closely the possibility of concluding appropriate multilateral and bilateral agreements with the Russian Federation to improve the fight against organised crime within the framework of the action plan.

E. MONITORING AND EVALUATION OF THE ACTION PLAN

Regular meetings will take place at senior level between the European Union, including the Commission and the Russian Federation to assess the implementation of the action plan. These meetings should also provide the opportunity for the launch of new initiatives. In addition the operational aspects of the action plan should be periodically considered by the appropriate subcommittee established under the EU-Russia Agreement on Partnership and Cooperation.

Not later than the end of 2001, the European Council will review the operation of this action plan and may decide to carry out further reviews in relation to this matter.

(1) The European Union welcomes the fact that the Russian Federation ratified the Conventions on Extradition and Mutual Assistance and their Protocols on 25 October 1999.

DOCNUM	32000F0413
AUTHOR	Council
FORM	Various acts
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2000 SEC_3_TYP_F
PUBREF	Official Journal C 106 , 13/04/2000 P. 0005 - 0012
DESCRIPT	action programme ; cooperation policy ; fight against crime ; organized crime ; European Union ; Russia
PUB	2000/04/13
LEGCIT	11997M038..... 21997A1128(01)..... 51997XG0815.....
SUB	Justice and home affairs ; External relations
REGISTER	19300000

Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

CONVENTION drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

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

REFERRING to the Act of the Council of the European Union of 26 May 1997,

WHEREAS the Member States consider the improvement of judicial cooperation in the fight against corruption to be a matter of common interest, coming under the cooperation provided for in Title VI of the Treaty;

WHEREAS by its Act of 27 September 1996 the Council drew up a Protocol directed in particular at acts of corruption involving national or Community officials and damaging or likely to damage the European Communities' financial interests;

WHEREAS, for the purpose of improving judicial cooperation in criminal matters between Member States, it is necessary to go further than the said Protocol and to draw up a Convention directed at acts of corruption involving officials of the European Communities or officials of the Member States in general;

DESIROUS of ensuring consistent and effective application of this Convention throughout the European Union,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1 Definitions

For the purposes of this Convention:

(a) 'official` shall mean any Community or national official, including any national official of another Member State;

(b) 'Community official` shall mean:

- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities,
- any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them;

(c) 'national official` shall be understood by reference to the definition of 'official` or 'public officer` in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State.

Nevertheless, in the case of proceedings involving a Member State's official initiated by another Member State, the latter shall not be bound to apply the definition of 'national official` except insofar as that definition is compatible with its national law.

Article 2 Passive corruption

1. For the purposes of this Convention, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatesoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption.

2. Each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence.

Article 3 Active corruption

1. For the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption.

2. Each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence.

Article 4 Assimilation

1. Each Member State shall take the necessary measures to ensure that in its criminal law the descriptions of the offences referred to in Articles 2 and 3 committed by or against its Government Ministers, elected members of its parliamentary chambers, the members of its highest Courts or the members of its Court of Auditors in the exercise of their functions apply similarly in cases where such offences are committed by or against Members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communites respectively in the exercise of their duties.

2. Where a Member State has enacted special legislation concerning acts or omissions for which Government Ministers are responsible by reason of their special political position in that Member State, paragraph 1 may not apply to such legislation, provided that the Member State ensures that Members of the Commission of the European Communities are also covered by the criminal legislation implementing Articles 2 and 3.

3. Paragraphs 1 and 2 shall be without prejudice to the provisions applicable in each Member State concerning criminal proceedings and the determination of the competent court.

4. This Convention shall apply in full accordance with the relevant provisions of the Treaties establishing the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice and the texts adopted for the purpose of their implementation, as regards the withdrawal of immunity.

Article 5 Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3, and participating in and instigating the conduct in question, is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

2. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against national officials or Community officials. In determining the penalty to be imposed, the national criminal courts may, in accordance with the principles of their national law, take into account any disciplinary penalty already imposed on the same person for the same conduct.

Article 6 Criminal liability of heads of businesses

Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of corruption, as referred to in Article 3, by a person under their authority acting on behalf of the business.

Article 7 Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4 where:

(a) the offence is committed in whole or in part within its territory;

(b) the offender is one of its nationals or one of its officials;

(c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the European Community institutions referred to in Article 4 (1) who is at the same time one of its nationals;

(d) the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.

2. Each Member State may declare, when giving the notification provided for in Article 13 (2), that it will not apply or will apply only in specific cases or conditions one or more of the jurisdiction rules laid down in paragraph 1 (b), (c) and (d).

Article 8 Extradition and prosecution

1. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4, when committed by its own nationals outside its territory.

2. Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offence established in accordance with the obligations arising out of Articles 2, 3 and 4 and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

3. For the purposes of this Article, the term 'national` of a Member State shall be construed in accordance with any declaration made by that State under Article 6 (1) (b) of the European Convention on Extradition and with paragraph 1 (c) of that Article.

Article 9 Cooperation

1. If any procedure in connection with an offence established in accordance with the obligations arising out of Articles 2, 3 and 4 concerns at least two Member States, those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution

of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member States where possible.

Article 10 Ne bis in idem

1. Member States shall apply, in their national criminal laws, the ne bis in idem rule, under which a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State.

2. A Member State may, when giving the notification referred to in Article 13 (2), declare that it shall not be bound by paragraph 1 of this Article in one or more of the following cases:

(a) if the facts which were the subject of the judgment rendered abroad took place in its own territory either in whole or in part; in the latter case this exception shall not apply if those facts took place partly in the territory of the Member State where the judgment was rendered;

(b) if the facts which where the subject of the judgment rendered abroad constitute an offence directed against the security or other equally essential interests of that Member State;

(c) if the facts which were the subject of the judgment rendered abroad were committed by an official of that Member State contrary to the duties of his office.

3. If a further prosecution is brought in a Member State against a person whose trial, in respect of the same facts, has been finally disposed of in another Member State, any period of deprivation of liberty served in the latter Member State arising from those facts shall be deducted from any sanction imposed. To the extent permitted by national law, sanctions not involving deprivation of liberty shall also be taken into account insofar as they have been enforced.

4. The exceptions which may be the subject of a declaration under paragraph 2 shall not apply if the Member State concerned in respect of the same facts requested the other Member State to bring the prosecution or granted extradition of the person concerned.

5. Relevant bilateral or multilateral agreements concluded between Member States and relevant declarations shall remain unaffected by this Article.

Article 11 Internal provisions

No provision in this Convention shall prevent Member States from adopting internal legal provisions which go beyond the obligations deriving from this Convention.

Article 12 Court of Justice

1. Any dispute between Member States on the interpretation or application of this Convention which it has proved impossible to resolve bilaterally must in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution. If no solution has been found within six months, the matter may be referred to the Court of Justice of the European Communities by one of the parties to the dispute.

2. Any dispute between one or more Member States and the Commission of the European Communities concerning Article 1, with the exception of point (c), or Articles 2, 3 and 4, insofar as it concerns a question of Community law or the Communities' financial interests, or involves members of officials of Community institutions of bodies set up in accordance with the Treaties establishing the European Communities, which it has proved impossible to settle through negotiation, may be submitted to the Court of Justice by one of the parties to the dispute.

3. Any court in a Member State may ask the Court of Justice to give a preliminary ruling on a matter concerning the interpretation of Articles 1 to 4 and 12 to 16 raised in a case pending before it and involving members or officials of Community institutions or bodies set up in accordance with the Treaties establishing the European Communities, acting in the exercise of their functions, if it considers that a decision on that matter is necessary to enable it to give judgment.

4. The competence of the Court of Justice provided for in paragraph 3 shall be subject to its acceptance by the Member State concerned in a declaration to that effect made at the time of the notification referred to in Article 13 (2) or at any subsequent time.

5. A Member State making a declaration under paragraph 4 may restrict the possibility of asking the Court of Justice to give a preliminary ruling to those of its courts against the decisions of which there is no judicial remedy under national law.

6. The Statute of the Court of Justice of the European Community and its Rules of Procedure shall apply. In accordance with those Statutes, any Member State, or the Commission, whether or not it has made a declaration pursuant to paragraph 4, shall be entitled to submit statements of case or written observations to the Court of Justice in cases which arise under paragraph 3.

Article 13 Entry into force

1. This Convention 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 procedures laid down by their respective constitutional requirements for adopting this Convention.

3. This Convention shall enter into force ninety days after the notification, referred to in paragraph 2, by the last Member State to fulfil that formality.

4. Until the entry into force of this Convention, any Member State may, when giving the notification referred to in paragraph 2 or at any time thereafter, declare that this Convention, with the exception of Article 12 thereof, shall apply to it in its relationships with those Member States which have made the same declaration. This Convention shall become applicable in respect of the Member State that makes such a declaration on the first day of the month following the expiry of a period of ninety days after the date of deposit of its declaration.

5. A Member State that has not made any declaration as referred to in paragraph 4 may apply this Convention with respect to the other contracting Member States on the basis of bilateral agreements.

Article 14 Accession of new Member States

1. This Convention shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Convention in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. Instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any State acceding to it ninety days after the date of deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force at the time of expiry of the said period of ninety days.

5. If this Convention has not yet entered into force when the instrument of accession is deposited, Article 13 (4) shall apply to acceding States.

Article 15 Reservations

1. No reservation shall be authorized with the exception of those provided for in Articles 7 (2) and 10 (2).

2. Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

Article 16 Depositary

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

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

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Hecho en Bruselas, el veintiséis de mayo de mil novecientos noventa y siete, en un ejemplar unico en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, siendo cada uno de estos textos igualmente auténtico, que sera depositado en los archivos de la Secretaría General del Consejo de la Union Europea.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.

Udfærdiget i Bruxelles, den seksogtyvende maj nitten hundrede og syvoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk og tysk, hvilke tekster alle har samme gyldighed, og deponeret i arkiverne i Generalsekretariatet for Rådet for Den Europæiske Union.

Zu Urkund dessen haben die Bevollmächtigten ihre Unterschriften unter dieses Übereinkommen gesetzt.

Geschehen zu Brüssel am sechsundzwanzigsten Mai neunzehnhundertsiebenundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist; die Urschrift wird im Archiv des Generalsekretariats des Rates der Europäischen Union hinterlegt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ouiâaoç.

êaéíå oôéo Añoi¡eeåo, oôéo åßêïoé ¡ié öaAno eéa åííéaêüoéa åíåí«íôa å=ôÜ, oå ¡ía iüíï aíôßôo=ï, oôçí aaaeéê«, aaeeéê«, aåñiaíéê«, äaíéê«, åeeçíéê«, éñeaíäéê«, éo=aíéê«, ïeeaíäéê«, =ïñôïaaeéê«, oïoçäéê« êaé öéíeaíäéê« ae¦ooa, üea ää ôa êåßiåía åßíaé åißoïo aoèåíôéêÜ 7 êaôaôíèåôaé oôa añ ßa ôço Aåíéê«o Añaiiaôåßao ôïo Ooiâïoeßïo ôço Åoñù=auê«o êíùoço.

In witness whereof, the undersigned Plenipotentiaries have hereunto set their hand.

Done at Brussels, on the twenty-sixth day of May in the year one thousand nine hundred and ninety-seven 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, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union.

En foi de quoi, les plénipotentiaires ont apposé leurs signatures au bas de la présente convention.

Fait à Bruxelles, le vingt-six mai mil neuf cent quatre-vingt-dix-sept, en un exemplaire unique,

en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, tous ces textes faisant également foi, exemplaire qui est déposé dans les archives du Secrétariat général du Conseil de l'Union européenne.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoibhinsiun seo.

Arna dhéanamh sa Bhruiséil, ar an séu la is fiche de Bhealtaine sa bhliain míle naoi gcéad nocha a seacht i scríbhinn bhunaidh amhain, sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san Iodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis agus comhudaras ag na téacsanna i ngach ceann de na teangacha sin; déanfar an scríbhinn bhunaidh sin a thaisceadh i gcartlann Ardrunaíocht Chomhairle on Aontais Eorpaigh.

In fede di che, i plenipotenziari hanno apposto le loro firme in calce alla presente convenzione.

Fatto a Bruxelles, addi ventisei maggio millenovecentonovantasette, in un esemplare unico nelle lingue danese, finlandese, francese, greca, inglese, irlandese, italiana, olandese, portoghese, spagnola, svedese e tedesca, ciascuna di esse facente ugualmente fede, che è depositato negli archivi del Segretariato generale del Consiglio dell'Unione europea.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder deze overeenkomst hebben gesteld.

Gedaan te Brussel, de zesentwintigste mei negentienhonderd zevenennegentig, opgesteld in één exemplaar in de Deense, de Duitse, de Engelse, de Finse, de Franse, de Griekse, de Ierse, de Italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde alle teksten gelijkelijk authentiek, dat wordt nedergelegd in het archief van het Secretariaat-generaal van de Raad van de Europese Unie.

Em fé do que, os plenipotenciarios abaixo assinados apuseram as suas assinaturas no final da presente convençao.

Feito em Bruxelas, em vinte e seis de Maio de mil novecentos e noventa e sete, em exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana, neerlandesa, portuguesa e sueca, fazendo igualmente fé todos os textos, depositado nos arquivos do secretariado-geral do Conselho da Uniao Europeia.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän yleissopimuksen.

Tehty Brysselissä kahdentenakymmenentenäkuudentena päivänä toukokuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäseitsemän yhtenä ainoana kappaleena englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä, ja jokainen näistä teksteistä on yhtä todistusvoimainen; tämä kappale talletetaan Euroopan unionin neuvoston pääsihteeristön arkistoon.

Till bevis på detta har undertecknade befullmäktigade undertecknat denna konvention.

Utfärdad i Bryssel den tjugosjätte maj nittonhundranittiosju i ett enda original på danska, engelska, finländska, franska, grekiska, irländska, italienska, nederländska, portugisiska, spanska, svenska och tyska, vilka samtliga texter är lika giltiga. Originalen skall deponeras i arkiven hos generalsekretariatet för Europeiska unionens råd.

Pour le gouvernement du royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí Eoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôíao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

DOCNUM	41997A0625(01)
AUTHOR	Representatives of the Governments of the Member States
FORM	Convention
TREATY	European Union
TYPDOC	4 ; supplementary legal acts ; 1997 ; A
PUBREF	Official Journal C 195 , 25/06/1997 P. 0002 - 0011
DESCRIPT	corruption ; civil servant ; European official ; judicial cooperation ; criminal procedure ; fraud
PUB	1997/06/25
DOC	1997/05/26
INFORCE	0000/00/00=EV
ENDVAL	9999/99/99
SIGNED	1997/05/26=Brussels

LEGBASE	11992MK03-P2PTC.....
LEGCIT	31996F1023(01).....
SUBSPREP	Relation..... 31997F0625(01)..... Relation..... 51998XG1215..... Relation..... 32003D0642.....
SUB	Justice and home affairs
REGISTER	19300000
DATES	of document: 26/05/1997 of effect: 00/00/0000; Entry into force See Art 13 of signature: 26/05/1997; Brussels end of validity: 99/99/9999

Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities

concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

(1) Whereas it is essential, for the credibility of the Community, to step up the efforts to counter fraud and other irregularities committed against the Community budget;

(2) Whereas Article 209a of the Treaty establishing the European Community makes it clear that the protection of the Communities' financial interests is primarily the responsibility of the Member States, without prejudice to other provisions of the Treaty;

(3) Whereas Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (3) established a common legal framework for all the fields of the Communities' activity;

(4) Whereas Article 1 (2) of the said Regulation includes a definition of 'irregularity` and whereas the sixth recital of that Regulation stipulates that irregular conduct includes fraudulent actions as defined in the Convention on the protection of the European Communities' financial interests (4);

(5) Whereas Article 10 of that Regulation provided for subsequent adoption of additional general provisions relating to on-the-spot inspections and checks;

(6) Whereas, without prejudice to the checks carried out by the Member States in accordance with Article 8 of Regulation (EC, Euratom) No 2988/95 and in the interests of efficiency, it is appropriate to adopt additional general provisions concerning on-the-spot checks and inspections by the Commission that do not affect the application of Community sectoral rules as referred to in Article 9 (2) of the said Regulation;

(7) Whereas implementation of the provisions of this Regulation is subject to identification of the objectives that justify their application, especially where, owing to the scale of fraud, which is not confined to one country and frequently involves organized rings, or where, on account of the special nature of the situation in a Member State, those objectives cannot, in view of the seriousness of the damage done to the Communities' financial interests or to the credibility of the Union, be fully realized by the Member States alone and can therefore be better achieved at Community level;

(8) Whereas on-the-spot checks and inspections may not exceed what is necessary to ensure the correct application of Community law;

(9) Whereas they shall also be carried out without prejudice to the provisions applicable in each Member State relating to the protection of the essential interests of State security;

(10) Whereas, in accordance with the principle of sincere cooperation of the Community implicit in Article 5 of the EC Treaty and in the light of the case-law of the Court of Justice of the European Communities, it is important that Member States' administrations and Commission departments cooperate genuinely and provide one another with the necessary assistance in the preparation and performance of on-the-spot checks and inspections;

(11) Whereas it is necessary to define the conditions under which Commission inspectors are to exercise their powers;

(12) Whereas those on-the-spot checks and inspections are carried out with due regard to the fundamental rights of the persons concerned and to the rules on professional secrecy and the protection of personal data; whereas in that regard it is important that the Commission ensure that its inspectors comply with Community and national provisions on the protection of personal data, in particular those laid down in 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 (5);

(13) Whereas, if action to combat fraud and irregularities is to be effective, the Commission must carry out inspections on the premises of those economic operators who may have been involved, directly or indirectly, in the irregularity in question and on the premises of other economic operators who might be concerned by that irregularity; whereas, in the event of the application of this Regulation, the Commission should ensure that those economic operators are not simultaneously subjected, in respect of the same acts, to similar checks and inspections carried out by the Commission or by the Member States on the basis of Community sectoral rules or national legislation;

(14) Whereas the Commission inspectors must have access to all the information on the transactions concerned on the same terms as national administrative inspectors; whereas the reports by the Commission inspectors, signed, if appropriate, by the national inspectors, must be drawn up taking into account the procedural requirements laid down in the law of the Member State concerned; whereas they must be admitted as evidence in the administrative and judicial proceedings of the Member State where it proves necessary to use them and have an identical value to the reports drawn up by national administrative inspectors;

(15) Whereas, in cases where there is a risk of evidence disappearing, or where economic operators oppose on-the-spot checks or inspections by the Commission, it is for the Member States to take the necessary precautionary or implementing measures in accordance with their legislation;

(16) Wheres this Regulation affects neither Member States' powers regarding the prosecution of criminal offences nor the rules governing mutual assistance between Member States on criminal matters;

(17) Whereas the Treaties contain no powers for the adoption of this Regulation other than those provided for in Article 235 of the EC Treaty and Article 203 of the Euratom Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation lays down the additional general provisions within the meaning of Article 10 of Regulation (EC, Euratom) No 2988/95 which are applicable to on-the-spot administrative checks and inspections carried out by the Commission in order to protect the financial interests of the Communities against irregularities as defined in Article 1 (2) of the said Regulation.

Without prejudice to the provisions of the Community sectoral rules, this Regulation shall apply to all areas of the Communities' activity.

This Regulation shall not affect Member States' powers regarding the prosecution of criminal offences or the rules governing mutual assistance in criminal matters between Member States.

Article 2

The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation:

- for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States, or
- where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or
- at the request of the Member State concerned.

Article 3

Where the Commission decides to carry out on-the-spot checks and inspections under this Regulation, it shall ensure that similar checks and inspections are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of Community sectoral regulations.

In addition, it shall take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation.

Article 4

On-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help. To that end, the officials of the Member State concerned may participate in the on-the-spot checks and inspections.

In addition, if the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities.

Article 5

On-the-spot checks and inspections shall be carried out by the Commission on economic operators to whom Community administrative measures and penalties pursuant to Article 7 of Regulation (EC, Euratom) No 2988/95 may be applied, where there are reasons to think that irregularities have been

committed.

In order to make it easier for the Commission to carry out such checks and inspections, economic operators shall be required to grant access to premises, land, means of transport or other areas, used for business purposes.

Where strictly necessary in order to establish whether an irregularity exists, the Commission may carry out on-the-spot checks and inspections on other economic operators concerned, in order to have access to pertinent information held by those operators on facts subject to on-the-spot checks and inspections.

Article 6

1. On-the-spot checks and inspections shall be carried out on the Commission's authority and responsibility by its officials or other servants, duly empowered, hereinafter called 'Commission inspectors`. Persons placed at the disposal of the Commission by the Member States as national experts on secondment may assist in such checks and inspections.

Commission inspectors shall exercise their powers on production of a written authorization showing their identity and position, together with a document indicating the subject-matter and purpose of the on-the-spot check or inspection.

Subject to the Community law applicable, they shall be required to comply, with the rules of procedure laid down by the law of the Member State concerned.

2. Subject to the agreement of the Member State concerned, the Commission may seek the assistance of officials from other Member States as observers and call on outside bodies acting under its responsibility to provide technical assistance.

The Commission shall ensure that the aforementioned officials and bodies give every guarantee as regards technical competence, independence and observance of professional secrecy.

Article 7

1. Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.

On-the-spot checks and inspections may concern, in particular:

- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators,
- computer data,
- production, packaging and dispatching systems and methods,
- physical checks as to the nature and quantity of goods or completed operations,
- the taking and checking of samples,
- the progress of works and investments for which financing has been provided, and the use made

of completed investments,

- budgetary and accounting documents,
- the financial and technical implementation of subsidized projects.

2. Where necessary, it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.

Article 8

1. Information communicated or acquired in any form under this Regulation shall be covered by professional secrecy and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.

Such information may not be communicated to persons other than those within the Community institutions or in the Member States whose functions require them to know it nor may it be used by Community institutions for purposes other than to ensure effective protection of the Communities' financial interests in all Member States. Where a Member State intends to use for other purposes information obtained by officials participating under its authority as observers, in accordance with Article 6 (2), in on-the-spot checks and inspections, it shall seek the agreement of the Member State where that information was obtained.

2. The Commission shall report as soon as possible to the competent authority of the State within whose territory an on-the-spot check or inspection has been performed any fact or suspicion relating to an irregularity which has come to its notice in the course of the on-the-spot check or inspection. In any event the Commission shall be required to inform the aforementioned authority of the result of such checks and inspections.

3. Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The material and supporting documents as referred to in Article 7 shall be annexed to the said reports. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports. Where an inspection is carried out jointly, pursuant to the second subparagraph of Article 4, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the Commission inspectors.

4. The Commission shall ensure that, when implementing this Regulation, its inspectors comply with Community and national provisions on the protection of personal data, in particular those laid down in Directive 95/46/EC of the European Parliament and of the Council.

5. Where on-the-spot checks or inspections are performed outside Community territory, reports shall be prepared by Commission inspectors in conditions which would enable them to constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary.

Article 9

Where the economic operators referred to in Article 5 resist an on-the-spot check or inspection, the Member State concerned, acting in accordance with national rules, shall give Commission inspectors such assistance as they need to allow them to discharge their duty in carrying out an on-the-spot check or inspection.

It shall be for the Member States to take any necessary measures, in conformity with national law.

Article 10

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 January 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 November 1996.

For the Council

The President

R. QUINN

(1) OJ No C 84, 21. 3. 1996, p. 10.

(2) OJ No C 166, 10. 6. 1996, p. 102 and Opinion delivered on 23 October 1996 (not yet published in the Official Journal).

(3) OJ No L 312, 23. 12. 1995, p. 1.

(4) OJ No C 316, 27. 11. 1995, p. 48.

(5) OJ No L 281, 23. 11. 1995, p. 31.

DOCNUM	31996R2185
AUTHOR	COUNCIL
FORM	REGULATION
TREATY	European Community ; European Atomic Energy Community
TYPDOC	3 ; SECONDARY LEGISLATION ; 1996 ; R
PUBREF	Official Journal L 292 , 15/11/1996 p. 0002 - 0005

DESCRIPT	fraud against the Community ; implementation of the budget ; implementation of Community law ; Community budget ; Community control ; EAEC Regulation
PUB	1996/11/15
DOC	1996/11/11
INFORCE	1996/11/18=EV ; 1997/01/01=MA
ENDVAL	9999/99/99
LEGBASE	11992E235..... 11957A203.....
LEGCIT	11992E209A..... 31995R2988..... 41995A1127(03)..... 31995L0046.....
MODIFIES	51995PC0690.....ADOPTION.....
SUB	PROVISIONS UNDER ARTICLE 235 EEC ; FINANCIAL PROVISIONS
REGISTER	09500000 ; 01600000
PREPWORK	PROPOSAL COMMISSION ; COM 95/0690 FINAL ; OJ C 84/96 P 10 CONSULTATION PROCEDURE ; OPINION EUROPEAN PARLIAMENT ; OJ C 166/96 P 102 CONSULTATION PROCEDURE ; OPINION EUROPEAN PARLIAMENT ; GIVEN ON 23/10/96
MISCINF	CNS 95/0358
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Joint declaration by the Ministers of Justice and Home Affairs of the Member States of the European Union and the candidate countries in association with the European Commission on the protection of commercial drivers engaged in export trade from becoming victims of organised crime

Joint declaration by the Ministers of Justice and Home Affairs of the Member States of the European Union and the candidate countries in association with the European Commission on the protection of commercial drivers engaged in export trade from becoming victims of organised crime

(2003/C 24/02)

We, the Ministers of Justice and Home Affairs of the Member States of the European Union in association with the European Commission, and we, the Ministers of Justice and Home Affairs of Bulgaria, Cyprus, the Czech Republic, Slovakia, Slovenia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania and Turkey, the former hereinafter referred to as Member States of the European Union and the latter referred to as the candidate countries, having met in Luxembourg on 14 October 2002,

WHEREAS:

(1) Providing our citizens with a high level of safety by developing common action to prevent and to combat crime, organised or otherwise, is a shared objective of our countries.

(2) One of the most important tasks of actors in this area, including law enforcement authorities and crime prevention units in all European countries is to protect and safeguard all exposed groups in society and the position of such groups should be paid special heed by the authorities.

(3) Vehicles engaged in export trade are an easy target for property crime in the eyes of many criminal organisations owing to the high-value goods which they often carry and the low level of manning and protection which they usually enjoy.

(4) Commercial drivers engaged in export trade do in terms of the risk of falling victim to serious crime form an exposed group whose security requires special precautions.

(5) Trade and transportation between the countries of Europe is of the highest importance in securing the economic and political development in the region.

(6) The security of commercial drivers engaged in export trade is a shared concern of Member States and candidate countries and an adequate level of security for drivers requires that the problems be uniformly addressed by Member States and candidate countries owing to the transnational nature of the export trade.

EXPRESS OUR DETERMINATION TO:

1. Ensure that appropriate measures are taken so that commercial drivers engaged in export trade do not fall victims of organised crime;

2. Ensure that the necessary protection against organised property crime and violent assaults is provided to this group;

3. Raise awareness of the development in these types of crimes and as appropriate conduct national or international surveys in order to map the incidents of crime directed at commercial drivers engaged in export trade and investigate the nature and scale of the problem and the background to it in their respective countries;

4. Initiate the appropriate measures to fight these types of crimes and - based on the estimated nature and scale of the problem and the outcome of conducted surveys - particularly consider the need to

(a) improve security on sections of road and parking sites generally and especially in the problem areas identified, including by stepping up the presence and visibility of law enforcement officials on the relevant roads and sites;

(b) undertake specific crime prevention initiatives in this area, as appropriate, but in particular by increasing the involvement of the relevant law enforcement authorities in the location and design of safe sites, in conjunction with increasing the number of supervised parking sites manned around the clock;

(c) keep central statistics on reports, charges and convictions with regard to violent attacks on drivers in order to continuously make actions in this field more targeted and effective;

(d) take further steps to ensure that law enforcement authorities are alert to any links between attacks in several countries and in that connection, in accordance with national law, and existing international agreements exchange information as widely as possible with the relevant authorities in other countries and generally step up cross-border cooperation to prevent and tackle the problem.

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AUTHOR	European Commission ; Others
FORM	Declaration
TREATY	European Union
TYPDOC	4 ; supplementary legal acts ; 2003 ; X
PUBREF	Official Journal C 024 , 31/01/2003 P. 0009 - 0009
DESCRIPT	organized crime ; fight against crime ; drivers ; public safety ; export
PUB	2003/01/31
DOC	2002/10/14
SUB	Justice and home affairs
REGISTER	19301000
DATES	of document: 14/10/2002

Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law

Council Framework Decision 2003/80/JHA

of 27 January 2003

on the protection of the environment through criminal law

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the initiative of the Kingdom of Denmark(1),

Having regard to the opinions of the European Parliament(2),

Whereas:

(1) The Union is concerned at the rise in environmental offences and their effects, which are increasingly extending beyond the borders of the States in which the offences are committed.

(2) Such offences pose a threat to the environment and therefore call for a tough response.

(3) Environmental offences are a problem jointly faced by Member States, which should therefore take concerted action to protect the environment under criminal law(3).

(4) The European Commission has submitted in March 2001 a proposal for a Directive of the European Parliament and the Council concerning the protection of the environment by criminal law(4), based on Article 175(1) of the Treaty establishing the European Community.

(5) The Council considered it appropriate to incorporate into the present Framework decision a number of substantive provisions contained in the proposed Directive, in particular those defining the conduct which Member States have to establish as criminal offences under their domestic law.

(6) The European Parliament delivered its opinion on the proposed Directive on 9 April 2002. The European Commission submitted in October 2002 an amended proposal for a Directive pursuant to Article 250(2) of the Treaty establishing the European Community. The Council did not consider it appropriate to modify the present Framework Decision on that basis.

(7) The Council has considered this proposal but has come to the conclusion that the majority required for its adoption by the Council can not be obtained. The said majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community and that the objectives could be reached by adopting a Framework-Decision on the basis of Title VI of the Treaty on European Union. The Council also considered that the present Framework Decision, based on Article 34 of the Treaty on European Union, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions. The amended proposal submitted by the Commission was not of a nature to allow the Council to change its position in this respect.

(8) Not only physical persons but also legal persons should be held liable for environmental offences.

(9) Member States should establish wide-ranging jurisdiction with respect to the said offences in such a way as to avoid that physical or legal persons would escape prosecution by the simple fact that the offence was not committed in their territory.

(10) On 4 November 1998 the Council of Europe adopted a Convention on the protection of the environment

through criminal law, which has been taken account of in the provisions of the present instrument,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision

(a) "unlawful" means infringing a law, an administrative regulation or a decision taken by a competent authority, including those giving effect to binding provisions of Community law aiming at the protection of the environment;

(b) "water" means all kinds of groundwater and surface water including the water of lakes, rivers, oceans and seas;

(c) "legal person" means any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

Article 2

Intentional offences

Each Member State shall take the necessary measures to establish as criminal offences under its domestic law:

(a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person;

(b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

(c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law;

(g) the unlawful trade in ozone-depleting substances;

when committed intentionally.

Article 3

Negligent offences

Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2.

Article 4

Participation and instigation

Each Member State shall take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable.

Article 5

Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

2. The criminal penalties provided for in paragraph 1 may be accompanied by other penalties or measures, in particular the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued.

Article 6

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for conduct referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

(a) a power of representation of the legal person, or

(b) an authority to take decisions on behalf of the legal person, or

(c) an authority to exercise control within the legal person,

as well as for the involvement as accessories or instigators in the commission of conduct referred to in Article 2.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the conduct referred to in Articles 2 and 3.

Article 7

Sanctions for legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of industrial or commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order;

(e) the obligation to adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded.

Article 8

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3 where the offence has been committed:

(a) fully or in part in its territory, even if the effects of the offence occur entirely elsewhere;

(b) on board a ship or an aircraft registered in it or flying its flag;

(c) for the benefit of legal persons with a registered office in its territory;

(d) by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction.

2. Subject to the provisions of Article 9, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

(a) paragraph 1(c);

(b) paragraph 1(d).

Article 9

Extradition and prosecution

1. (a) Any Member State which, under its law, does not yet extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences provided for in Articles 2 and 3 when committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offence involving the conduct described in Articles 2 and 3, and it does not yet extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

2. For the purpose of this Article, a national of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition of 13 December 1957.

Article 10

Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this Framework Decision before 27 January 2005.

2. Before 27 April 2005, Member States shall communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. On the basis of that information and a written report by the Commission, the Council shall, no later than 27 January 2006, check the extent to which Member States have taken the measures necessary to comply with this Framework Decision.

Article 11

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 12

Effective date

This Framework Decision shall take effect on the day of its publication in the Official Journal of the European Union.

Done at Brussels, 27 January 2003.

For the Council

The President

G. Papandreou

(1) OJ C 39, 11.2.2000, p. 4.

(2) Opinions delivered on 7 July 2000 (OJ C 121, 24.4.2001, p. 494) and on 9 April 2002 (not yet published in the Official Journal).

(3) See also the Annex.

(4) OJ C 180 E, 26.6.2001, p. 238.

ANNEX

The Council takes note that Austria intends to comply with Article 2(f) and (g) as far as minor cases are concerned and Article 3 by providing for effective, proportionate and dissuasive sanctions under administrative criminal law.

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AUTHOR	Council
FORM	framework decision
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2003 SEC_3_TYP_F
PUBREF	Official Journal L 029 , 05/02/2003 P. 0055 - 0058
DESCRIPT	environmental protection ; criminal law ; penalty ; legal person ; offence ; environmental law
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DOC	2003/01/27
INFORCE	2003/02/05=PE
ENDVAL	9999/99/99
TRANSPOS	2005/01/27
LEGBASE	11997M029..... 11997M031-PTE)..... 11997M034-P2PTB).....
LEGCIT	11997E175.....

11997E250.....
52001PC0139.....
52002PC0544.....

EARLACTS 32000Y0211(02).....Relation.....

SUB Justice and home affairs

REGISTER 19300000

PREPWORK initiative ;OJ C 39/2000 P 4
Opinion European Parliament;OJ C 121/2001 P 494
Opinion European Parliament;given on 09/04/2002

DATES of document: 27/01/2003
of effect: 05/02/2003; Takes effect Date pub. See Art 12
end of validity: 99/99/9999
of transposition: 27/01/2005; At the latest See Art 10

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration

Directive 2001/97/EC of the European Parliament and of the Council

of 4 December 2001

amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), first and third sentences, and Article 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3), in the light of the joint text approved by the Conciliation Committee on 18 September 2001,

Whereas:

(1) It is appropriate that Directive 91/308/EEC(4), hereinafter referred to as "the Directive", as one of the main international instruments in the fight against money laundering, should be updated in line with the conclusions of the Commission and the wishes expressed by the European Parliament and the Member States. In this way the Directive should not only reflect best international practice in this area but should also continue to set a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime.

(2) The General Agreement on Trade in Services (GATS) allows Members to adopt measures necessary to protect public morals and to adopt measures for prudential reasons, including for ensuring the stability and integrity of the financial system. Such measures should not impose restrictions that go beyond what is necessary to achieve those objectives.

(3) The Directive does not establish clearly which Member State's authorities should receive suspicious transaction reports from branches of credit and financial institutions having their head office in another Member State nor which Member State's authorities are responsible for ensuring that such branches comply with the Directive. The authorities of the Member States in which the branch is located should receive such reports and exercise the above responsibilities.

(4) This allocation of responsibilities should be set out clearly in the Directive by means of an amendment to the definition of "credit institution" and "financial institution".

(5) The European Parliament has expressed concerns that the activities of currency exchange offices ("bureaux de change") and money transmitters (money remittance offices) are vulnerable to money laundering. These activities should already fall within the scope of the Directive. In order to dispel any doubt in this matter the Directive should clearly confirm that these activities are covered.

(6) To ensure the fullest possible coverage of the financial sector it should also be made clear that the Directive applies to the activities of investment firms as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field(5).

(7) The Directive obliges Member States only to combat the laundering of the proceeds of drugs offences. There has been a trend in recent years towards a much wider definition of money laundering

based on a broader range of predicate or underlying offences, as reflected for example in the 1996 revision of the 40 Recommendations of the Financial Action Task Force (FATF), the leading international body devoted to the fight against money laundering.

(8) A wider range of predicate offences facilitates suspicious transaction reporting and international cooperation in this area. Therefore, the Directive should be brought up to date in this respect.

(9) In Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime(6), the Member States agreed to make all serious offences, as defined in the Joint Action, predicate offences for the purpose of the criminalisation of money laundering.

(10) The suppression of organised crime in particular is closely linked to measures to combat money laundering. The list of predicate offences should therefore be adapted accordingly.

(11) The Directive imposes obligations regarding in particular the reporting of suspicious transactions. It would be more appropriate and in line with the philosophy of the Action Plan to Combat Organised Crime(7) for the prohibition of money laundering under the Directive to be extended.

(12) On 21 December 1998 the Council adopted Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union(8). This Joint Action reflects the Member States' agreement on the need for a common approach in this area.

(13) As required by the Directive, suspicious transaction reports are being made by the financial sector, and particularly by the credit institutions, in every Member State. There is evidence that the tightening of controls in the financial sector has prompted money launderers to seek alternative methods for concealing the origin of the proceeds of crime.

(14) There is a trend towards the increased use by money launderers of non-financial businesses. This is confirmed by the work of the FATF on money laundering techniques and typologies.

(15) The obligations of the Directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professions which have been shown to be vulnerable to money laundering.

(16) Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.

(17) However, where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

(18) Directly comparable services need to be treated in the same manner when practised by any of the professionals covered by the Directive. In order to preserve the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and

the Treaty of the European Union, in the case of auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should not be subject to the reporting obligations in accordance with the Directive.

(19) The Directive makes reference to "the authorities responsible for combating money laundering" to which reports of suspicious operations must be made on the one hand, and to authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive ("competent authorities") on the other hand. It is understood that the Directive does not oblige Member States to create such "competent authorities" where they do not exist, and that bar associations and other self-regulatory bodies for independent professionals do not fall under the term "competent authorities".

(20) In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the "authorities responsible for combating money laundering" and in general the appropriate forms of cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/308/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following: "Article 1

For the purpose of this Directive:

(A) Credit institution means a credit institution, as defined in Article 1(1) first subparagraph of Directive 2000/12/EC(9) and includes branches within the meaning of Article 1(3) of that Directive and located in the Community, of credit institutions having their head offices inside or outside the Community;

(B) 'Financial institution' means:

1. an undertaking other than a credit institution whose principal activity is to carry out one or more of the operations included in numbers 2 to 12 and number 14 of the list set out in Annex I to Directive 2000/12/EC; these include the activities of currency exchange offices (bureaux de change) and of money transmission/remittance offices;

2. an insurance company duly authorised in accordance with Directive 79/267/EEC(10), insofar as it carries out activities covered by that Directive;

3. an investment firm as defined in Article 1(2) of Directive 93/22/EEC(11);

4. a collective investment undertaking marketing its units or shares.

This definition of financial institution includes branches located in the Community of financial institutions, whose head offices are inside or outside the Community,

(C) 'Money laundering' means the following conduct when committed intentionally:

- the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

- the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

- participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing indents.

Knowledge, intent or purpose required as an element of the abovementioned activities may be inferred from objective factual circumstances.

Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.

(D) 'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interests in such assets.

(E) 'Criminal activity' means any kind of criminal involvement in the commission of a serious crime.

Serious crimes are, at least:

- any of the offences defined in Article 3(1)(a) of the Vienna Convention;

- the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA(12);

- fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities' financial interests(13);

- corruption;

- an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State.

Member States shall before 15 December 2004 amend the definition provided for in this indent in order to bring this definition into line with the definition of serious crime of Joint Action 98/699/JHA. The Council invites the Commission to present before 15 December 2004 a proposal for a Directive amending in that respect this Directive.

Member States may designate any other offence as a criminal activity for the purposes of this Directive.

(F) 'Competent authorities' means the national authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive."

2. The following Article shall be inserted: "Article 2a

Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

1. credit institutions as defined in point A of Article 1;

2. financial institutions as defined in point B of Article 1;

and on the following legal or natural persons acting in the exercise of their professional activities:

3. auditors, external accountants and tax advisors;

4. real estate agents;

5. notaries and other independent legal professionals, when they participate, whether:

(a) by assisting in the planning or execution of transactions for their client concerning the

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies or similar structures;

(b) or by acting on behalf of and for their client in any financial or real estate transaction;

6. dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15000 or more;

7. casinos."

3. Article 3 shall be replaced by the following: "Article 3

1. Member States shall ensure that the institutions and persons subject to this Directive require identification of their customers by means of supporting evidence when entering into business relations, particularly, in the case of the institutions, when opening an account or savings accounts, or when offering safe custody facilities.

2. The identification requirement shall also apply for any transaction with customers other than those referred to in paragraph 1, involving a sum amounting to EUR 15000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked. Where the sum is not known at the time when the transaction is undertaken, the institution or person concerned shall proceed with identification as soon as it or he is apprised of the sum and establishes that the threshold has been reached.

3. By way of derogation from the preceding paragraphs, the identification requirements with regard to insurance policies written by insurance undertakings within the meaning of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance (third life assurance Directive)(14), where they perform activities which fall within the scope of that Directive shall not be required where the periodic premium amount or amounts to be paid in any given year does or do not exceed EUR 1000 or where a single premium is paid amounting to EUR 2500 or less. If the periodic premium amount or amounts to be paid in any given year is or are increased so as to exceed the EUR 1000 threshold, identification shall be required.

4. Member States may provide that the identification requirement is not compulsory for insurance policies in respect of pension schemes taken out by virtue of a contract of employment or the insured's occupation, provided that such policies contain no surrender clause and may not be used as collateral for a loan.

5. By way of derogation from the preceding paragraphs, all casino customers shall be identified if they purchase or sell gambling chips with a value of EUR 1000 or more.

6. Casinos subject to State supervision shall be deemed in any event to have complied with the

identification requirement laid down in this Directive if they register and identify their customers immediately on entry, regardless of the number of gambling chips purchased.

7. In the event of doubt as to whether the customers referred to in the above paragraphs are acting on their own behalf, or where it is certain that they are not acting on their own behalf, the institutions and persons subject to this Directive shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting.

8. The institutions and persons subject to this Directive shall carry out such identification, even where the amount of the transaction is lower than the threshold laid down, wherever there is suspicion of money laundering.

9. The institutions and persons subject to this Directive shall not be subject to the identification requirements provided for in this Article where the customer is a credit or financial institution covered by this Directive or a credit or financial institution situated in a third country which imposes, in the opinion of the relevant Member States, equivalent requirements to those laid down by this Directive.

10. Member States may provide that the identification requirements regarding transactions referred to in paragraphs 3 and 4 are fulfilled when it is established that the payment for the transaction is to be debited from an account opened in the customer's name with a credit institution subject to this Directive according to the requirements of paragraph 1.

11. Member States shall, in any case, ensure that the institutions and persons subject to this Directive take specific and adequate measures necessary to compensate for the greater risk of money laundering which arises when establishing business relations or entering into a transaction with a customer who has not been physically present for identification purposes ('non-face to face' operations). Such measures shall ensure that the customer's identity is established, for example, by requiring additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification by an institution subject to this Directive, or by requiring that the first payment of the operations is carried out through an account opened in the customer's name with a credit institution subject to this Directive. The internal control procedures laid down in Article 11(1) shall take specific account of these measures."

4. In Articles 4, 5, 8 and 10 the terms "credit and financial institutions" shall be replaced by "the institutions and persons subject to this Directive".

5. Article 6 shall be replaced by the following: "Article 6

1. Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees cooperate fully with the authorities responsible for combating money laundering:

(a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering;

(b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11(1)(a) shall normally forward the information.

3. In the case of the notaries and independent legal professionals referred to in Article 2a(5),

Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."

6. Article 7 shall be replaced by the following: "Article 7

Member States shall ensure that the institutions and persons subject to this Directive refrain from carrying out transactions which they know or suspect to be related to money laundering until they have apprised the authorities referred to in Article 6. Those authorities may, under conditions determined by their national legislation, give instructions not to execute the operation. Where such a transaction is suspected of giving rise to money laundering and where to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation, the institutions and persons concerned shall apprise the authorities immediately afterwards."

7. The current text becomes paragraph 1 and the following shall be added to Article 8: "2. Member States shall not be obliged under this Directive to apply the obligation laid down in paragraph 1 to the professions mentioned in the second paragraph of Article 6(3)."

8. Article 9 shall be replaced by the following: "Article 9

The disclosure in good faith to the authorities responsible for combating money laundering by an institution or person subject to this Directive or by an employee or director of such an institution or person of the information referred to in Articles 6 and 7 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the institution or person or its directors or employees in liability of any kind."

9. The following paragraph shall be added to Article 10 "Member States shall ensure that supervisory bodies empowered by law or regulation to oversee the stock, foreign exchange and financial derivatives markets inform the authorities responsible for combating money laundering if they discover facts that could constitute evidence of money laundering."

10. Article 11 shall be replaced by the following: "Article 11

1. Member States shall ensure that the institutions and persons subject to this Directive:

(a) establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering;

(b) take appropriate measures so that their employees are aware of the provisions contained in this Directive. These measures shall include participation of their relevant employees in special training programmes to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases.

Where a natural person falling within any of Article 2a(3) to (7) undertakes his professional activities as an employee of a legal person, the obligations in this Article shall apply to that legal person rather than to the natural person.

2. Member States shall ensure that the institutions and persons subject to this Directive have access to up-to-date information on the practices of money launderers and on indications leading to the recognition of suspicious transactions."

11. In Article 12 the words "credit or financial institutions referred to in Article 1" shall be replaced by "institutions and persons referred to in Article 2a."

Article 2

Within three years of the entry into force of this Directive, the Commission shall carry out a particular examination, in the context of the report provided for in Article 17 of Directive 91/308/EEC, of aspects relating to the implementation of the fifth indent of Article 1(E), the specific treatment of lawyers and other independent legal professionals, the identification of clients in non-face to face transactions and possible implications for electronic commerce.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 June 2003 at the latest. They shall forthwith inform the Commission thereof.

Where Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 4

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 4 December 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

D. Reynders

(1) OJ C 177 E, 27.6.2000, p. 14.

(2) OJ C 75, 15.3.2000, p. 22.

(3) Opinion of the European Parliament of 5 July 2000 (OJ C 121, 24.4.2001, p. 133), Council Common Position of 30 November 2000 (OJ C 36, 2.2.2001, p. 24) and Decision of the European Parliament of 5 April 2001 (not yet published in the Official Journal). Decision of the European Parliament of 13 November 2001 and Decision of the Council of 19 November 2001.

(4) OJ L 166, 28.6.1991, p. 77.

(5) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

(6) OJ L 333, 9.12.1998, p. 1.

(7) OJ C 251, 15.8.1997, p. 1.

(8) OJ L 351, 29.12.1998, p. 1.

(9) OJ L 126, 26.5.2000, p. 1. Directive as amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 37).

(10) OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

(11) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

(12) OJ L 351, 29.12.1998, p. 1.

(13) OJ C 316, 27.11.1995, p. 48.

(14) OJ L 360, 9.12.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27.)

Commission Declaration

The Commission reiterates the commitment made in its work programme 2001 to launch a proposal before the end of this year for a Regulation of the European Parliament and of the Council establishing a cooperation mechanism between the competent national authorities of the Member States and the Commission in order to ensure the protection of the Communities' financial interests against illegal activities, including Value Added Tax (VAT) fraud and money laundering. This commitment has been confirmed in the Communication from the Commission concerning the Action Plan for 2001-2003 on protecting the Communities' financial interests - Fight against fraud - of 15 May 2001(1).

(1) COM(2001) 254 final: see paragraph 2.2.1.

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BELPROV 1. - Loi du 12 janvier 2004 modifiant la loi du 11 janvier 1993 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux, la loi du 22 mars 1993 relative au statut et au contrôle des établissements de crédit, et la loi du 6 avril 1995 relative au statut des entreprises d'investissement et à leur contrôle, aux intermédiaires financiers et conseillers en placements MB du 23/01/2004, page 4352 (C- 2004/03033)

DEUPROV 1. - Geldwaschegesetz in der Fassung des Gesetzes zur Verbesserung der Bekämpfung der Geldwäsche un der Bekämpfung der Finanzierung des Terrorismus (Geldwäschebekämpfungsgesetz) BGBl n° 57 Teil I vom 14/08/2002 Seite 3105

DNKPROV 1. - Bekendtgorelse af lov om forebyggende foranstaltninger mod hvidvaskning af penge og finansiering af terrorisme ref: Lovbekendtgorelse n° 734 du 30/08/2002
2. - Lov om aendring af lov om forebyggende foranstaltninger mod hvidvaskning af penge ref: Lov n° 422 du 06/06/2002 p. 2549

ESPPROV 1. - Ley 19/2003, de 4 de julio, sobre regimen juridico de los movimientos de capitales y de las transacciones economicas con el exterior y sobre determinadas medidas de prevencion del blanqueo de capitales BOE n° 160 de 05/07/2003 p. 26166

FRAPROV 1. - Loi n° 2004-130 du 11 février 2004 réformant le statut de certaines professions judiciaires ou juridiques, des experts judiciaires, des conseils en propriété industrielle et des experts en ventes aux enchères publiques JORF du 12/02/2004 p. 2847 (NOR : JUSX0200190L)

GRCPROV NO REFERENCE AVAILABLE

IRLPROV 1. - The Criminal Justice Act, 1994 (Section 32) Regulations 2003 Statutory

Instrument n° 242 of 2003
2. - Criminal Justice Act, 1994 (Section 32) (Amendment) Regulations 2003 SI n° 416 of 11/09/2003 (SG(2003)A/10516 du 03/11/2003)

ITAPROV 1. - Decreto legislativo n. 56 del 20.02.2004 - Attuazione della direttiva 2001/97/CE in materia di prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi da attivita illecite GURI - Série Generale n° 49 del 28/02/2004 p. 87

LUXPROV NO REFERENCE AVAILABLE

NLDPROV 1. - Besluit van 24/02/2003 tot aanwijziging van instellingen en diensten in het kader van de Wet identificatie bij dienstverlening en de Wet melding ongebruikelijke transacties. ref: Staatsblad n° 94 van 24/02/2003
2. - Wet van 13/12/2001, houdende wijziging van de Wet melding ongebruikelijke transacties en de Wet identificatie bij financiele dienstverlening 1993 met het oog op het verplichtstellen van ongebruikelijke transacties door handelaren in zaken van grote waarde. ref: Staatsblad n° 665 van 13/12/2001

PRTPROV 1. - Lei n° 11/2004 de 27/03/2004 Diario da Republica I Serie A n° 74 de 27/03/2004 p. 1980

GBRPROV NO REFERENCE AVAILABLE

AUTPROV 1. - Bundesgesetz : Ænderung der Gewerbeordnung 1994, des Berufsausbildungsgesetz, des Konsumentenschutzgesetzes, das Neugründungs-Förderungsgesetzes und des Arbeitskräfteüberlassungsgesetzes BGBl. für die Republik Osterreich n° 111 vom 23/07/2002 p. 1137
2. - Bundesgesetz : Ænderung de Bankwesengesetz, das Glücksspielgesetz, das Kapitalmarktgesetz, das Versicherungsaufsichtsgesetz und das Finanzmarktaufsichtsbehörden- gesetz geändert wird. BGBl. für die Republik Osterreich n° 35 vom 13/06/2003 p. 179 (SG(2003)A/6026 du 25/6/2003)

SVEPROV NO REFERENCE AVAILABLE

FINPROV 1. - Laki luottolaitostoiminnasta SSK (1607/93) 30/12/1993
2. - Laki ulkomaisen luotto- ja rahoituslaitoksen toiminnasta Suomessa SSK (1608/93) 30/02/1993
3. - Laki rahanpesun estämisestä ja selvittämisestä annetun lain muuttamisesta. SSK 365/2003 tethy 16/05/2003 (SG(2003)A/06218 du 8/7/2003)
4. - Laki Euroopan talousalueesta tehdyn sopimuksen eräiden määräysten hyväksymisestä ja sopimuksen soveltamisesta SSK (1504/92)
5. - Rikoslaki SSK (39/1889) 19/12/1889
6. - Kirjanpitolaki SSK (655/73) 10/08/1973
7. - Rahoitustarkastuslaki SSK (503/93) 11/06/1993

2001/413/JHA: Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment

Council Framework Decision

of 28 May 2001

combating fraud and counterfeiting of non-cash means of payment

(2001/413/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) Fraud and counterfeiting of non-cash means of payment often operate on an international scale.

(2) The work developed by various international organisations (i.e. the Council of Europe, the Group of Eight, the OECD, Interpol and the UN) is important but needs to be complemented by action of the European Union.

(3) The Council considers that the seriousness and development of certain forms of fraud regarding non-cash means of payment require comprehensive solutions. Recommendation No 18 of the Action Plan to combat organised crime(3), approved by the Amsterdam European Council on 16 and 17 June 1997, as well as point 46 of the Action Plan of the Council and the Commission on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(4), approved by the Vienna European Council on 11 and 12 December 1998, call for an action on this subject.

(4) Since the objectives of this Framework Decision, namely to ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in all Member States cannot be sufficiently achieved by the Member States in view of the international dimension of those offences and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in that Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

(5) This Framework Decision should assist in the fight against fraud and counterfeiting involving non-cash means of payment together with other instruments already agreed by the Council such as Joint Action 98/428/JHA on the creation of a European Judicial Network(5), Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union(6), Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime(7), as well as the Decision of 29 April 1999 extending Europol's mandate to deal with forgery of money and means of payment(8).

(6) The Commission submitted to the Council, on 1 July 1998, the Communication entitled "A framework for action combating fraud and counterfeit of non-cash means of payment" which advocates a Union Policy covering both preventive and repressive aspects of the problem.

(7) The Communication contains a Draft Joint Action which is one element of that comprehensive

approach, and constitutes the starting point for this Framework Decision.

(8) It is necessary that a description of the different forms of behaviour requiring criminalisation in relation to fraud and counterfeiting of non-cash means of payment cover the whole range of activities that together constitute the menace of organised crime in this regard.

(9) It is necessary that these forms of behaviour be classified as criminal offences in all Member States, and that effective, proportionate and dissuasive sanctions be provided for natural and legal persons having committed, or being liable for, such offences.

(10) By giving protection by penal law primarily to payment instruments that are provided with a special form of protection against imitation or abuse, the intention is to encourage operators to provide that protection to payment instruments issued by them, and thereby to add an element of prevention to the instrument.

(11) It is necessary that Member States afford each other the widest measure of mutual assistance, and that they consult each other when two or more Member States have jurisdiction over the same offence,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purpose of this Framework Decision:

(a) "Payment instrument" shall mean a corporeal instrument, other than legal tender (bank notes and coins), enabling, by its specific nature, alone or in conjunction with another (payment) instrument, the holder or user to transfer money or monetary value, as for example credit cards, eurocheque cards, other cards issued by financial institutions, travellers' cheques, eurocheques, other cheques and bills of exchange, which is protected against imitation or fraudulent use, for example through design, coding or signature;

(b) "Legal person" shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 2

Offences related to payment instruments

Each Member State shall take the necessary measures to ensure that the following conduct is a criminal offence when committed intentionally, at least in respect of credit cards, eurocheque cards, other cards issued by financial institutions, travellers cheques, eurocheques, other cheques and bills of exchange:

(a) theft or other unlawful appropriation of a payment instrument;

(b) counterfeiting or falsification of a payment instrument in order for it to be used fraudulently;

(c) receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument in

order for it to be used fraudulently;

(d) fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument;

Article 3

Offences related to computers

Each Member State shall take the necessary measures to ensure that the following conduct is a criminal offence when committed intentionally:

performing or causing a transfer of money or monetary value and thereby causing an unauthorised loss of property for another person, with the intention of procuring an unauthorised economic benefit for the person committing the offence or for a third party, by:

- without right introducing, altering, deleting or suppressing computer data, in particular identification data, or

- without right interfering with the functioning of a computer programme or system.

Article 4

Offences related to specifically adapted devices

Each Member State shall take the necessary measures to ensure that the following conduct is established as a criminal offence when committed intentionally:

the fraudulent making, receiving, obtaining, sale or transfer to another person or possession of:

- instruments, articles, computer programmes and any other means peculiarly adapted for the commission of any of the offences described under Article 2(b);

- computer programmes the purpose of which is the commission of any of the offences described under Article 3.

Article 5

Participation, instigation and attempt

Each Member State shall take the necessary measures to ensure that participating in and instigating the conduct referred to in Articles 2, 3 and 4, or attempting the conduct referred to in Article 2(a), (b) and (d) and Article 3, are punishable.

Article 6

Penalties

Each Member State shall take the necessary measures to ensure that the conduct referred to in

Articles 2 to 5 is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

Article 7

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for conduct referred to in Article 2(b), (c) and (d) and Articles 3 and 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person, or

- an authority to take decisions on behalf of the legal person, or

- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in the commission of such an offence.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in Article 2(b), (c) and (d) and Articles 3 and 4 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the conduct referred to in Article 2(b), (c) and (d) and Articles 3 and 4.

Article 8

Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 9

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2, 3, 4 and 5 where the offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Subject to of Article 10, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b);

- paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 10

Extradition and prosecution

1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences provided for in Articles 2, 3, 4 and 5 when committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed, in another Member State, an offence involving the conduct described in Articles 2, 3, 4 or 5, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be forwarded in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition.

Article 11

Cooperation between Member States

1. In accordance with the applicable conventions, multilateral or bilateral agreements or arrangements, Member States shall afford each other the widest measure of mutual assistance in respect of proceedings relating to the offences provided for in this Framework Decision.

2. Where several Member States have jurisdiction in respect of offences envisaged by this Framework

Decision, they shall consult one another with a view to coordinating their action in order to prosecute effectively.

Article 12

Exchange of information

1. Member States shall designate operational contact points or may use existing operational structures for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.

2. Each Member State shall inform the General Secretariat of the Council and the Commission of its department or departments acting as contact points in accordance with paragraph 1. The General Secretariat shall notify the other Member States of these contact points.

Article 13

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 14

Implementation

1. Member States shall bring into force the measures necessary to comply with this Framework Decision by 2 June 2003.

2. By 2 June 2003, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed upon them under this Framework Decision. The Council shall, by 2 September 2003, on the basis of a report established on the basis of this information and a written report by the Commission, assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 15

Entry into force

This Framework Decision shall enter into force on the date of its publication in the Official Journal of the European Communities.

Done at Brussels, 28 May 2001.

For the Council

The President

T. Bodström

(1) OJ C 376 E, 28.12.1999, p. 20.

(2) OJ C 121, 24.4.2001, p. 105.

(3) OJ C 251, 15.8.1997, p. 1.

(4) OJ C 19, 23.1.1999, p. 1.

(5) OJ L 191, 7.7.1998, p. 4.

(6) OJ L 351, 29.12.1998, p. 1.

(7) OJ L 333, 9.12.1998, p. 1.

(8) OJ C 149, 28.5.1999, p. 16.

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FORM	framework decision
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PUBREF	Official Journal L 149 , 02/06/2001 P. 0001 - 0004
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DOC	2001/05/28
INFORCE	2001/06/02=EV
ENDVAL	9999/99/99
TRANSPOS	2003/06/02
LEGBASE	11997M034-P2PTB.....
LEGCIT	51997XG0815..... 41998X0428..... 41998X0699..... 41998X0733..... 31999Y0123(01)..... 41999Y0528(02).....

MODIFIES	51998DC0395..... Relation..... 51999PC0438..... Adoption.....
SUB	Internal market ; Consumer protection ; Justice and home affairs
REGISTER	15204000 ; 19302000
PREPWORK	Proposal Commission;Com 1999/0438 Final Consultation procedure Opinion European Parliament;OJ C 121/2001 P 105 Consultation procedure
MISCINF	CNS 99/0190
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2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

Council Framework Decision

of 26 June 2001

on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

(2001/500/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a), (c) and (e) and Article 34(2)(b) thereof,

Having regard to the initiative of the French Republic,

Having regard to the opinion of the European Parliament,

Whereas:

(1) On 3 December 1998 the Council adopted Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime(1).

(2) Account should be taken of the Presidency conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, and of the Presidency conclusions of the European Council meeting in Vienna on 11 and 12 December 1998.

(3) The European Council, noting that serious forms of crime increasingly have tax and duty aspects, calls on Member States to provide full mutual legal assistance in the investigation and prosecution of this type of crime.

(4) The European Council calls for the approximation of criminal law and procedures on money laundering (in particular, confiscating funds), adding that the scope of criminal activities which constitute principal offences for money laundering should be uniform and sufficiently broad in all Member States.

(5) The European Council in Tampere considered that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime.

(6) The European Council in Tampere noted that money laundering is at the very heart of organised crime and should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.

(7) Member States have subscribed to the principles of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, hereinafter referred to as "the 1990 Convention",

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Reservations in respect of the 1990 Convention

In order to enhance action against organised crime, Member States shall take the necessary steps not to make or uphold reservations in respect of the following articles of the 1990 Convention:

(a) Article 2, in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year.

However, Member States may uphold reservations on Article 2 of the 1990 Convention in respect of the confiscation of the proceeds from tax offences for the sole purpose of their being able to confiscate such proceeds, both nationally and through international cooperation, under national, Community and international tax-debt recovery legislation;

(b) Article 6, in so far as serious offences are concerned. Such offences shall in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

Article 2

Penalties

Each Member State shall take the necessary steps consistent with its system of penalties to ensure that the offences referred to in Article 6(1)(a) and (b) of the 1990 Convention, as they result from the Article 1(b) of this framework Decision, are punishable by deprivation of liberty for a maximum of not less than 4 years.

Article 3

Value confiscation

Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders. However, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000.

The words "property", "proceeds" and "confiscation" shall have the same meaning as in Article 1 of the 1990 Convention.

Article 4

Processing of requests for mutual assistance

Member States shall take the necessary steps to ensure that all requests from other Member States which relate to asset identification, tracing, freezing or seizing and confiscation are processed

with the same priority as is given to such measures in domestic proceedings.

Article 5

Repeal of existing provisions

Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA are hereby repealed.

Article 6

Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this framework Decision by 31 December 2002.

2. By 1 March 2003, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations arising for them from this framework Decision and, where appropriate, the notifications made pursuant to Article 40(2) of the 1990 Convention. On the basis of this information and a written report from the Commission, the Council shall ascertain, by 31 December 2003, to what extent Member States have taken the measures necessary to comply with this framework Decision.

Article 7

Territorial application

This framework Decision shall apply to Gibraltar as soon as application of the 1990 Convention is extended to Gibraltar.

Article 8

Entry into force

This framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Luxembourg, 26 June 2001.

For the Council

The President

T. Ostros

(1) OJ L 333, 9.12.1998, p. 1.

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PUBREF	Official Journal L 182 , 05/07/2001 P. 0001 - 0002
DESCRIPT	money laundering ; confiscation of property ; penalty ; offence ; fight against crime ; organised crime
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MODIFIES	31998F0699..... Amendment..... Repeal ART 1 from 05/07/2001 31998F0699..... Amendment..... Repeal ART 3 from 05/07/2001 31998F0699..... Amendment..... Repeal ART 5.1 from 05/07/2001 31998F0699..... Amendment..... Repeal ART 8.2 from 05/07/2001
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Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty

authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (97/C 313/03)

(Text with EEA relevance)

I. ROLE OF THE MEMBER STATES AND OF THE COMMUNITY

1. In competition policy the Community and the Member States perform different functions. Whereas the Community is responsible only for implementing the Community rules, Member States not only apply their domestic law but also have a hand in implementing Articles 85 and 86 of the EC Treaty.

2. This involvement of the Member States in Community competition policy means that decision can be taken as closely as possible to the citizen (Article A of the Treaty on European Union). The decentralized application of Community competition rules also leads to a better allocation of tasks. If, by reason of its scale or effects, the proposed action can best be taken at Community level, it is for the Commission to act. Otherwise, it is for the competition authority of the Member State concerned to act.

3. Community law is implemented by the Commission and national competition authorities, on the one hand, and national courts, on the other, in accordance with the principles developed by the Community legislature and by the Court of Justice and the Court of First Instance of the European Communities.

It is the task of national courts to safeguard the rights of private persons in their relations with one another (1). Those rights derive from the fact that the prohibitions in Articles 85 (1) and 86 (2) and the exemptions granted by regulation (3) have been recognized by the Court of Justice as being directly applicable. Relations between national courts and the Commission in applying Articles 85 and 86 were spelt out in a Notice published by the Commission in 1993 (4). This Notice is the counterpart, for relations with national authorities, to that of 1993 on relations with national courts.

4. As administrative authorities, both the Commission and national competition authorities act in the public interest in performing their general task of monitoring and enforcing the competition rules (5). Relations between them are determined primarily by this common role of protecting the general interest. Although similar to the Notice on cooperation with national courts, this Notice accordingly reflects this special feature.

5. The specific nature of the role of the Commission and of national competition authorities is characterized by the powers conferred on those bodies by the Council regulations adopted under Article 87 of the Treaty. Article 9 (1) of Regulation No 17 (6) thus provides: 'Subject to review of its decision by the Court of Justice (7), the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty`. And Article 9 (3) of the same Regulation provides: 'As long as the Commission has not initiated any procedure under Article 2 (8), 3 (9) or 6 (10), the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty.`

It follows that, provided their national law has conferred the necessary powers on them, national competition authorities are empowered to apply the prohibitions in Articles 85 (1) and 86. On the other hand, for the purposes of applying Article 85 (3), they do not have any powers to grant exemptions in individual cases; they must abide by the decisions and regulations adopted by the Commission under that provision. They may also take account of other measures adopted by the Commission in such cases, in particular comfort letters, treating them as factual evidence.

6. The Commission is convinced that enhancing the role of national competition authorities will boost the effectiveness of Articles 85 and 86 of the Treaty and, generally speaking, will bolster the application of Community competition rules throughout the Community. In the interests of safeguarding and developing the single market, the Commission considers that those provisions should be used as widely as possible. Being closer to the activities and businesses that require monitoring, national authorities are often in a better position than the Commission to protect competition.

7. Cooperation must therefore be organized between national authorities and the Commission. If this cooperation is to be fruitful, they will have to keep in close and constant touch.

8. The Commission proposes to set out in this Notice the principles it will apply in future when dealing with the cases described herein. The Notice also seeks to induce firms to approach national competition authorities more often.

9. This Notice describes the practical cooperation which is desirable between the Commission and national authorities. It does not affect the extent of the powers conferred by Community law on either the Commission or national authorities for the purpose of dealing with individual cases.

10. For cases falling within the scope of Community law, to avoid duplication of checks on compliance with the competition rules which are applicable to them, which is costly for the firms concerned, checks should wherever possible be carried out by a single authority (either a Member State's competition authority or the Commission). Control by a single authority offers advantages for businesses.

Parallel proceedings before the Commission, on the one hand, and a national competition authority, on the other, are costly for businesses whose activities fall within the scope both of Community law and of Member States' competition laws. They can lead to the repetition of checks on the same activity, by the Commission, on the one hand, and by the competition authorities of the Member States concerned, on the other.

Businesses in the Community may therefore in certain circumstances find it to their advantage if some cases falling within the scope of Community competition law were dealt with solely by national authorities. In order that this advantage may be enjoyed to the full, the Commission thinks it is desirable that national authorities should themselves apply Community law directly or, failing that, obtain, by applying their domestic law, a result similar to that which would have been obtained had Community law been applied.

11. What is more, in addition to the resulting benefits accruing to competition authorities in terms of mobilization of their resources, cooperation between authorities reduces the risk of divergent decisions and hence the opportunities for those who might be tempted to do so to seek out whichever authority seemed to them to be the most favourable to their interests.

12. Member States' competition authorities often have a more detailed and precise knowledge than the Commission of the relevant markets (particularly those with highly specific national features) and the businesses concerned. Above all, they may be in a better position than the Commission to detect restrictive practices that have not been notified or abuses of a dominant position whose effects are essentially confined to their territory.

13. Many cases handled by national authorities involve arguments based on national law and arguments drawn from Community competition law. In the interests of keeping proceedings as short as possible, the Commission considers it preferable that national authorities should directly apply Community law themselves, instead of making firms refer to the Community-law aspects of their cases to the Commission.

14. An increasing number of major issues in the field of Community competition law have been clarified over the last thirty years through the case-law of the Court of Justice and the Court of First

Instance and through decisions taken on questions of principle and the exemption regulations adopted by the Commission. The application of that law by national authorities is thereby simplified.

15. The Commission intends to encourage the competition authorities of all Member States to engage in this cooperation. However, the national legislation of several Member States does not currently provide competition authorities with the procedural means of applying Articles 85 (1) and 86. In such Member States conduct caught by the Community provisions can be effectively dealt with by national authorities only under national law.

In the Commission's view, it is desirable that national authorities should apply Articles 85 or 86 of the Treaty, if appropriate in conjunction with their domestic competition rules, when handling cases that fall within the scope of those provisions.

16. Where authorities are not in a position to do this and hence can apply only their national law to such cases, the application of that law should 'not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules` (11). At the very least, the solution they find to a case falling within the scope of Community law must be compatible with that law, Member States being forbidden, given the primacy of Community law over national competition law (12) and the obligation to cooperate in good faith laid down in Article 5 of the Treaty (13), to take measures capable of defeating the practical effectiveness of Articles 85 and 86.

17. Divergent decisions are more likely to be reached where a national authority applies its national law rather than Community law. Where a Member State's competition authority applies Community law, it is required to comply with any decisions taken previously by the Commission in the same proceedings. Where the case has merely been the subject of a comfort letter, then, according to the Court of Justice, although this type of letter does not bind national courts, the opinion expressed by the Commission constitutes a factor which the national courts may take into account in examining whether the agreements on conduct in question are in accordance with the provisions of Article 85 (14). In the Commission's view, the same holds true for national authorities.

18. Where an infringement of Articles 85 or 86 is established by Commission decision, that decision precludes the application of a domestic legal provision authorizing what the Commission has prohibited. The objective of the prohibitions in Articles 85 (1) and 86 is to guarantee the unity of the common market and the preservation of undistorted competition in that market. They must be strictly complied with if the functioning of the Community regime is not to be endangered (15).

19. The legal position is less clear as to whether national authorities are allowed to apply their more stringent national competition law where the situation they are assessing has previously been the subject of an individual exemption decision of the Commission or is covered by a block exemption Regulation. In Walt Wilhelm, the Court stated that the Treaty 'permits the Community authorities to carry out certain positive, though indirect, actions with a view to promoting a harmonious development of economic activities within the whole Community` (paragraph 5 of the judgment). In Bundeskartellamt v. Volkswagen and VAG Leasing (16), the Commission contended that national authorities may not prohibit exempted agreements. The uniform application of Community law would be frustrated every time an exemption granted under Community law was made to depend on the relevant national rules. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of an act giving effect to the Treaty - which an exemption under Article 85 (3) undoubtedly is - would also be disregarded. In the case in point, however, the Court did not have to settle the question.

20. If the Commission's Directorate-General for Competition sends a comfort letter in which it

expresses the opinion that an agreement or a practice is incompatible with Article 85 of the Treaty but states that, for reasons to do with its internal priorities, it will not propose to the Commission that it take a decision thereon in accordance with the formal procedures laid down in Regulation No 17, it goes without saying that the national authorities in whose territory the effects of the agreement or practice are felt may take action in respect of that agreement or practice.

21. In the case of a comfort letter in which the Directorate-General for Competition expresses the opinion that an agreement does restrict competition within the meaning of Article 85 (1) but qualifies for exemption under Article 85 (3), the Commission will call upon national authorities to consult it before they decide whether to adopt a different decision under Community or national law.

22. As regards comfort letters in which the Commission expresses the opinion that, on the basis of the information in its possession, there is no need for it to take any action under Article 85 (1) or Article 86 of the Treaty, 'that fact cannot by itself have the result of preventing the national authorities from applying to those agreements` or practices 'provisions of national competition law which may be more rigorous than Community law in this respect. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85 (1) and (2)` or Article 86, 'the scope of which is limited to agreements` or dominant positions 'capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally`. (Judgment of the Court of Justice in Procureur de la République v. Giry and Guerlain (17)).

II. GUIDELINES ON CASE ALLOCATION

23. Cooperation between the Commission and national competition authorities has to comply with the current legal framework. First, if it is to be caught by Community law and not merely by national competition law, the conduct in question must be liable to have an appreciable effect on trade between Member States. Secondly, the Commission has sole power to declare Article 85 (1) of the Treaty inapplicable under Article 85 (3).

24. In practice, decisions taken by a national authority can apply effectively only to restrictions of competition whose impact is felt essentially within its territory. This is the case in particular with the restrictions referred to in Article 4 (2) (1) of Regulation No 17, namely agreements, decisions or concerted practices the only parties to which are undertakings from one Member State and which, though they do not relate either to imports or to exports between Member States, may affect intra-Community trade (18). It is extremely difficult from a legal standpoint for such an authority to conduct investigations outside its home country, such as when on-the-spot inspections need to be carried out on businesses, and to ensure that its decisions are enforced beyond its national borders. The upshot is that the Commission usually has to handle cases involving businesses whose relevant activities are carried on in more than one Member State.

25. A national authority having sufficient resources in terms of manpower and equipment and having had the requisite powers conferred on it, also needs to be able to deal effectively with any cases covered by the Community rules which it proposes to take on. The effectiveness of a national authority's action is dependent on its powers of investigation, the legal means it has at its disposal for settling a case - including the power to order interim measures in an emergency - and the penalties it is empowered to impose on businesses found guilty of infringing the competition rules. Differences between the rules of procedure applicable in the various Member States should not, in the Commission's view, lead to outcomes which differ in their effectiveness when similar cases are being dealt with.

26. In deciding which cases to handle itself, the Commission will take into account the effects

of the restrictive practice or abuse of a dominant position and the nature of the infringement.

In principle, national authorities will handle cases the effects of which are felt mainly in their territory and which appear upon preliminary examination unlikely to qualify for exemption under Article 85 (3). However, the Commission reserves the right to take on certain cases displaying a particular Community interest.

Mainly national effects

27. First of all, it should be pointed out that the only cases at issue here are those which fall within the scope of Articles 85 and 86.

That being so, the existing and foreseeable effects of a restrictive practice or abuse of a dominant position may be deemed to be closely linked to the territory in which the agreement or practice is applied and to the geographic market for the goods or services in question.

28. Where the relevant geographic market is limited to the territory of a single Member State and the agreement or practice is applied only in that State, the effects of the agreement or practice must be deemed to occur mainly within that State even if, theoretically, the agreement or practice is capable of affecting trade between Member States.

Nature of the infringement: cases that cannot be exempted

29. The following considerations apply to cases brought before the Commission, to cases brought before a national competition authority and to cases which both may have to deal with.

A distinction should be drawn between infringements of Article 85 of the Treaty and infringements of Article 86.

30. The Commission has exclusive powers under Article 85 (3) of the Treaty to declare the provisions of Article 85 (1) inapplicable. Any notified restrictive practice that prima facie qualifies for exemption must therefore be examined by the Commission, which will take account of the criteria developed in this area by the Court of Justice and the Court of First Instance and also by the relevant regulations and its own previous decisions.

31. The Commission also has exclusive responsibility for investigation complaints against decisions it has taken under its exclusive powers, such as a decision to withdraw an exemption previously granted by it under Article 85 (3) (19).

32. No such limitation exists, however, on implementation of Article 86 of the Treaty. The Commission and the Member States have concurrent competence to investigate complaints and to prohibit abuses of dominant positions.

Cases of particular significance to the Community

33. Some cases considered by the Commission to be of particular Community interest will more often be dealt with by the Commission even if, inasmuch as they satisfy the requirements set out above (points 27-28 and 29-32), they can be dealt with by a national authority.

34. This category includes cases which raise a new point of law, that is to say, those which have not yet been the subject of a Commission decision or a judgment of the Court of Justice or Court of First Instance.

35. The economic magnitude of a case is not in itself sufficient reason for its being dealt with by the Commission. The position might be different where access to the relevant market by firms from other Member States is significantly impeded.

36. Cases involving alleged anti-competitive behaviour by a public undertaking, an undertaking

to which a Member State has granted special or exclusive rights with the meaning of Article 90 (1) of the Treaty, or an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly within the meaning of Article 90 (2) of the Treaty may also be of particular Community interest.

III. COOPERATION IN CASES WHICH THE COMMISSION DEALS WITH FIRST

37. Cases dealt with by the Commission have three possible origins: own-initiative proceedings, notifications and complaints. By their very nature, own-initiative proceedings do not lend themselves to decentralized processing by national competition authorities.

38. The exclusivity of the Commission's powers to apply Article 85 (3) of the Treaty in individual cases means that cases notified to the Commission under Article 4 (1) of Regulation No 17 by parties seeking exemption under Article 85 (3) cannot be dealt with by a national competition authority on the Commission's initiative. According to the case-law of the Court of First Instance, these exclusive powers confer on the applicant the right to obtain from the Commission a decision on the substance of his request for exemption (20).

39. National competition authorities may deal, at the Commission's request, with complaints that do not involve the application of Article 85 (3), namely those relating to restrictive practices which must be notified under Articles 4 (1), 5 (1) and 25 of Regulation No 17 but have not been notified to the Commission and those based on alleged infringement of Article 86 of the Treaty. On the other hand, complaints concerning matters falling within the scope of the Commission's exclusive powers, such as withdrawal of exemption, cannot be usefully handled by a national competition authority (21).

40. The criteria set out at points 23 to 36 above in relation to the handling of a case by the Commission or a national authority, in particular as regards the territorial extent of the effects of a restrictive practice or dominant position (points 27-28), should be taken into account.

Commission's right to reject a complaint

41. It follows from the case-law of the Court of First Instance that the Commission is entitled under certain conditions to reject a complaint which does not display sufficient Community interest to justify further investigation (22).

42. The Commission's resultant right to reject a complaint stems from the concurrent competence of the Commission, national courts and - where they have the power - national competition authorities to apply Articles 85 (1) and 86 and from the consequent protection available to complainants before the courts and administrative authorities. With regard to that concurrent competence, it has been consistently held by the Court of Justice and the Court of First Instance that Article 3 of Regulation No 17 (the legal basis for the right to lodge a complaint with the Commission for alleged infringement of Article 85 or Article 86) does not entitle an applicant under that Article to obtain from the Commission a decision within the meaning of Article 189 of the Treaty as to whether or not the alleged infringement has occurred (23).

Conditions for rejecting a complaint

43. The investigation of a complaint by a national authority presupposes that the following specific conditions, derived from the case-law of the Court of First Instance, are met.

44. The first of these conditions is that, in order to assess whether or not there is a Community interest in having a case investigated further, the Commission must first undertake a careful examination of the questions of fact and law set out in the complaint (24). In accordance with the obligation imposed on it by Article 190 of the Treaty to state the reasons for its decisions, the Commission has to inform the complainant of the legal and factual considerations which have induced it to conclude

that the complaint does not display a sufficient Community interest to justify further investigation. The Commission cannot therefore confine itself to an abstract reference to the Community interest (25).

45. In assessing whether it is entitled to reject a complaint for lack of any Community interest, the Commission must balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement, and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of making sure that Articles 85 and 86 are complied with (26). In particular, as the Court of First Instance held in BEMIM (27), where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the courts and competent administrative authorities of that Member State by the complainant against the body against which the complaint was made, the Commission is entitled to reject the complaint for lack of any sufficient Community interest in further investigation of the case, provided however that the rights of the complainant can be adequately safeguarded. As to whether the effects of the restrictive practice are localized, such is the case in particular with practices to which the only parties are undertakings from one Member State and which, although they do not relate either to imports or to exports between Member States, within the meaning of point 1 of Article 4 (2) of Regulation No 17 (28), are capable of affecting intra-Community trade. As regards the safeguarding of the complainant's rights, the Commission considers that the referral of the matter to the national authority concerned needs must protect them quite adequately. On this latter point, the Commission takes the view that the effectiveness of the national authority's action depends notably on whether that authority is able to take interim measures if it deems it necessary, without prejudice to the possibility, found in the law of certain Member States, that such measures may be taken with the requisite degree of effectiveness by a court.

Procedure

46. Where the Commission considers these conditions to have been met, it will ask the competition authority of the Member State in which most of the effects of the contested agreement or practice are felt if it would agree to investigate and decide on the complaint. Where the competition authority agrees to do so, the Commission will reject the complaint pending before it on the ground that it does not display sufficient Community interest and will refer the matter to the national competition authority, either automatically or at the complainant's request. The Commission will place the relevant documents in its possession at the national authority's disposal (29).

47. With regard to investigation of the complaint, it should be stressed that, in accordance with the ruling given by the Court of Justice in Case C-67/91 (30) (the 'Spanish banks` case), national competition authorities are not entitled to use as evidence, for the purposes of applying either national rules or the Community competition rules, unpublished information contained in replies to requests for information sent to firms under Article 11 of Regulation No 17 or information obtained as a result of any inspections carried out under Article 14 of that Regulation. This information can nevertheless be taken into account, where appropriate, to justify instituting national proceedings (31).

IV. COOPERATION IN CASES WHICH A NATIONAL AUTHORITY DEALS WITH FIRST

Introduction

48. At issue here are cases falling within the scope of Community competition law which a national competition authority handles on its own initiative, applying Articles 85 (1) or 86, either alone or in conjunction with its national competition rules, or, where it cannot do so, its national rules alone. This covers all cases within this field which a national authority investigates before the

Commission - where appropriate - does so, irrespective of their procedural origin (own-initiative proceedings, notification, complaint, etc.). These cases are therefore those which fulfil the conditions set out in Part II (Guidelines on case allocation) of this Notice.

49. As regards cases which they deal with under Community law, it is desirable that national authorities should systematically inform the Commission of any proceedings they initiate. The Commission will pass on this information to the authorities in the other Member States.

50. This cooperation is especially necessary in regard to cases of particular significance to the Community within the meaning of points 33-36. This category includes (a) all cases raising a new point of law, the aim being to avoid decisions, whether based on national law or on Community law, which are incompatible with the latter; (b) among cases of the utmost importance from an economic point of view, only those in which access by firms from other Member States to the relevant national market is significantly impeded; and (c) certain cases in which a public undertaking or an undertaking treated as equivalent to a public undertaking (within the meaning of Article 90 (1) and (2) of the Treaty) is suspected of having engaged in an anti-competitive practice. Each national authority must determine, if necessary after consulting the Commission, whether a given case fits into one of these sub-categories.

51. Such cases will be investigated by national competition authorities in accordance with the procedures laid down by their national law, whether they are acting with a view to applying the Community competition rules or applying their national competition rules (32).

52. The Commission also takes the view that, like national courts to which competition cases involving Articles 85 or 86 have been referred, national competition authorities applying those provisions are always at liberty, within the limits of their national procedural rules and subject to Article 214 of the Treaty, to seek information from the Commission on the state of any proceedings which the Commission may have set in motion and as to the likelihood of its giving an official ruling, pursuant to Regulation No 17, on cases which they are investigating on their own initiative. Under the same circumstances, national competition authorities may contact the Commission where the concrete application of Article 85 (1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which the Commission is in a position to supply to them (33).

53. The Commission is convinced that close cooperation with national authorities will forestall any contradictory decisions. But if, 'during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures` (Walt Wilhelm) to ensure that measures implementing Community competition law are fully effective. The Commission takes the view that these measures should generally consist in national authorities staying their proceedings pending the outcome of the proceedings being conducted by the Commission. Where a national authority applies its national law, such a stay of proceedings would be based on the principles of the primacy of Community law (Walt Wilhelm) (34) and legal certainty, and where it applies Community law, on the principle of legal certainty alone. For its part, the Commission will endeavour to deal as a matter of priority with cases subject to national proceedings thus stayed. A second possibility may, however, be envisaged, whereby the Commission is consulted before adopting the national decision. The consultations would consist, due regard being had to the judgment in the Spanish banks case, in exchanging any documents preparatory to the decisions envisaged, so that Member States' authorities might be able to take account of the Commission's position in their own decision without the latter having to be deferred until such time as the Commission's decision has been taken.

Procedure

In respect of complaints

54. Since complainants cannot force the Commission to take a decision as to whether the infringement they allege has actually occurred, and since the Commission is entitled to reject a complaint which lacks a sufficient Community interest, national competition authorities should not have any special difficulty in handling complaints submitted initially to them involving matters that fall within the scope of the Community competition rules.

In respect of notifications

55. Although they form a very small percentage of all notifications to the Commission, special consideration needs to be given to notifications to the Commission of restrictive practices undergoing investigation by a national authority made for dilatory purposes. A dilatory notification is one where a firm, threatened with a decision banning a restrictive practice which a national authority is poised to take following an investigation under Article 85 (1) or under national law, notifies the disputed agreement to the Commission and asks for it to be exempted under Article 85 (3) of the Treaty. Such a notification is made in order to induce the Commission to initiate a proceeding under Articles 2, 3 or 6 of Regulation No 17 and hence, by virtue of Article 9 (3) of that Regulation, to remove from Member States' authorities the power to apply the provisions of Article 85 (1). The Commission will not consider a notification to be dilatory until after it has contacted the national authority concerned and checked that the latter agrees with its assessment. The Commission calls upon national authorities, moreover, to inform it of their own accord of any notifications they receive which, in their view, are dilatory in nature.

56. A similar situation arises where an agreement is notified to the Commission with a view to preventing the imminent initiation of national proceedings which might result in the prohibition of that agreement (35).

57. The Commission recognizes, of course, that a firm requesting exemption is entitled to obtain from it a decision on the substance of its request (see point 38). However, if the Commission takes the view that such notification is chiefly aimed at suspending the national proceedings, given its exclusive powers to grant exemptions it considers itself justified in not examining it as a matter of priority.

58. The national authority which is investigating the matter and has therefore initiated proceedings should normally ask the Commission for its provisional opinion on the likelihood of its exempting the agreement now notified to it. Such a request will be superfluous where, 'in the light of the relevant criteria developed by the case-law of the Court of Justice and the Court of First Instance and by previous regulations and decisions of the Commission, the national authority has ascertained that the agreement, decision or concerted practice at issue cannot be the subject of an individual exemption` (36).

59. The Commission will deliver its provisional opinion on the likelihood of an exemption being granted, in the light of a preliminary examination of the questions of fact and law involved, as quickly as possible once the complete notification is received. Examination of the notification having revealed that the agreement in question is unlikely to qualify for exemption under Article 85 (3) and that its effects are mainly confined to one Member State, the opinion will state that further investigation of the matter is not a Commission priority.

60. The Commission will transmit this opinion in writing to the national authority investigating the case and to the notifying parties. It will state in its letter that it will be highly unlikely to take a decision on the matter before the national authority to which it was referred has taken its final decision and that the notifying parties retain their immunity from any fines the Commission might impose.

61. In its reply, the national authority, after taking note of the Commission's opinion, should undertake to contact the Commission forthwith if its investigation leads it to a conclusion which differs from that opinion. This will be the case if, following its investigation, the national authority concludes that the agreement in question should not be banned under Article 85 (1) of the Treaty or, if that provisions cannot be applied, under the relevant national law. The national authority should also undertake to forward a copy of its final decision on the matter to the Commission. Copies of the correspondence will be sent to the competition authorities of the other Member States for information.

62. The Commission will not itself initiate proceedings in the same case before the proceedings pending before the national authority have been completed; in accordance with Article 9 (3) of Regulation No 17, such action would have the effect of taking the matter out of the hands of the national authority. The Commission will do this only in quite exceptional circumstances - in a situation where, against all expectations, the national authority is liable to find that there has been no infringement of Articles 85 or 86 or of its national competition law, or where the national proceedings are unduly long drawn-out.

63. Before initiating proceedings the Commission will consult the national authority to discover the factual or legal grounds for that authority's proposed favourable decision or the reasons for the delay in the proceedings.

V. CONCLUDING REMARKS

64. This Notice is without prejudice to any interpretation by the Court of First Instance and the Court of Justice.

65. In the interests of effective, consistent application of Community law throughout the Union, and legal simplicity and certainty for the benefit of undertakings, the Commission calls upon those Member States which have not already done so to adopt legislation enabling their competition authority to implement Articles 85 (1) and 86 of the Treaty effectively.

66. In applying this Notice, the Commission and the competent authorities of the Member States and their officials and other staff will observe the principle of professional secrecy in accordance with Article 20 of Regulation No 17.

67. This Notice does not apply to competition rules in the transport sector, owing to the highly specific way in which cases arising in that sector are handled from a procedural point of view (37).

68. The actual application of this Notice, especially in terms of the measures considered desirable to facilitate its implementation, will be the subject of an annual review carried out jointly by the authorities of the Member States and the Commission.

69. This Notice will be reviewed no later than at the end of the fourth year after its adoption.

(1) Case T-24/90 Automec v. Commission ('Automec II`) [1992] ECR II-2223, paragraph 85.

(2) Case 127/73 BRT v. SABAM [1974] ECR 51, paragraph 16.

(3) Case 63/75 Fonderies Roubaix-Wattrelos v. Fonderies A. Roux [1976] ECR 111.

(4) Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13. 2. 1993, p. 6).

(5) Automec II, see footnote 1; paragraph 85.

(6) Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty; OJ 13, 21. 2. 1962, p. 204/62 (English Special Edition 1959-62, p. 87).

(7) Now by the Court of First Instance and, on appeal, by the Court of Justice.

(8) Negative clearance.

(9) Termination of infringements - prohibition decisions.

(10) Decisions pursuant to Article 85 (3).

(11) Case 14/68 Walt Wilhelm and Others v. Bundeskartellamt [1969] ECR 1, paragraph 4.

(12) Walt Wilhelm, see footnote 11; paragraph 6; Case 66/86 Ahmed Saeed Flugreisen and Others v. Zentrale Zur Bekämpfung Unlauteren Wettbewerbs [1989] ECR 803, paragraph 48.

(13) Case C-165/91 Van Munster v. Rijksdienst voor Pensioenen [1994] ECR I-4661, paragraph 32.

(14) Case 99/79 Lancôme v. Etos [1980] ECR 2511, paragraph 11, cited in the abovementioned notice on cooperation between national courts and the Commission in applying Articles 85 and 86.

(15) Fourth Report on Competition Policy 1974, point 45.

(16) Case C-266/93 [1995] ECR I-3477; see also the Opinion of Advocate-General Tesauro in the same case, paragraph 51.

(17) Joined Cases 253/78 and 1 to 3/79 Procureur de la République v. Giry and Guerlain [1980] ECR 2327, paragraph 18.

(18) It is possible that an agreement, 'although it does not relate either to imports or to exports between Member States` within the meaning of Article 4 of Regulation No 17, 'may affect trade between Member States` within the meaning of Article 85 (1) of the Treaty (judgment of the Court of Justice in Case 43/69 Bilger v. Jehle [1970] ECR 127, paragraph 5).

(19) Automec II, see footnote 1; paragraph 75.

(20) Case T-23/90 Peugeot v. Commission [1991] ECR II-653, paragraph 47.

(21) Automec II, see footnote 1; paragraph 75.

(22) Automec II, se footnote 1; paragraph 85; cited in Case T-114/92 BEMIM v. Commission [1995] ECR II-147, paragraph 80, and in Case T-77/95 SFEI and Others v. Commission [1997] ECR II-1, paragraphs 29 and 55.

(23) See in particular Case 125/78, GEMA v. Commission [1979] ECR 3173, paragraph 17, and Case T-16/91, Rendo and Others v. Commission [1992] ECR II-2417, paragraph 98.

(24) Automec II, see footnote 1; paragraph 82.

(25) Automec II, see footnote 1; paragraph 85.

(26) Automec II, see footnote 1; paragraph 86, cited in BEMIM, paragraph 80.

(27) See footnote 22; paragraph 86.

(28) See footnote 18.

(29) However, in the case of information accompanied by a request for confidentiality with a view to protecting the informant's anonymity, an institution which accepts such information is bound, under Article 214 of the Treaty, to comply with such a condition (Case 145/83 Adams v. Commission [1985] ECR 3539). The Commission will thus not divulge to national authorities the name of an informant who wishes to remain anonymous unless the person concerned withdraws, at the Commission's request, his request for anonymity vis-à-vis the national authority which may be dealing with his complaint.

(30) Case C-67/91 Direccion General de Defensa de la Competencia v. Asociacion Española de Banca Privada (AEB) and Others [1992] ECR I-4785, operative part.

(31) See footnote 30; paragraphs 39 and 43.

(32) See footnote 30; paragraph 32.

(33) Case C-234/89 Delimitis v. Henninger Bräu [1991] ECR I-935, paragraph 53.

(34) See footnote 11; paragraphs 8, 9 and 5 respectively.

(35) With respect to agreements not subject to notification pursuant to point 1 of Article 4 (2) of Regulation No 17, points 56 and 57 of this Notice also apply mutatis mutandis to express requests for exemption.

(36) Points 29 and 30 of the Notice on cooperation between national courts and the Commission.

(37) Council Regulation No 141/62 of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ 124, 28. 11. 1962, p. 2753; English Special Edition 1959-62, p. 291), as amended by Regulations Nos 165/65/EEC (OJ 210, 11. 12. 1965, p. 314) and 1002/67/EEC (OJ 306, 16. 12. 1967, p. 1); Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23. 7. 1968, p. 1; English Special Edition 1968 I, p. 302); Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31. 12. 1986, p. 4); Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31. 12. 1987, p. 1); and Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92 (OJ L 89, 21. 4. 1995, p. 7).

authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (97/C 313/03)

(Text with EEA relevance)

I. ROLE OF THE MEMBER STATES AND OF THE COMMUNITY

1. In competition policy the Community and the Member States perform different functions. Whereas the Community is responsible only for implementing the Community rules, Member States not only apply their domestic law but also have a hand in implementing Articles 85 and 86 of the EC Treaty.

2. This involvement of the Member States in Community competition policy means that decision can be taken as closely as possible to the citizen (Article A of the Treaty on European Union). The decentralized application of Community competition rules also leads to a better allocation of tasks. If, by reason of its scale or effects, the proposed action can best be taken at Community level, it is for the Commission to act. Otherwise, it is for the competition authority of the Member State concerned to act.

3. Community law is implemented by the Commission and national competition authorities, on the one hand, and national courts, on the other, in accordance with the principles developed by the Community legislature and by the Court of Justice and the Court of First Instance of the European Communities.

It is the task of national courts to safeguard the rights of private persons in their relations with one another (1). Those rights derive from the fact that the prohibitions in Articles 85 (1)

and 86 (2) and the exemptions granted by regulation (3) have been recognized by the Court of Justice as being directly applicable. Relations between national courts and the Commission in applying Articles 85 and 86 were spelt out in a Notice published by the Commission in 1993 (4). This Notice is the counterpart, for relations with national authorities, to that of 1993 on relations with national courts.

4. As administrative authorities, both the Commission and national competition authorities act in the public interest in performing their general task of monitoring and enforcing the competition rules (5). Relations between them are determined primarily by this common role of protecting the general interest. Although similar to the Notice on cooperation with national courts, this Notice accordingly reflects this special feature.

5. The specific nature of the role of the Commission and of national competition authorities is characterized by the powers conferred on those bodies by the Council regulations adopted under Article 87 of the Treaty. Article 9 (1) of Regulation No 17 (6) thus provides: 'Subject to review of its decision by the Court of Justice (7), the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty`. And Article 9 (3) of the same Regulation provides: 'As long as the Commission has not initiated any procedure under Article 2 (8), 3 (9) or 6 (10), the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty.`

It follows that, provided their national law has conferred the necessary powers on them, national competition authorities are empowered to apply the prohibitions in Articles 85 (1) and 86. On the other hand, for the purposes of applying Article 85 (3), they do not have any powers to grant exemptions in individual cases; they must abide by the decisions and regulations adopted by the Commission under that provision. They may also take account of other measures adopted by the Commission in such cases, in particular comfort letters, treating them as factual evidence.

6. The Commission is convinced that enhancing the role of national competition authorities will boost the effectiveness of Articles 85 and 86 of the Treaty and, generally speaking, will bolster the application of Community competition rules throughout the Community. In the interests of safeguarding and developing the single market, the Commission considers that those provisions should be used as widely as possible. Being closer to the activities and businesses that require monitoring, national authorities are often in a better position than the Commission to protect competition.

7. Cooperation must therefore be organized between national authorities and the Commission. If this cooperation is to be fruitful, they will have to keep in close and constant touch.

8. The Commission proposes to set out in this Notice the principles it will apply in future when dealing with the cases described herein. The Notice also seeks to induce firms to approach national competition authorities more often.

9. This Notice describes the practical cooperation which is desirable between the Commission and national authorities. It does not affect the extent of the powers conferred by Community law on either the Commission or national authorities for the purpose of dealing with individual cases.

10. For cases falling within the scope of Community law, to avoid duplication of checks on compliance with the competition rules which are applicable to them, which is costly for the firms concerned, checks should wherever possible be carried out by a single authority (either a Member State's competition authority or the Commission). Control by a single authority offers advantages for businesses.

Parallel proceedings before the Commission, on the one hand, and a national competition authority, on the other, are costly for businesses whose activities fall within the scope both of Community law and of Member States' competition laws. They can lead to the repetition of checks on the same

activity, by the Commission, on the one hand, and by the competition authorities of the Member States concerned, on the other.

Businesses in the Community may therefore in certain circumstances find it to their advantage if some cases falling within the scope of Community competition law were dealt with solely by national authorities. In order that this advantage may be enjoyed to the full, the Commission thinks it is desirable that national authorities should themselves apply Community law directly or, failing that, obtain, by applying their domestic law, a result similar to that which would have been obtained had Community law been applied.

11. What is more, in addition to the resulting benefits accruing to competition authorities in terms of mobilization of their resources, cooperation between authorities reduces the risk of divergent decisions and hence the opportunities for those who might be tempted to do so to seek out whichever authority seemed to them to be the most favourable to their interests.

12. Member States' competition authorities often have a more detailed and precise knowledge than the Commission of the relevant markets (particularly those with highly specific national features) and the businesses concerned. Above all, they may be in a better position than the Commission to detect restrictive practices that have not been notified or abuses of a dominant position whose effects are essentially confined to their territory.

13. Many cases handled by national authorities involve arguments based on national law and arguments drawn from Community competition law. In the interests of keeping proceedings as short as possible, the Commission considers it preferable that national authorities should directly apply Community law themselves, instead of making firms refer to the Community-law aspects of their cases to the Commission.

14. An increasing number of major issues in the field of Community competition law have been clarified over the last thirty years through the case-law of the Court of Justice and the Court of First Instance and through decisions taken on questions of principle and the exemption regulations adopted by the Commission. The application of that law by national authorities is thereby simplified.

15. The Commission intends to encourage the competition authorities of all Member States to engage in this cooperation. However, the national legislation of several Member States does not currently provide competition authorities with the procedural means of applying Articles 85 (1) and 86. In such Member States conduct caught by the Community provisions can be effectively dealt with by national authorities only under national law.

In the Commission's view, it is desirable that national authorities should apply Articles 85 or 86 of the Treaty, if appropriate in conjunction with their domestic competition rules, when handling cases that fall within the scope of those provisions.

16. Where authorities are not in a position to do this and hence can apply only their national law to such cases, the application of that law should 'not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules` (11). At the very least, the solution they find to a case falling within the scope of Community law must be compatible with that law, Member States being forbidden, given the primacy of Community law over national competition law (12) and the obligation to cooperate in good faith laid down in Article 5 of the Treaty (13), to take measures capable of defeating the practical effectiveness of Articles 85 and 86.

17. Divergent decisions are more likely to be reached where a national authority applies its national law rather than Community law. Where a Member State's competition authority applies Community law, it is required to comply with any decisions taken previously by the Commission in the same

proceedings. Where the case has merely been the subject of a comfort letter, then, according to the Court of Justice, although this type of letter does not bind national courts, the opinion expressed by the Commission constitutes a factor which the national courts may take into account in examining whether the agreements on conduct in question are in accordance with the provisions of Article 85 (14). In the Commission's view, the same holds true for national authorities.

18. Where an infringement of Articles 85 or 86 is established by Commission decision, that decision precludes the application of a domestic legal provision authorizing what the Commission has prohibited. The objective of the prohibitions in Articles 85 (1) and 86 is to guarantee the unity of the common market and the preservation of undistorted competition in that market. They must be strictly complied with if the functioning of the Community regime is not to be endangered (15).

19. The legal position is less clear as to whether national authorities are allowed to apply their more stringent national competition law where the situation they are assessing has previously been the subject of an individual exemption decision of the Commission or is covered by a block exemption Regulation. In Walt Wilhelm, the Court stated that the Treaty 'permits the Community authorities to carry out certain positive, though indirect, actions with a view to promoting a harmonious development of economic activities within the whole Community` (paragraph 5 of the judgment). In Bundeskartellamt v. Volkswagen and VAG Leasing (16), the Commission contended that national authorities may not prohibit exempted agreements. The uniform application of Community law would be frustrated every time an exemption granted under Community law was made to depend on the relevant national rules. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of an act giving effect to the Treaty - which an exemption under Article 85 (3) undoubtedly is - would also be disregarded. In the case in point, however, the Court did not have to settle the question.

20. If the Commission's Directorate-General for Competition sends a comfort letter in which it expresses the opinion that an agreement or a practice is incompatible with Article 85 of the Treaty but states that, for reasons to do with its internal priorities, it will not propose to the Commission that it take a decision thereon in accordance with the formal procedures laid down in Regulation No 17, it goes without saying that the national authorities in whose territory the effects of the agreement or practice are felt may take action in respect of that agreement or practice.

21. In the case of a comfort letter in which the Directorate-General for Competition expresses the opinion that an agreement does restrict competition within the meaning of Article 85 (1) but qualifies for exemption under Article 85 (3), the Commission will call upon national authorities to consult it before they decide whether to adopt a different decision under Community or national law.

22. As regards comfort letters in which the Commission expresses the opinion that, on the basis of the information in its possession, there is no need for it to take any action under Article 85 (1) or Article 86 of the Treaty, 'that fact cannot by itself have the result of preventing the national authorities from applying to those agreements` or practices 'provisions of national competition law which may be more rigorous than Community law in this respect. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85 (1) and (2)` or Article 86, 'the scope of which is limited to agreements` or dominant positions 'capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally`. (Judgment of the Court of Justice in Procureur de la République v. Giry and Guerlain (17)).

II. GUIDELINES ON CASE ALLOCATION

23. Cooperation between the Commission and national competition authorities has to comply with the current legal framework. First, if it is to be caught by Community law and not merely by national competition law, the conduct in question must be liable to have an appreciable effect on trade between Member States. Secondly, the Commission has sole power to declare Article 85 (1) of the Treaty inapplicable under Article 85 (3).

24. In practice, decisions taken by a national authority can apply effectively only to restrictions of competition whose impact is felt essentially within its territory. This is the case in particular with the restrictions referred to in Article 4 (2) (1) of Regulation No 17, namely agreements, decisions or concerted practices the only parties to which are undertakings from one Member State and which, though they do not relate either to imports or to exports between Member States, may affect intra-Community trade (18). It is extremely difficult from a legal standpoint for such an authority to conduct investigations outside its home country, such as when on-the-spot inspections need to be carried out on businesses, and to ensure that its decisions are enforced beyond its national borders. The upshot is that the Commission usually has to handle cases involving businesses whose relevant activities are carried on in more than one Member State.

25. A national authority having sufficient resources in terms of manpower and equipment and having had the requisite powers conferred on it, also needs to be able to deal effectively with any cases covered by the Community rules which it proposes to take on. The effectiveness of a national authority's action is dependent on its powers of investigation, the legal means it has at its disposal for settling a case - including the power to order interim measures in an emergency - and the penalties it is empowered to impose on businesses found guilty of infringing the competition rules. Differences between the rules of procedure applicable in the various Member States should not, in the Commission's view, lead to outcomes which differ in their effectiveness when similar cases are being dealt with.

26. In deciding which cases to handle itself, the Commission will take into account the effects of the restrictive practice or abuse of a dominant position and the nature of the infringement.

In principle, national authorities will handle cases the effects of which are felt mainly in their territory and which appear upon preliminary examination unlikely to qualify for exemption under Article 85 (3). However, the Commission reserves the right to take on certain cases displaying a particular Community interest.

Mainly national effects

27. First of all, it should be pointed out that the only cases at issue here are those which fall within the scope of Articles 85 and 86.

That being so, the existing and foreseeable effects of a restrictive practice or abuse of a dominant position may be deemed to be closely linked to the territory in which the agreement or practice is applied and to the geographic market for the goods or services in question.

28. Where the relevant geographic market is limited to the territory of a single Member State and the agreement or practice is applied only in that State, the effects of the agreement or practice must be deemed to occur mainly within that State even if, theoretically, the agreement or practice is capable of affecting trade between Member States.

Nature of the infringement: cases that cannot be exempted

29. The following considerations apply to cases brought before the Commission, to cases brought before a national competition authority and to cases which both may have to deal with.

A distinction should be drawn between infringements of Article 85 of the Treaty and infringements of Article 86.

30. The Commission has exclusive powers under Article 85 (3) of the Treaty to declare the provisions of Article 85 (1) inapplicable. Any notified restrictive practice that prima facie qualifies for exemption must therefore be examined by the Commission, which will take account of the criteria developed in this area by the Court of Justice and the Court of First Instance and also by the relevant regulations and its own previous decisions.

31. The Commission also has exclusive responsibility for investigation complaints against decisions it has taken under its exclusive powers, such as a decision to withdraw an exemption previously granted by it under Article 85 (3) (19).

32. No such limitation exists, however, on implementation of Article 86 of the Treaty. The Commission and the Member States have concurrent competence to investigate complaints and to prohibit abuses of dominant positions.

Cases of particular significance to the Community

33. Some cases considered by the Commission to be of particular Community interest will more often be dealt with by the Commission even if, inasmuch as they satisfy the requirements set out above (points 27-28 and 29-32), they can be dealt with by a national authority.

34. This category includes cases which raise a new point of law, that is to say, those which have not yet been the subject of a Commission decision or a judgment of the Court of Justice or Court of First Instance.

35. The economic magnitude of a case is not in itself sufficient reason for its being dealt with by the Commission. The position might be different where access to the relevant market by firms from other Member States is significantly impeded.

36. Cases involving alleged anti-competitive behaviour by a public undertaking, an undertaking to which a Member State has granted special or exclusive rights with the meaning of Article 90 (1) of the Treaty, or an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly within the meaning of Article 90 (2) of the Treaty may also be of particular Community interest.

III. COOPERATION IN CASES WHICH THE COMMISSION DEALS WITH FIRST

37. Cases dealt with by the Commission have three possible origins: own-initiative proceedings, notifications and complaints. By their very nature, own-initiative proceedings do not lend themselves to decentralized processing by national competition authorities.

38. The exclusivity of the Commission's powers to apply Article 85 (3) of the Treaty in individual cases means that cases notified to the Commission under Article 4 (1) of Regulation No 17 by parties seeking exemption under Article 85 (3) cannot be dealt with by a national competition authority on the Commission's initiative. According to the case-law of the Court of First Instance, these exclusive powers confer on the applicant the right to obtain from the Commission a decision on the substance of his request for exemption (20).

39. National competition authorities may deal, at the Commission's request, with complaints that do not involve the application of Article 85 (3), namely those relating to restrictive practices which must be notified under Articles 4 (1), 5 (1) and 25 of Regulation No 17 but have not been notified to the Commission and those based on alleged infringement of Article 86 of the Treaty. On the other hand, complaints concerning matters falling within the scope of the Commission's exclusive powers, such as withdrawal of exemption, cannot be usefully handled by a national competition authority (21).

40. The criteria set out at points 23 to 36 above in relation to the handling of a case by the

Commission or a national authority, in particular as regards the territorial extent of the effects of a restrictive practice or dominant position (points 27-28), should be taken into account.

Commission's right to reject a complaint

41. It follows from the case-law of the Court of First Instance that the Commission is entitled under certain conditions to reject a complaint which does not display sufficient Community interest to justify further investigation (22).

42. The Commission's resultant right to reject a complaint stems from the concurrent competence of the Commission, national courts and - where they have the power - national competition authorities to apply Articles 85 (1) and 86 and from the consequent protection available to complainants before the courts and administrative authorities. With regard to that concurrent competence, it has been consistently held by the Court of Justice and the Court of First Instance that Article 3 of Regulation No 17 (the legal basis for the right to lodge a complaint with the Commission for alleged infringement of Article 85 or Article 86) does not entitle an applicant under that Article to obtain from the Commission a decision within the meaning of Article 189 of the Treaty as to whether or not the alleged infringement has occurred (23).

Conditions for rejecting a complaint

43. The investigation of a complaint by a national authority presupposes that the following specific conditions, derived from the case-law of the Court of First Instance, are met.

44. The first of these conditions is that, in order to assess whether or not there is a Community interest in having a case investigated further, the Commission must first undertake a careful examination of the questions of fact and law set out in the complaint (24). In accordance with the obligation imposed on it by Article 190 of the Treaty to state the reasons for its decisions, the Commission has to inform the complainant of the legal and factual considerations which have induced it to conclude that the complaint does not display a sufficient Community interest to justify further investigation. The Commission cannot therefore confine itself to an abstract reference to the Community interest (25).

45. In assessing whether it is entitled to reject a complaint for lack of any Community interest, the Commission must balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement, and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of making sure that Articles 85 and 86 are complied with (26). In particular, as the Court of First Instance held in BEMIM (27), where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the courts and competent administrative authorities of that Member State by the complainant against the body against which the complaint was made, the Commission is entitled to reject the complaint for lack of any sufficient Community interest in further investigation of the case, provided however that the rights of the complainant can be adequately safeguarded. As to whether the effects of the restrictive practice are localized, such is the case in particular with practices to which the only parties are undertakings from one Member State and which, although they do not relate either to imports or to exports between Member States, within the meaning of point 1 of Article 4 (2) of Regulation No 17 (28), are capable of affecting intra-Community trade. As regards the safeguarding of the complainant's rights, the Commission considers that the referral of the matter to the national authority concerned needs must protect them quite adequately. On this latter point, the Commission takes the view that the effectiveness of the national authority's action depends notably on whether that authority is able to take interim measures if it deems it necessary, without prejudice to the possibility, found in the law of certain Member States, that

such measures may be taken with the requisite degree of effectiveness by a court.

Procedure

46. Where the Commission considers these conditions to have been met, it will ask the competition authority of the Member State in which most of the effects of the contested agreement or practice are felt if it would agree to investigate and decide on the complaint. Where the competition authority agrees to do so, the Commission will reject the complaint pending before it on the ground that it does not display sufficient Community interest and will refer the matter to the national competition authority, either automatically or at the complainant's request. The Commission will place the relevant documents in its possession at the national authority's disposal (29).

47. With regard to investigation of the complaint, it should be stressed that, in accordance with the ruling given by the Court of Justice in Case C-67/91 (30) (the 'Spanish banks` case), national competition authorities are not entitled to use as evidence, for the purposes of applying either national rules or the Community competition rules, unpublished information contained in replies to requests for information sent to firms under Article 11 of Regulation No 17 or information obtained as a result of any inspections carried out under Article 14 of that Regulation. This information can nevertheless be taken into account, where appropriate, to justify instituting national proceedings (31).

IV. COOPERATION IN CASES WHICH A NATIONAL AUTHORITY DEALS WITH FIRST

Introduction

48. At issue here are cases falling within the scope of Community competition law which a national competition authority handles on its own initiative, applying Articles 85 (1) or 86, either alone or in conjunction with its national competition rules, or, where it cannot do so, its national rules alone. This covers all cases within this field which a national authority investigates before the Commission - where appropriate - does so, irrespective of their procedural origin (own-initiative proceedings, notification, complaint, etc.). These cases are therefore those which fulfil the conditions set out in Part II (Guidelines on case allocation) of this Notice.

49. As regards cases which they deal with under Community law, it is desirable that national authorities should systematically inform the Commission of any proceedings they initiate. The Commission will pass on this information to the authorities in the other Member States.

50. This cooperation is especially necessary in regard to cases of particular significance to the Community within the meaning of points 33-36. This category includes (a) all cases raising a new point of law, the aim being to avoid decisions, whether based on national law or on Community law, which are incompatible with the latter; (b) among cases of the utmost importance from an economic point of view, only those in which access by firms from other Member States to the relevant national market is significantly impeded; and (c) certain cases in which a public undertaking or an undertaking treated as equivalent to a public undertaking (within the meaning of Article 90 (1) and (2) of the Treaty) is suspected of having engaged in an anti-competitive practice. Each national authority must determine, if necessary after consulting the Commission, whether a given case fits into one of these sub-categories.

51. Such cases will be investigated by national competition authorities in accordance with the procedures laid down by their national law, whether they are acting with a view to applying the Community competition rules or applying their national competition rules (32).

52. The Commission also takes the view that, like national courts to which competition cases involving Articles 85 or 86 have been referred, national competition authorities applying those provisions are always at liberty, within the limits of their national procedural rules and subject to Article

214 of the Treaty, to seek information from the Commission on the state of any proceedings which the Commission may have set in motion and as to the likelihood of its giving an official ruling, pursuant to Regulation No 17, on cases which they are investigating on their own initiative. Under the same circumstances, national competition authorities may contact the Commission where the concrete application of Article 85 (1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which the Commission is in a position to supply to them (33).

53. The Commission is convinced that close cooperation with national authorities will forestall any contradictory decisions. But if, 'during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures` (Walt Wilhelm) to ensure that measures implementing Community competition law are fully effective. The Commission takes the view that these measures should generally consist in national authorities staying their proceedings pending the outcome of the proceedings being conducted by the Commission. Where a national authority applies its national law, such a stay of proceedings would be based on the principles of the primacy of Community law (Walt Wilhelm) (34) and legal certainty, and where it applies Community law, on the principle of legal certainty alone. For its part, the Commission will endeavour to deal as a matter of priority with cases subject to national proceedings thus stayed. A second possibility may, however, be envisaged, whereby the Commission is consulted before adopting the national decision. The consultations would consist, due regard being had to the judgment in the Spanish banks case, in exchanging any documents preparatory to the decisions envisaged, so that Member States' authorities might be able to take account of the Commission's position in their own decision without the latter having to be deferred until such time as the Commission's decision has been taken.

Procedure

In respect of complaints

54. Since complainants cannot force the Commission to take a decision as to whether the infringement they allege has actually occurred, and since the Commission is entitled to reject a complaint which lacks a sufficient Community interest, national competition authorities should not have any special difficulty in handling complaints submitted initially to them involving matters that fall within the scope of the Community competition rules.

In respect of notifications

55. Although they form a very small percentage of all notifications to the Commission, special consideration needs to be given to notifications to the Commission of restrictive practices undergoing investigation by a national authority made for dilatory purposes. A dilatory notification is one where a firm, threatened with a decision banning a restrictive practice which a national authority is poised to take following an investigation under Article 85 (1) or under national law, notifies the disputed agreement to the Commission and asks for it to be exempted under Article 85 (3) of the Treaty. Such a notification is made in order to induce the Commission to initiate a proceeding under Articles 2, 3 or 6 of Regulation No 17 and hence, by virtue of Article 9 (3) of that Regulation, to remove from Member States' authorities the power to apply the provisions of Article 85 (1). The Commission will not consider a notification to be dilatory until after it has contacted the national authority concerned and checked that the latter agrees with its assessment. The Commission calls upon national authorities, moreover, to inform it of their own accord of any notifications they receive which, in their view, are dilatory in nature.

56. A similar situation arises where an agreement is notified to the Commission with a view to preventing the imminent initiation of national proceedings which might result in the prohibition

of that agreement (35).

57. The Commission recognizes, of course, that a firm requesting exemption is entitled to obtain from it a decision on the substance of its request (see point 38). However, if the Commission takes the view that such notification is chiefly aimed at suspending the national proceedings, given its exclusive powers to grant exemptions it considers itself justified in not examining it as a matter of priority.

58. The national authority which is investigating the matter and has therefore initiated proceedings should normally ask the Commission for its provisional opinion on the likelihood of its exempting the agreement now notified to it. Such a request will be superfluous where, 'in the light of the relevant criteria developed by the case-law of the Court of Justice and the Court of First Instance and by previous regulations and decisions of the Commission, the national authority has ascertained that the agreement, decision or concerted practice at issue cannot be the subject of an individual exemption` (36).

59. The Commission will deliver its provisional opinion on the likelihood of an exemption being granted, in the light of a preliminary examination of the questions of fact and law involved, as quickly as possible once the complete notification is received. Examination of the notification having revealed that the agreement in question is unlikely to qualify for exemption under Article 85 (3) and that its effects are mainly confined to one Member State, the opinion will state that further investigation of the matter is not a Commission priority.

60. The Commission will transmit this opinion in writing to the national authority investigating the case and to the notifying parties. It will state in its letter that it will be highly unlikely to take a decision on the matter before the national authority to which it was referred has taken its final decision and that the notifying parties retain their immunity from any fines the Commission might impose.

61. In its reply, the national authority, after taking note of the Commission's opinion, should undertake to contact the Commission forthwith if its investigation leads it to a conclusion which differs from that opinion. This will be the case if, following its investigation, the national authority concludes that the agreement in question should not be banned under Article 85 (1) of the Treaty or, if that provisions cannot be applied, under the relevant national law. The national authority should also undertake to forward a copy of its final decision on the matter to the Commission. Copies of the correspondence will be sent to the competition authorities of the other Member States for information.

62. The Commission will not itself initiate proceedings in the same case before the proceedings pending before the national authority have been completed; in accordance with Article 9 (3) of Regulation No 17, such action would have the effect of taking the matter out of the hands of the national authority. The Commission will do this only in quite exceptional circumstances - in a situation where, against all expectations, the national authority is liable to find that there has been no infringement of Articles 85 or 86 or of its national competition law, or where the national proceedings are unduly long drawn-out.

63. Before initiating proceedings the Commission will consult the national authority to discover the factual or legal grounds for that authority's proposed favourable decision or the reasons for the delay in the proceedings.

V. CONCLUDING REMARKS

64. This Notice is without prejudice to any interpretation by the Court of First Instance and the Court of Justice.

65. In the interests of effective, consistent application of Community law throughout the Union, and legal simplicity and certainty for the benefit of undertakings, the Commission calls upon those Member States which have not already done so to adopt legislation enabling their competition authority to implement Articles 85 (1) and 86 of the Treaty effectively.

66. In applying this Notice, the Commission and the competent authorities of the Member States and their officials and other staff will observe the principle of professional secrecy in accordance with Article 20 of Regulation No 17.

67. This Notice does not apply to competition rules in the transport sector, owing to the highly specific way in which cases arising in that sector are handled from a procedural point of view (37).

68. The actual application of this Notice, especially in terms of the measures considered desirable to facilitate its implementation, will be the subject of an annual review carried out jointly by the authorities of the Member States and the Commission.

69. This Notice will be reviewed no later than at the end of the fourth year after its adoption.

(1) Case T-24/90 Automec v. Commission ('Automec II`) [1992] ECR II-2223, paragraph 85.

(2) Case 127/73 BRT v. SABAM [1974] ECR 51, paragraph 16.

(3) Case 63/75 Fonderies Roubaix-Wattrelos v. Fonderies A. Roux [1976] ECR 111.

(4) Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13. 2. 1993, p. 6).

(5) Automec II, see footnote 1; paragraph 85.

(6) Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty; OJ 13, 21. 2. 1962, p. 204/62 (English Special Edition 1959-62, p. 87).

(7) Now by the Court of First Instance and, on appeal, by the Court of Justice.

(8) Negative clearance.

(9) Termination of infringements - prohibition decisions.

(10) Decisions pursuant to Article 85 (3).

(11) Case 14/68 Walt Wilhelm and Others v. Bundeskartellamt [1969] ECR 1, paragraph 4.

(12) Walt Wilhelm, see footnote 11; paragraph 6; Case 66/86 Ahmed Saeed Flugreisen and Others v. Zentrale Zur Bekämpfung Unlauteren Wettbewerbs [1989] ECR 803, paragraph 48.

(13) Case C-165/91 Van Munster v. Rijksdienst voor Pensioenen [1994] ECR I-4661, paragraph 32.

(14) Case 99/79 Lancôme v. Etos [1980] ECR 2511, paragraph 11, cited in the abovementioned notice on cooperation between national courts and the Commission in applying Articles 85 and 86.

(15) Fourth Report on Competition Policy 1974, point 45.

(16) Case C-266/93 [1995] ECR I-3477; see also the Opinion of Advocate-General Tesauro in the same case, paragraph 51.

(17) Joined Cases 253/78 and 1 to 3/79 Procureur de la République v. Giry and Guerlain [1980] ECR 2327, paragraph 18.

(18) It is possible that an agreement, 'although it does not relate either to imports or to exports between Member States` within the meaning of Article 4 of Regulation No 17, 'may affect trade between Member States` within the meaning of Article 85 (1) of the Treaty (judgment of the

Court of Justice in Case 43/69 Bilger v. Jehle [1970] ECR 127, paragraph 5).

(19) Automec II, see footnote 1; paragraph 75.

(20) Case T-23/90 Peugeot v. Commission [1991] ECR II-653, paragraph 47.

(21) Automec II, see footnote 1; paragraph 75.

(22) Automec II, se footnote 1; paragraph 85; cited in Case T-114/92 BEMIM v. Commission [1995] ECR II-147, paragraph 80, and in Case T-77/95 SFEI and Others v. Commission [1997] ECR II-1, paragraphs 29 and 55.

(23) See in particular Case 125/78, GEMA v. Commission [1979] ECR 3173, paragraph 17, and Case T-16/91, Rendo and Others v. Commission [1992] ECR II-2417, paragraph 98.

(24) Automec II, see footnote 1; paragraph 82.

(25) Automec II, see footnote 1; paragraph 85.

(26) Automec II, see footnote 1; paragraph 86, cited in BEMIM, paragraph 80.

(27) See footnote 22; paragraph 86.

(28) See footnote 18.

(29) However, in the case of information accompanied by a request for confidentiality with a view to protecting the informant's anonymity, an institution which accepts such information is bound, under Article 214 of the Treaty, to comply with such a condition (Case 145/83 Adams v. Commission [1985] ECR 3539). The Commission will thus not divulge to national authorities the name of an informant who wishes to remain anonymous unless the person concerned withdraws, at the Commission's request, his request for anonymity vis-à-vis the national authority which may be dealing with his complaint.

(30) Case C-67/91 Direccion General de Defensa de la Competencia v. Asociacion Española de Banca Privada (AEB) and Others [1992] ECR I-4785, operative part.

(31) See footnote 30; paragraphs 39 and 43.

(32) See footnote 30; paragraph 32.

(33) Case C-234/89 Delimitis v. Henninger Bräu [1991] ECR I-935, paragraph 53.

(34) See footnote 11; paragraphs 8, 9 and 5 respectively.

(35) With respect to agreements not subject to notification pursuant to point 1 of Article 4 (2) of Regulation No 17, points 56 and 57 of this Notice also apply mutatis mutandis to express requests for exemption.

(36) Points 29 and 30 of the Notice on cooperation between national courts and the Commission.

(37) Council Regulation No 141/62 of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ 124, 28. 11. 1962, p. 2753; English Special Edition 1959-62, p. 291), as amended by Regulations Nos 165/65/EEC (OJ 210, 11. 12. 1965, p. 314) and 1002/67/EEC (OJ 306, 16. 12. 1967, p. 1); Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23. 7. 1968, p. 1; English Special Edition 1968 I, p. 302); Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31. 12. 1986, p. 4); Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31. 12. 1987, p. 1); and Commission

Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92 (OJ L 89, 21. 4. 1995, p. 7).

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Order of the Court
of 13 July 1990
J. J. Zwartveld and others.
Request for judicial cooperation: Rechter-commissaris bij de Arrondissementsrechtbank Groningen - Netherlands.
Commission - National judge - Request for judicial cooperation - Inviolability of documents.
Case C-2/88 Imm.

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1 . Privileges and immunities of the European Communities - Functional character - Scope - Limits - Institutions' duty of sincere cooperation with the Member States - Cooperation with the national judicial authorities seeking to ensure that Community law is respected

(EEC Treaty, Art. 5; Protocol on the Privileges and Immunities of the European Communities, Art. 19)

2 . European Communities - Institutions - Obligations - Assistance to be given to national judicial authorities seeking to ensure that Community law is respected - Procedure - Production of documents and authorization of officials to give evidence

(EEC Treaty, Arts 5 and 155)

3 . Privileges and immunities of the European Communities - Refusal of an institution to cooperate with national judicial authorities seeking to ensure that Community law is respected - Review as to whether refusal is justified under the Protocol - Jurisdiction of the Court in the case of a request submitted by the national court

(EEC Treaty, Art. 164; Protocol on the Privileges and Immunities of the European Communities)

1 . In the European Economic Community, which is a community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings but also imposes on Member States and the Community institutions mutual duties of sincere cooperation . In the case of the Community institutions, this duty of sincere cooperation is of particular importance vis-à-vis the judicial authorities of the Member States who are responsible for ensuring that Community law is applied and respected in the national legal system.

In the light of those principles, the Protocol on the Privileges and Immunities granted to the European Communities cannot be interpreted as permitting the Community institutions to neglect the aforesaid duty of cooperation, a duty which is, moreover, referred to in Article 19 of the Protocol, since the privileges and immunities which it confers have a functional, and therefore relative, character, being intended to avoid any interference with the functioning and independence of the Communities .

2 . It is incumbent upon every Community institution to give its active assistance to a national court hearing proceedings on the infringement of Community rules, which seeks the production of information concerning the existence of the facts constituting those infringements, by producing documents and authorizing its officials to give evidence in the national proceedings; that applies particularly to the Commission, to which Article 155 of the EEC Treaty entrusts the task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.

3 . The Court, which is responsible under Article 164 of the Treaty for ensuring that in the interpretation and application of the Treaty the law is observed, has the power to review at the request of a national judicial authority whether the Community institutions' reliance on the Protocol in order to refuse to cooperate with national judicial authorities hearing charges concerning the infringement of Community law is justified in view of the need to avoid any interference with the functioning and independence of the Communities

In Case C-2/88 Imm.,

REQUEST for judicial cooperation submitted by the Rechter-commissaris (examining judge) for criminal cases at the Arrondissementsrechtbank (District Court) Groningen, the Netherlands, in the preliminary investigation concerning

J . J . Zwartveld and Others,

THE COURT

composed of : O. Due, President, Sir Gordon Slynn, C. N. Kakouris, F . A. Schockweiler and M. Zuleeg (Presidents of Chambers), G . F . Mancini, T. F. O' Higgins, J. C. Moitinho de Almeida, G . C . Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General : F. G. Jacobs

Registrar : J.-G. Giraud

after hearing the views of the Advocate General

makes the following

Order

1 By a document lodged at the Court Registry on 8 August 1988 under No C-2/88 Imm., the Rechter-commissaris at the Arrondissementsrechtbank Groningen submitted to the Court a "request for judicial cooperation" in which he states as follows :

(i) he is investigating a charge that in 1985 and 1986 the director and members of the management of the fish market in Lauwersoog (the Netherlands) were guilty of forgery, contrary to Article 225 of the Netherlands Penal Code;

(ii) it appeared from the investigation that the managers of the fish market had introduced a second market or "black market", in addition to the official market, in breach of the national provisions adopted to implement the Community rules on fishing quotas;

(iii) it is clear from statements made by witnesses (officials in certain ministries and two members of the Netherlands Government) that those responsible for fisheries policy in the Netherlands were aware of the results of inspections carried out by EEC inspectors in the Netherlands between 1983 and 1986;

(iv) it is essential for purposes of the investigation for the Rechter-commissaris to obtain the inspection reports in question and documents drawn up on the basis of those reports, and it might be necessary, after he has considered the documents, to take evidence from the inspectors concerned, of whose identity he is unaware;

(v) the request for the production of these reports was refused by the Commission on the ground that the documents formed part of a file on legal matters pending in the Commission.

2 The Rechter-commissaris refers to Articles 1 and 12 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing a Single Council and Single Commission

of the European Communities of 8 April 1965 (hereinafter referred to as "the Protocol "), in conjunction with the European convention or conventions on mutual assistance, to which, he states, the Community is not a party but which are incorporated in the Community legal order so that they must be regarded as an integral part of Community law to which the national authorities are subject. On the basis of those provisions he requests the Court :

(a) to order the Commission, or at least the Directorate-General concerned, to provide him with the information which he has requested; and,

in the alternative, to grant the competent examining magistrate leave to search premises and to seize :

(i) (internal) reports and, if necessary, inspection reports drawn up since 1983 by EEC inspectors who have carried out inspections in the Netherlands with regard to sea fisheries;

(ii) any documents (which may have been drafted on the basis of the findings of the aforesaid officials) concerning compliance with the Community rules on sea fisheries.

(b) To order or at least allow the aforesaid EEC inspectors and senior officials in the Directorate-General for Fisheries, if necessary by lifting their immunity, to be examined as witnesses either by the Rechter-commissaris or at least in his presence by an examining magistrate within the European Community, concerning both the inspections carried out by them between 1983 and 1987 in the Netherlands and the discussions which they had with Netherlands officials on Netherlands fisheries policy.

3 By a document lodged at the Court Registry on 13 October 1988, the Commission contended that the Rechter-commissaris' s request was inadmissible.

4 As far as the Court' s jurisdiction was concerned, the Commission stated that the EEC Treaty set out exhaustively when and how Member States, individuals and courts could bring a case before the Court. The right of national courts to refer a case to the Court was regulated exhaustively in Article 177 of the EEC Treaty. The Rechter-commissaris' s request did not concern the interpretation of a provision of the Treaty or secondary legislation.

5 As far as the legal grounds were concerned, the Commission observed that Article 1 of the Protocol did not relate to documents such as those referred to by the Rechter-commissaris. Article 2 of the Protocol provided that the archives of the Community were to be inviolable and did not mention any possibility that the Court might lift that inviolability. Article 12 of the Protocol did not concern the hearing of officials and other servants of the Community as witnesses or the lifting in that connection of the immunities enjoyed by those persons. That question was governed by Article 19 of the Staff Regulations of Officials of the European Communities, which did not provide for authorization to be given by the Court.

6 In reply to questions put by the Court, the Commission stated the legal grounds on which it opposed the production of documents arguing that there was no obligation to do so in Articles 1 and 2 of the Protocol .

7 Asked to state whether it considered that the production of documents requested in connection with possible frauds against Community rules was capable of interfering with the proper functioning or the independence of the Communities and if so, why, the Commission stated that the reports drawn up by its inspectors were documents which of their nature could not be used except for internal information . They were purely internal documents and could not commit the Commission or reflect its position. Their production might in addition jeopardize the Commission' s relations with the Member States in the delicate area of supervision.

8 Asked whether the scope of the inviolability of archives provided for in Article 2 of the Protocol was absolute, even so far as the Court was concerned, and prevented the Court from requesting or

authorizing the production to a national court of documents in the framework of a judicial investigation, the Commission replied that, unlike Article 1, Article 2 of the Protocol did not contain any exception empowering the Court to lift the inviolability.

9 Requested to state whether such production was not possible as part of the cooperation between Community institutions and the responsible authorities of the Member States provided for in Article 19 of the Protocol, the Commission stated that Article 2 contained no exception and Article 19 could not be used as the basis for lifting inviolability.

10 The Commission was asked whether in this case it was prepared to divulge the identity of the inspectors and, if necessary, to authorize them to be examined as witnesses on their findings and, if not, to state why the Community' s interests precluded them from giving evidence . In reply, the Commission stated that it was not prepared, for the reasons already given, to divulge the identity of the inspectors or to authorize them to give evidence. Any obligation on inspectors to be examined as witnesses would appreciably affect their work and therefore the effectiveness of Community supervision.

11 The Commission stated that it was, however, prepared to forward to the Rechter-commissaris a report on the facts which had been established, provided that the efficiency of the Community supervision was not jeopardized, and to authorize one or more members of staff to give evidence before the Rechter-commissaris.

12 The Rechter-commissaris informed the Court that in view of the conditions imposed by the Commission it could not agree to the Commission' s proposal.

13 Following the publication of notice of this case in the Official Journal of the European Communities (Official Journal 1988 C 232, p. 5), the Government of the Netherlands lodged written observations in a document dated 19 October 1988.

14 The Court requested the Community institutions and the Member States to submit their observations on the scope of Articles 1, 2 and 19 of the Protocol with regard to a request such as that submitted to the Court by the Rechter-commissaris; written observations were submitted by the Council, the European Parliament, the French Republic, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom.

15 In order to assess whether the objection of inadmissibility lodged by the Commission is well founded, it should be recalled that the Court has already held in its judgment in Case 6/64 Costa v ENEL [1964] ECR 585, that, by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States.

16 In its judgment in Case 294/83 Les Verts v European Parliament [1986] ECR 1357, the Court established the principle that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty (paragraph 23). The EEC Treaty established the Court of Justice as the judicial body responsible for ensuring that both the Member States and the Community institutions comply with the law.

17 In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation . That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings (see the judgment in Case 68/88 Commission v Greece [1989] ECR 2965, at p. 2984, paragraph 23) but also imposes on Member States and the Community institutions mutual duties

of sincere cooperation (see the judgment in Case 230/81 Luxembourg v European Parliament [1983] ECR 255, paragraph 37).

18 This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system .

19 When analysed in the light of those principles, the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities (see the order of the Court in Case

C-1/88 SA Générale de Banque v Commission [1989] ECR 857, paragraph 9).

20 The functional, and therefore relative, character of the privileges and immunities of the Communities is, moreover, expressly embodied in the provisions of the Protocol; Article 1 provides that the Court may authorize administrative or legal measures of constraint with regard to the property and assets of the Communities, and Article 18 provides that the privileges, immunities and facilities are accorded to officials and other servants of the Communities solely in the interests of the Communities.

21 The Protocol therefore does not permit the Community institutions to neglect the duty of sincere cooperation with the national authorities, and in particular the judicial authorities, a duty which is, moreover, referred to in Article 19 of the Protocol itself.

22 In this case, the request has been made by a national court which is hearing proceedings on the infringement of Community rules, and it seeks the production of information concerning the existence of the facts constituting those infringements. It is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorizing its officials to give evidence in the national proceedings; that applies particularly to the Commission, to which Article 155 of the EEC Treaty entrusts the task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.

23 The Court, which is responsible under Article 164 of the EEC Treaty for ensuring that in the interpretation and application of the Treaty the law is observed, must have the power to review, at the request of a national judicial authority and by means of a legal procedure appropriate to the objective pursued by that authority, whether the duty of sincere cooperation, incumbent on the Commission in this case, has been complied with.

24 Consequently, the Court has jurisdiction to examine whether the Community institutions' reliance on the Protocol in order to justify the refusal to cooperate sincerely with the national authorities is justified in view of the need to avoid any interference with the functioning and independence of the Communities.

25 Under those circumstances, the Commission must produce to the Rechter-commissaris the documents which it has requested, unless it presents to the Court imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities justifying its refusal to do so.

26 The Commission must also authorize its officials, in accordance with Article 19 of the Staff Regulations of Officials of the European Communities, to be examined as witnesses before the Rechter-commissaris with regard to their findings during the inspections carried out in the Netherlands between 1983 and 1987 in the sea fisheries sector, unless it presents to the Court imperative reasons relating to the need to safeguard the interests of the Communities which justify its refusal of authorization.

On those grounds,

THE COURT

hereby orders as follows :

(1) The request by the Rechter-commissaris, Groningen, is declared admissible .

(2) The Commission is ordered to forward to the Court a list of the reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries and to submit to the Court in respect of the reports which the Commission refuses to produce to the Rechter-commissaris, Groningen, a statement of the imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities which justify that refusal.

(3) The reports in respect of which the Commission does not rely on the said imperative reasons are to be transmitted forthwith to the Rechter-commissaris, Groningen.

(4) The Court will rule at a later date on the request for production of the reports in respect of which the Commission relies on the said imperative reasons.

(5) The Commission is ordered to authorize its officials to be examined as witnesses before the Rechter-commissaris, Groningen, with regard to their findings during the inspections carried out in the Netherlands between 1983 and 1987 in the sea fisheries sector, and to submit to the Court in respect of the officials for whom such authorization is refused a statement of the imperative reasons relating to the need to safeguard the interests of the Communities which justify refusal of authorization.

(6) The Court will rule at a later date on the request concerning the officials whom the Commission refuses to authorize to be examined as witnesses in reliance on the said imperative reasons.

(7) Costs are reserved.

Luxembourg, 13 July 1990.

DOCNUM	61988O0002(01)
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Communities
TYPDOC	6 ; CJUS ; cases ; 1988 ; O ; order
PUBREF	European Court reports 1990 Page I-03365 Swedish special edition X Page 00489 Finnish special edition X Page 00509
DOC	1990/07/13
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JURCIT	11957E005 : N 17 11957E155-T1 : N 22 11957E164 : N 23 11957E177 : N 4 61964J0006 : N 15 11965F/PRO/PRI/01 : N 2 5 6 8 14 20 11965F/PRO/PRI/02 : N 5 6 8 9 14 11965F/PRO/PRI/12 : N 2 5 11965F/PRO/PRI/18 : N 20 11965F/PRO/PRI/19 : N 9 14 21 31968R0259(01)-A19 : N 5 26 61981J0230 : N 17 61983J0294 : N 16 61988J0068 : N 17 61988S0001 : N 19
SUB	Privileges and immunities ; Provisions governing the Institutions
AUTLANG	Dutch
OBSERV	Council ; European Parliament ; Netherlands ; Federal Republic of Germany ; France ; Greece ; Ireland ; Italy ; Portugal ; United Kingdom ; Member States ; Institutions
NATIONA	Netherlands
NOTES	Keurentjes, R.B.M.: Nederlands juristenblad 1990 p.1282-1283 Lauwaars, R.H.: S.E.W. ; Sociaal-economische wetgeving 1990 p.827-829 Van der Klis, G.W. ; Ottervanger, T.R.: Advocatenblad 1990 p.686-687 Mortelmans, K.J.M.: Ars aequi 1990 p.983-991 Goletti, Giovanni Battista: Rivista di diritto europeo 1990 p.881-886 Lauwaars, R.H.: Euridica 1990 no 2 p.17 Simon, Denys: Journal du droit international 1991 p.445-447 Watson, J.S.: Common Market Law Review 1991 p.428-443 Clemente, Giorgio: Rivista della Corte dei conti 1991 no 2 p.204-209 Prieß, Hans-Joachim: Europarecht 1991 p.342-355
PROCEDU	Application as to immunities - successful ; Application as to immunities - interlocutory judgment
ADVGEN	Jacobs
JUDGRAP	Schockweiler
DATES	of document: 13/07/1990 of application: 08/08/1988

Order of the Court
of 6 December 1990
J. J. Zwartveld and others.
Request for judicial cooperation: Rechter-commissaris bij de Arrondissementsrechtbank Groningen - Netherlands.
Commission - National court - Inviolability of documents.
Case C-2/88 Imm.

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European Communities - Institutions - Obligations - Duty to cooperate with national authorities acting to ensure respect for Community law - Implementation - Disclosure of documents and authorization of officials to give evidence - Legitimate grounds of refusal - Review by the Court

The Community institutions' duty of sincere cooperation with the judicial authorities of the Member States which are responsible for ensuring that Community law is applied and respected in the national legal system does not preclude a refusal to disclose documents or to authorize officials to give evidence where there are legitimate grounds relating to the protection of the rights of third parties or where there may be interference with the functioning and independence of the Communities. In the case of such refusal the institution concerned must provide the Court with the information required to allow it to decide whether the refusal is justified.

In Case C-2/88 Imm.,

REQUEST for judicial cooperation submitted by the rechter-commissaris (examining judge) for criminal cases at the Arrondissementsrechtbank (District Court) Groningen, the Netherlands, in the preliminary investigation concerning

J . J . Zwartveld and Others,

THE COURT,

composed of : O. Due, President, G. F. Mancini, T. F. O' Higgins, J . C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F . A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General : F. G. Jacobs

Registrar : J.-G. Giraud

after hearing the views of the Advocate General

makes the following

Order

1 By a document lodged at the Court Registry on 8 August 1988 under No C-2/88 Imm., the rechter-commissaris at the Arrondissementsrechtbank Groningen submitted to the Court a "request for judicial cooperation" in which he states as follows :

(i) he is investigating a charge that in 1985 and 1986 the director and members of the management of the fish market in Lauwersoog (the Netherlands) were guilty of forgery, contrary to Article 225 of the Netherlands Penal Code;

(ii) it appeared from the investigation that the managers of the fish market had introduced a second market or black market, in addition to the official market, in breach of the national provisions adopted to implement the Community rules on fishing quotas;

(iii) it is clear from statements made by witnesses (officials in certain ministries and two members

of the Netherlands Government) that those responsible for fisheries policy in the Netherlands were aware of the results of inspections carried out by EEC inspectors in the Netherlands between 1983 and 1986;

(iv) it is essential for purposes of the investigation for the rechter-commissaris to obtain the inspection reports in question and documents drawn up on the basis of those reports, and it might be necessary, after he has considered the documents, to take evidence from the inspectors concerned, of whose identity he is unaware;

(v) the request for the production of these reports was refused by the Commission on the ground that the documents formed part of a file on legal matters pending in the Commission.

2 The rechter-commissaris referred to Articles 1 and 12 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing a Single Council and Single Commission of the European Communities of 8 April 1965 (hereinafter referred to as "the Protocol "), in conjunction with the European convention or conventions on mutual assistance, to which, he stated, the Community was not a party but which were incorporated in the Community legal order so that they were to be regarded as an integral part of Community law to which the national authorities were subject. On the basis of those provisions he requested the Court :

(a) to order the Commission, or at least the Directorate-General concerned, to provide him with the information which he has requested; and,

in the alternative, to grant the competent examining magistrate leave to search premises and to seize :

(i) (internal) reports and, if necessary, inspection reports drawn up since 1983 by EEC inspectors who have carried out inspections in the Netherlands with regard to sea fisheries,

(ii) any documents (which may have been drafted on the basis of the findings of the aforesaid officials) concerning compliance with the Community rules on sea fisheries.

(b) to order or at least allow the aforesaid EEC inspectors and senior officials in the Directorate-General for Fisheries, if necessary by lifting their immunity, to be examined as witnesses either by the rechter-commissaris or at least in his presence by an examining magistrate within the European Community, concerning both the inspections carried out by them between 1983 and 1987 in the Netherlands and the discussions which they had with Netherlands officials on Netherlands fisheries policy.

3 By a document lodged at the Court Registry on 13 October 1988, the Commission contended that the rechter-commissaris' s request was inadmissible.

4 By an order of 13 July 1990 in Case C-2/88 Imm. Zwartfeld and Others [1990] ECR I-3365), the Court decided as follows :

(1) the request by the rechter-commissaris, Groningen, is declared admissible;

(2) the Commission is ordered to forward to the Court a list of the reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries and to submit to the Court in respect of the reports which the Commission refuses to produce to the rechter-commissaris, Groningen, a statement of the imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities which justify that refusal;

(3) the reports in respect of which the Commission does not rely on the said imperative reasons are to be transmitted forthwith to the rechter-commissaris, Groningen;

(4) the Court will rule at a later date on the request for production of the reports in respect

of which the Commission relies on the said imperative reasons;

(5) the Commission is ordered to authorize its officials to be examined as witnesses before the rechter-commissaris, Groningen, with regard to their findings during the inspections carried out in the Netherlands between 1983 and 1987 in the sea fisheries sector, and to submit to the Court in respect of the officials for whom such authorization is refused a statement of the imperative reasons relating to the need to safeguard the interests of the Communities which justify refusal of authorization;

(6) the Court will rule at a later date on the request concerning the officials whom the Commission refuses to authorize to be examined as witnesses in reliance on the said imperative reasons;

(7) costs are reserved.

5 By a document lodged at the Court Registry on 21 September 1990, the Commission transmitted to the Court the reports of inspections carried out in the Netherlands by the Commission' s fishery inspectors between 1983 and 1987. The Commission considers, however, that imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities preclude the individual facts contained in those reports from being communicated to the rechter-commissaris and its officials from giving evidence on those facts .

6 The first reason put forward by the Commission is based on the need to respect the division of powers between the Commission, which is entrusted with the task of monitoring the actions of the national authorities, and those authorities, which are responsible for investigations and prosecutions of fishermen and other persons subject to supervision or of national officials responsible for supervision. The second reason put forward by the Commission is that it must not, by the communication of private information, jeopardize the rights of third parties who might be liable to disciplinary or legal proceedings under national law.

7 Before considering the validity of the imperative reasons relating to the need to avoid interference with the functioning and the independence of the Communities which the Commission pleads in order to justify its refusal to communicate all the documents to the rechter-commissaris and to permit its officials to give evidence, it is necessary to determine the reports which could be produced to the national court.

8 It is clear from the rechter-commissaris' s request that it is conducting a preliminary investigation of a charge that the managers of the fish market at Lauwersoog were guilty of forgery. A reading of the reports of inspections carried out in the Netherlands by the Commission' s fishery inspectors between 1983 and 1987 which have been produced to the Court reveals that only four of those reports concern inspections carried out in the Port of Lauwersoog.

9 In these circumstances the only reports which may be produced to the rechter-commissaris and the only facts on which the Commission' s officials may give evidence are those concerning the inspections in the port in which the fish market managed by the persons against whom the national court is conducting its investigation is situated.

10 As regards the imperative reason put forward by the Commission relating to the need to avoid any interference with the functioning and independence of the Communities, namely the need to respect the division of powers between the Community authorities and the national authorities, it must be stated that the risk of such interference has not been established. The national court' s request is intended solely to obtain the communication of certain information in the Commission' s possession which it requires in order to exercise the powers conferred upon it by national law and does not involve any risk that the Commission will encroach upon the powers of the national authorities . As the Court stressed in its order of 13 July 1990 Zwartfeld and Others, cited above, the Community

institutions are under a duty of sincere cooperation with the judicial authorities of the Member States, which are responsible for ensuring that Community law is applied and respected in the national legal system.

11 Although the Commission may justify a refusal to produce documents to a national judicial authority on legitimate grounds connected with the protection of the rights of third parties or where the disclosure of this information would be capable of interfering with the functioning and independence of the Community, in particular by jeopardizing the accomplishment of the tasks entrusted to it, it must be stated that the Commission has not adduced any evidence to show that the production to the rechter-commissaris of the individual particulars, more specifically those concerning boats, contained in reports on the inspections carried out in the Port of Lauwersoog and the granting of permission to Commission officials to give evidence thereon would be likely adversely to affect all those interests.

12 Consequently, it must be stated that the Commission has failed to establish the imperative reasons which would justify the refusal to produce to the rechter-commissaris the reports or parts of the reports on inspections carried out by the Commission' s fishery inspectors in the Port of Lauwersoog in the Netherlands between 1983 and 1987 and the refusal to permit its officials to be examined as witnesses on the information contained in those reports.

13 It follows from the foregoing that the Commission must be ordered to produce to the rechter-commissaris in Groningen the reports or parts of the reports drawn up by Commission officials who carried out inspections with regard to sea fisheries in the Port of Lauwersoog in the Netherlands and to permit its officials to be examined as witnesses before the rechter-commissaris in Groningen exclusively on the information contained in those reports.

14 Since none of the parties has asked for costs, the Commission, the Council, the European Parliament and the Member States which have submitted observations must be ordered to pay their own costs.

On those grounds,

THE COURT

hereby orders as follows :

(1) The Commission shall produce to the rechter-commissaris in Groningen the reports or parts of the reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries concerning the port of Lauwersoog .

(2) The Commission shall authorize its officials to be examined as witnesses before the rechter-commissaris in Groningen exclusively with regard to the information contained in the reports on the inspections carried out in the port of Lauwersoog.

(3) The Commission shall inform the Court within a period of one month of the action taken pursuant to this order.

(4) The Commission, the Council, the European Parliament and the Member States which have submitted observations to the Court shall bear any costs which they have incurred.

Luxembourg, 6 December 1990

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AUTHOR Court of Justice of the European Communities

FORM	Order
TREATY	European Communities
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PUBREF	European Court reports 1990 Page I-04405
DOC	1990/12/06
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JURCIT	11965F/PRO/PRI/01 : N 2 11965F/PRO/PRI/12 : N 2 61988O0002(01) : N 4 10
SUB	Privileges and immunities ; Provisions governing the Institutions
AUTLANG	Dutch
OBSERV	Council ; European Parliament ; Netherlands ; Federal Republic of Germany ; France ; Greece ; Ireland ; Italy ; Portugal ; United Kingdom ; Member States ; Institutions
NATIONA	Netherlands
NOTES	Lauwaars, R.H.: Euridica 1990 no 4 p.21 Watson, J.S.: Common Market Law Review 1991 p.428-443 Lauwaars, R.H.: S.E.W. ; Sociaal-economische wetgeving 1991 p.584-585 Clemente, Giorgio: Rivista della Corte dei conti 1991 no 2 p.204-209
PROCEDU	Application as to immunities - successful
ADVGEN	Jacobs
JUDGRAP	Schockweiler
DATES	of document: 06/12/1990 of application: 08/08/1988

Order of the Court (Second Chamber)
of 20 September 2001
Asia Motor France SA, André-François Bach and Monin automobiles SA v Commission of the European Communities.
Competition - Decision rejecting complaints - Appeal in part manifestly inadmissible and in part manifestly unfounded.
Case C-1/01 P.

1. Competition - Administrative procedure - Investigation of complaints - Excessive duration - Consequences

2. Appeals - Grounds - Plea alleging incorrect appraisal of the facts - Inadmissible - Whether the Court of Justice may review the appraisal of the evidence submitted to the Court of First Instance - Possible only where the clear sense of the evidence has been distorted

(Art. 225 EC; EC Statute of the Court of Justice, Art. 51)

3. Appeals - Grounds - Admissibility - Conditions

(Art. 225 EC; EC Statute of the Court of Justice, Art. 51, first subpara.)

1. Where an excessive amount of time is taken to deal with a complaint concerning infringement of the competition rules, that cannot, as a rule, affect the actual content of the final decision adopted by the Commission. It cannot, save in exceptional circumstances, alter the substantive matters which, according to the case, determine whether or not the existence of an infringement of the competition rules is established or give the Commission good reason not to conduct an investigation.

(see para. 34)

2. The Court of First Instance alone has jurisdiction to make findings of fact, save where a substantive inaccuracy in those findings is attributable to the documents submitted to it, and also to appraise those facts. The appraisal of the facts does not, save where the evidence before the Court of First Instance has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

(see para. 41)

3. In any appeal a precise statement must be given not only of the parts of the judgment under appeal with which the appellant takes issue but also of the legal arguments upon which the appeal is specifically founded.

(see para. 44)

In Case C-1/01 P,

Asia Motor France SA, established in Chemille (France) in liquidation,

André-François Bach, acting in his capacity as receiver of the business of Jean-Michel Cesbron, residing in Chemille, the subject of a court order in bankruptcy,

and

Monin automobiles SA, established in Bourg-de-Péage (France) in liquidation,

all represented by J-C. Fourgoux, avocat, with an address for service in Luxembourg,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 26 October 2000 in Case T-154/98 Asia Motor France and Others v Commission [2000]

ECR II-3453, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by G. Marenco and F. Siredey-Garnier, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Europe Auto Services SA (EAS), established in Livange (Luxembourg),

applicant at first instance,

THE COURT (Second Chamber),

composed of: V. Skouris, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

Costs

48 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has requested that the appellants be ordered to pay the costs and they have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby orders:

1. The appeal is dismissed;

2. Asia Motor France SA, Mr Bach, in his capacity as receiver of the business of Mr Cesbron, and Monin automobiles SA shall pay the costs.

1 By application lodged at the Court Registry on 3 January 2001, Asia Motor France SA, Mr Bach, in his capacity as receiver of the business of Mr Cesbron, and Monin automobiles SA brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 26 October 2000 of the Court of First Instance in Case T-154/98 Asia Motor France and Others v Commission [2000] ECR II-3453 (hereinafter the judgment under appeal), by which the Court of First Instance dismissed their action for annulment of the Commission's decision of 15 July 1998 rejecting the complaints lodged by the appellants and Europe Auto Services SA (hereinafter EAS) concerning the existence of cartel practices alleged to be contrary to Article 85 of the EC Treaty (now Article 81 EC) (hereinafter the contested decision) and for formal note to be taken that they reserved the right to claim compensation for the harm sustained.

The background to the dispute

2 The appellants and EAS imported and marketed in France Japanese makes of vehicle cleared for free circulation in other Member States of the Community, such as Belgium and the Grand-Duchy of Luxembourg. They are currently in court-supervised liquidation.

3 Considering himself to be the victim of an unlawful cartel operated by five importers of Japanese cars into France, namely Sidat Toyota France, Mazda France Motors, Honda France, Mitsubishi Sonauto and Richard Nissan SA, one of the applicants at first instance, Jean-Michel Cesbron, lodged a complaint with the Commission on 18 November 1985 alleging, inter alia, infringement of Article 85 of the Treaty.

4 On 29 November 1988 the appellants and EAS lodged a fresh complaint against the five importers. As is clear from the fourth paragraph of the judgment under appeal, the authors of that complaint claimed, amongst other things, that the five importers had given an undertaking to the French administrative authorities not to sell on the French domestic market more than 3% of the total number of motor vehicles registered on French territory in the preceding calendar year. The importers were said to have reached an agreement on sharing that quota between them in accordance with certain rules established in advance, excluding any other undertaking wishing to distribute in France Japanese makes of vehicle other than those distributed by the parties to the alleged agreement.

5 An initial action brought before the Court of First Instance by the appellants and EAS seeking, inter alia, a declaration that the Commission had failed to adopt a decision in their regard on the basis of Article 85 of the Treaty was dismissed by judgment of 18 September 1992 in Case T-28/90 Asia Motor France and Others v Commission [1992] ECR II-2285 on the ground that there was no longer any need to give a decision on the application because the Commission had, by letter of 5 December 1991, notified to the applicants and to EAS a decision rejecting their complaints.

6 It is also clear from paragraph 13 of the judgment under appeal that the complaints were rejected, amongst other things, on the ground that the conduct of the five importers concerned formed part of the policy of the French public authorities in regard to imports into France of Japanese motor vehicles and that, under that policy, the authorities not only determined the total number of vehicles admitted each year into France but also laid down the arrangements for sharing out that total.

7 In its judgment in Case T-7/92 Asia Motor France and Others v Commission [1993] ECR II-669 (Asia Motor France II), the Court of First Instance annulled the Commission's decision of 5 December 1991 in so far as it related to Article 85 of the Treaty.

8 In Asia Motor France II the Court of First Instance found, at paragraph 48 of its judgment, that the French authorities' statement to the effect that the traders had no autonomy in operating the regulatory system established by the authorities was not supported by any documentary evidence. It went on to conclude at paragraph 55 that, in so far as the decision of 5 December 1991 rejected the complaints on the ground that the traders in question had no autonomy of freedom of action whereas that ground was gainsaid by precise, detailed evidence which was submitted for the Commission's appraisal by the complainants, it was vitiated by a manifest error in the assessment of the facts which had led it to err in law as regards the applicability of Article 85 of the Treaty to the conduct of the traders in question.

9 Having carried out further investigations with the French authorities following the decision in Asia Motor France II, the Commission notified to the appellants and EAS, by letter of 13 October 1994, a further decision again rejecting their complaints. That decision was based on the same ground as that mentioned in paragraph 6 of the present order.

10 In its judgment in Case T-387/94 Asia Motor France and Others v Commission [1996] ECR II-961 (Asia Motor France III), the Court of First Instance annulled the Commission's new decision of 13 October 1994 in so far as it rejected the complaints made by the appellants and EAS.

11 In Asia Motor France III the Court of First Instance held successively that:

- the French authorities themselves had confirmed that no provision of French law had imposed on the importers of Japanese cars into metropolitan France the conduct with which issue was taken in the complaints (paragraph 64);

- the Commission had based its decision of 13 October 1994, in so far as it related to the complaints calling in question imports of Japanese cars into metropolitan France, on the same evidence as that used to support the conclusion reached in its earlier decision of 5 December 1991 that the economic operators in question had no autonomy or freedom of action (paragraph 66);

- no item in the case-file enabled it to be concluded that indirect pressure had in fact been brought to bear on the importers by withdrawing their authorisation or by refusing them the benefit of the type-approval system for new models and that that matter was not checked with the French authorities or the importers into metropolitan France during the administrative procedure (paragraph 68);

- the Commission had stated at the hearing that the French authorities' decision not to authorise Japanese makes other than those of the five importers in question was an integral part of the arrangement that was introduced in order to limit sales of Japanese vehicles to 3% of the market in metropolitan France and could be regarded as the quid pro quo for the importers' acceptance of the policy sought by the administration, which seemed, at first sight, to rule out irresistible pressures exerted by the French authorities (paragraph 69).

12 The Court of First Instance concluded from the foregoing that the ... decision [of 13 October 1994 was] not based, in the absence of new evidence relating to the import scheme applicable in metropolitan France, on objective, relevant and consistent evidence such as to show that the French authorities unilaterally brought irresistible pressures to bear on the undertakings in question to adopt the conduct criticised in the complaints (paragraph 70). The Court also concluded that [i]n the absence of evidence of the existence of irresistible pressures ... forcing the importers to agree to limit their imports, the importers' conduct in complying with the wishes of the French administration must be regarded as being the exercise of a commercial choice, having regard to all the relevant risks and advantages (the second sentence of paragraph 71).

13 That being so, the Court held that the Commission had made a manifest error in assessing the facts in so far as it considered, in the light of the evidence available to it, that the conduct of the authorised importers in metropolitan France lacked autonomy to such an extent as to cause it, by reason of that fact, to fall outside the scope of Article 85(1) of the Treaty (the first sentence of paragraph 71).

14 Following the judgment in Asia Motor France III, the Commission undertook a supplementary investigation of the complaints submitted by the appellants and EAS and, on seeing the importers' answers to the requests for information that it had sent them, by letter of 16 July 1998 notified the contested decision to the authors of the complaints.

15 It is clear from paragraph 52 of the judgment under appeal that the contested decision was based, amongst other things, on the following considerations:

... during the relevant period, the French public authorities would fix, at the beginning of each year and for each authorised importer, the number of vehicles authorised for import. The distribution of the overall quota of 3% was therefore a matter entirely for the French authorities. Contrary to the complainants' submission, the importers did not divide the quota amongst themselves, but were obliged to comply with the sales quotas imposed on them unilaterally by the authorities. Thus, as far as distribution of the quota is concerned, it is clear that there was no concurrence of wills between the five importers, and thus no agreement within the meaning of Article 85(1) (point 6

of the contested decision).

... the pressure brought to bear by the French administrative authorities was not directed against the importers as a group, in order to have them agree amongst themselves to adhere to the overall quota of 3%, but... against each importer individually, in order to ensure that each of them adhered to its share of that quota as established by the authorities themselves. There was no need for the importers to be in contact with one another in order for the authorities to attain that objective (point 12 of the contested decision).

The procedure before the Court of First Instance and the judgment under appeal

16 By application lodged at the Registry of the Court of First Instance on 23 September 1998, the appellants and EAS applied for annulment of the contested decision and asked that formal note be taken that they reserved the right to claim compensation for the harm sustained.

17 By order of 21 May 1999 (Case T-154/98 Asia Motor France and Others v Commission [1999] ECR II-1703), the Court of First Instance held that action to be admissible in so far as it was based on a plea alleging a manifest error of assessment and a plea alleging infringement of Article 176 of the EC Treaty (now Article 233 EC).

18 As regards the judgment under appeal, the Court of First Instance first of all ruled, at paragraphs 42 to 45, that the plea raised by the appellants and EAS for the first time in the reply, by which they alleged that the Commission took an inordinate amount of time to reach its decision on their complaints and thus infringed the general principle of Community law according to which everyone is entitled to fair legal process (see, inter alia, Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 21), was a new plea introduced in the course of the proceedings and was thus inadmissible.

19 In response to the argument raised by the appellants and EAS that the Court must raise the plea of breach of that principle of its own motion, given that what is at issue is a fundamental right guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and one that must be protected by the European Union in accordance with Article F(1) and (2) of the Treaty on European Union (now, after amendment, Article 6(1) and (2) EU), the Court held, at paragraph 46 of the judgment under appeal, that it may of its own motion consider the question of infringement of essential procedural requirements and, in particular, of the procedural guarantees conferred by Community law. However, it took the view that, having already been required to rule on which of the pleas set out in the application had been properly raised (see the order of 21 May 1999 in Asia Motor France v Commission, cited above), there was no reason for it to consider that question of its own motion.

20 Next, the Court held, at paragraph 48 of the judgment under appeal, that in the context of an action brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Community judicature is not required to take formal note of the fact that a party reserves the right to bring an action for compensation for damage and it consequently held the claim made in the application that it should do so to be inadmissible.

21 Lastly, the Court considered the merits of the two pleas which, in its order in Asia Motor France v Commission, cited above, it had ruled admissible.

22 As regards the plea alleging a manifest error of assessment the Court considered, in paragraphs 79, 80, 81 and 84 of the judgment under appeal, a number of pieces of new evidence obtained by the Commission in the course of the supplementary investigation it undertook following the judgment in Asia Motor France III, and in paragraph 85 it found that, in the absence of an agreement within the meaning of Article 85(1) of the Treaty, the conclusion reached by the Commission in the contested

decision that the complaints made by the appellants and EAS were unfounded was based upon objective, relevant and consistent evidence.

23 At paragraph 87 of the judgment under appeal, the Court added that the new evidence obtained during the supplementary investigation also permitted a different interpretation of the evidence to which the Court, in its judgments in Asia Motor France II and Asia Motor France III, attached strong probative force in relation to the probable existence of a concurrence of wills.

24 As specifically regards the point mentioned in paragraph 69 of the judgment in Asia Motor France III that the five importers in question were said to have benefited from a quid pro quo in that the French authorities decided not to authorise any Japanese makes of car other than those of the five importers, the Court held, at paragraph 89 of the judgment under appeal, that the explanation proffered by the Commission at the hearing to the effect that, by so doing, the French authorities meant to make the policy they implemented more palatable, can reasonably be accepted.

25 As regards the plea alleging that the Commission, in infringement of Article 176 of the Treaty, failed to take the necessary measures to comply with the Court's judgment in Asia Motor France III, the Court of First Instance held at paragraph 103 of the judgment under appeal that, following the decision in Asia Motor France III, and in particular the criticism made of the Commission in paragraph 68 of that judgment that it had not checked with the French authorities or the importers into metropolitan France whether the authorities had brought pressure to bear on the importers in order to force them to agree to limit their imports, the Commission specifically called upon the importers to show, inter alia, that such pressure had been exerted upon them and that they had been unable to resist it. The Court added that the statement that the questions put by the Commission in its requests for information sent to the importers were inappropriate and slanted could not be accepted given that the questions were clearly formulated in light of the grounds of the judgment in Asia Motor France III. Furthermore, it could not be inferred from the grounds of that judgment that, in the context of its supplementary investigation, the Commission ought necessarily to have obtained, in addition, information from the French authorities.

26 At paragraph 104 of the judgment under appeal, the Court also rejected the argument that the evidence gathered during the supplementary investigation was irrelevant and was not analysed by the Commission seriously. The Court pointed out that it had already found, in paragraphs 78 to 90 of the judgment under appeal, that that evidence, taken together with the evidence already available to the Commission, provided sufficient justification in law for the Commission's conclusion that the complaints made by the appellants and EAS must be rejected for lack of any agreement of the type prohibited by Article 85(1) of the Treaty.

27 Consequently, the Court of First Instance dismissed the action in its entirety.

The appeal

28 In their appeal, the appellants ask the Court of Justice to set aside the judgment in Case T-154/98 and the Commission's decision of 15 July 1998 and to order the Commission to pay the costs.

29 The appellants put forward two pleas in law in support of their appeal, the first alleging breach of fundamental rights and the second being based upon manifest error of fact and law, distortion, contradiction, insufficient statement of reasons and infringement of Article 176 of the EC Treaty.

30 The appellants also state that they fail to see why the Court of First Instance was unable to take formal note that they reserve the right to bring a separate action in damages on the basis of Article 288 ... EC.

31 The Commission asks the Court to dismiss the appeal in its entirety and order the appellants

to pay the costs.

Findings of the Court

32 Under Article 119 of the Rules of Procedure of the Court of Justice, where an appeal is clearly inadmissible or clearly unfounded the Court may at any time dismiss the appeal by reasoned order, without opening the oral procedure.

The first plea

33 By their first plea the appellants complain that the Court of First Instance did not raise of its own motion the plea of breach of the principle of reasonable expedition and that it thus disregarded the requirement of fair legal process as laid down, inter alia, in Article 6(1) of the ECHR and recognised as a general principle of Community law by the Court of Justice in paragraph 21 of its judgment in Baustahlgewebe v Commission, cited above.

34 In this regard it is sufficient to observe that the Court of Justice has already held that where an excessive amount of time is taken to deal with a complaint concerning, inter alia, infringement of Article 85(1) of the Treaty that cannot, as a rule, affect the actual content of the final decision adopted by the Commission. It cannot, save in exceptional circumstances, alter the substantive matters which, according to the case, determine whether or not the existence of an infringement of the competition rules is established or give the Commission good reason not to conduct an investigation (order of 13 December 2000 in Case C-39/00 P SGA v Commission ECR I-11201, paragraph 44).

35 That being so, the Court of First Instance was quite right to decide (at paragraph 46 of the judgment under appeal) not to raise the question of the unreasonable amount of time taken in the procedure before the Commission.

36 The first plea must therefore be rejected as manifestly unfounded.

The second plea

37 By their second plea the appellants argue that the judgments in Asia Motor France II and Asia Motor France III, which have not been appealed by the Commission, present a body of findings and reasoning that has the force of legal precedent and cannot be ignored, distorted or contradicted. By this they refer to certain passages of the judgments from which it is clear that it was necessary to prove that the importers impugned in the complaints had no autonomy or freedom of action, that there was no legislation or set of rules requiring the importers to agree to limit their share of the market and that the importers' involvement, amounting to a commercial choice on their part, in an arrangement according to which the decision of the French authorities not to authorise Japanese makes of car other than those marketed by the importers in question was the quid pro quo for their undertakings of voluntary limitation.

38 The appellants submit that, by accepting in the judgment under appeal the explanation proffered by the Commission at the hearing to the effect that, by their decision to refuse to authorise the importation of other makes of Japanese cars, the French authorities meant to make the policy they implemented more palatable, the Court purely and simply cobbled together the findings of its two earlier judgments. In so doing, it made an obvious mistake in its assessment of the legal consequences of the facts, distorted the meaning of terms whose sense should not be altered without due consideration, such as "arrangement", "quid pro quo", "undertaking"... and "commercial choice" and contradicted itself as if it had not yet given any rulings and as if there were no legal precedent or established facts.

39 In this connection it must first of all be observed that, by their second plea, the appellants essentially reproach the Court of First Instance for not having confirmed the findings it made in its judgments in Asia Motor France II and Asia Motor France III and for not consequently

annulling the contested decision on the view, based on those findings, that it, like the earlier decisions of 5 December 1991 and 13 October 1994, was vitiated by incorrect assessment of the facts leading the Commission to err in law as to the applicability of Article 85 of the Treaty to the conduct of the importers in question.

40 Secondly, as is made clear in paragraph 22 of the present order, in the judgment under appeal the Court of First Instance made explicit reference to the new evidence obtained by the Commission in the course of its supplementary investigation carried out following the judgment in Asia Motor France III, which enabled it to conclude, this time with good cause, that the appellants' complaints could be rejected as unfounded.

41 Thirdly, it is settled law that the Court of First Instance alone has jurisdiction to make findings of fact, save where a substantive inaccuracy in those findings is attributable to the documents submitted to it, and also to appraise those facts. The appraisal of the facts does not, save where the evidence before the Court has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraph 35, and Case C-44/00 P Sodima v Commission [2000] ECR I-11231, paragraph 38).

42 The appellants have clearly not disputed the veracity of the new evidence on the basis of which the Court of First Instance found that the Commission had good cause definitively to reject, in the contested decision, the complaints before it.

43 The second plea must therefore also be dismissed as manifestly unfounded.

The Court of First Instance's refusal to take formal note that the appellants reserved the right to bring an action in damages against the Commission

44 In this regard, suffice it to observe that in any appeal a precise statement must be given not only of the parts of the judgment under appeal with which the appellant takes issue but also of the legal arguments upon which the appeal is specifically founded (order in Sodima v Commission, cited above, paragraph 39).

45 Clearly, in that they merely state that they fail to see why the Court of First Instance was unable to take formal note that they reserve the right to bring a separate action in damages on the basis of Article 288... EC, the appellants have failed to satisfy the requirement mentioned in the preceding paragraph.

46 Consequently, the appeal must be dismissed as inadmissible in so far as it is directed against the Court of First Instance's refusal to take formal note that the appellants reserved the right to bring an action in damages against the Commission.

47 It follows from all the foregoing that the appeal is in part manifestly inadmissible and in part manifestly unfounded and that it must therefore be dismissed pursuant to Article 119 of the Rules of Procedure.

DOCNUM	62001O0001
AUTHOR	Court of Justice of the European Communities
FORM	Order

TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2001 ; O ; order
PUBREF	European Court reports 2001 Page I-06349
DOC	2001/09/20
LODGED	2001/01/03
JURCIT	11992E085 : N 39 61998A0154 : N 1 - 47 61998J0237 : N 41 62000O0039 : N 34 62000O0044 : N 41 44
SUB	Competition ; Rules applying to undertakings
AUTLANG	French
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	France
PROCEDU	Application for annulment ; Appeal - inadmissible ; Appeal - unfounded
ADVGEN	Jacobs
JUDGRAP	Schintgen
DATES	of document: 20/09/2001 of application: 03/01/2001

Judgment of the Court (Second Chamber)
of 4 July 1989
Benito Francesconi and others v Commission of the European Communities.
Action for damages - Compensation for loss suffered as a result of the Commission's failure to disclose information permitting the identification of the producers and distributors of adulterated wines containing methanol.
Joined cases 326/86 and 66/88.

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1 . Non-contractual liability - Conditions - Unlawful conduct - Damage - Causal link

(EEC Treaty, Art. 215, second paragraph)

2 . Agriculture - Common organization of the markets - Wine - Conformity of products with Community provisions - Member States' duty to supervise - Protection of consumers' health - Intervention by the Community - Conditions

(Council Regulations No 357/79, Art. 64, and No 359/79, Art. 3; Council Decision 84/133)

1 . In order for the Community to become liable under the second paragraph of Article 215 of the Treaty a series of conditions must be satisfied as regards the unlawfulness of the acts alleged against the institution, the fact of damage and the existence of a causal link between the wrongful act or conduct and the damage complained of.

2 . The Community institutions are required to intervene to ensure observance of the Community provisions in the wine sector only if there is evidence that the national bodies are not satisfactorily fulfilling the task of supervision they have in this sector under Article 64 of Regulation No 337/79, Article 3 of Regulation No 359/79 and Decision 84/133 introducing a system for the rapid exchange of information on dangers arising from the use of consumer products.

In Joined Cases 326/86 and 66/88,

Benito Francesconi, residing at 1070 Brussels (Belgium),

Enoteca Nazionale Italiana di Benito Francesconi SPRL, 1070 Brussels (Belgium),

La Vinoteca d' Italia SPRL, 1070 Brussels (Belgium),

Italianissimo SPRL, 1070 Brussels (Belgium),

Fromagerie Sita SC, Fayt-lez-Manage (Belgium),

Gapi SPRL, 1050 Brussels (Belgium),

Willems-de Lunardo & Fils SPRL, Jemeppes-sur-Meuse (Belgium),

Nino Cucci, residing at Louvain-la-Neuve (Belgium),

Gebroeders Salerno PVBA, Tienen (Belgium),

Vincenzo Smeraglia, residing at Heemskerk (Netherlands),

Napoli Houtplein BV, Haarlem (Netherlands),

Bertolo e Figli SRL, Turin (Italy),

Luigi Brezza, San Georgio Monferrato (Alessandria, Italy),

Marco Franchino, residing at Gattinara (Vercelli, Italy),

Mario Patriarca, residing at Gattinara (Vercelli, Italy),

Oreste Cillario, residing at Dogliani (Cuneo, Italy),

Ninetto Vairetto, residing at Carema (Turin, Italy),

Melchiore Balbiano, residing at Andezeno (Turin, Italy),

Aldo Canale, residing at Serralunga (Cuneo, Italy),

Silvio Grasso, residing at La Morra (Cuneo, Italy),

all represented first by Dominique Buysschaert, then by Pierre Sculier, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Guy Harles, 4 Avenue Marie-Thérèse (applicants in Case 326/86),

and

Giuseppe Visigalli, residing at Pavia (Italy),

Gina, Idelfonso, Manuela, Renzo and Rosanna Cappelletti, residing at Milan (Italy),

Matteo Bisogni, residing at Turin (Italy),

Clarisa Nagliato, Moreno and Mascia Casetto, residing at Milan (Italy),

Filomena Fasciano, residing at Milan (Italy),

all represented by Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 13 Boulevard Royal (applicants in Case 66/88),

applicants,

v

Commission of the European Communities, represented by its Legal Adviser Denise Sorasio, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Centre Wagner, Kirchberg,

defendant,

APPLICATION for compensation for loss suffered as a result of the Commission' s neglect in failing to disclose information enabling the producers and distributors of adulterated wine to be identified (Case 326/86), and

for compensation for loss suffered as a result of the Commission' s neglect in connection with wines adulterated with methanol which led to the death of the applicants' relatives (Case 66/88),

THE COURT (Second Chamber)

composed of : T. F. O' Higgins, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General : C. O. Lenz

Registrar : B. Pastor, Administrator,

having regard to the Report for the Hearing and further to the hearing on 19 April 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 May 1989,

gives the following

Judgment

1 By applications lodged at the Court Registry on 23 December 1986 (Case 326/86) and 3 March 1988 (Case 66/88) respectively, 20 dealers, restaurateurs or producers of Italian wine and the personal representatives of persons who died after drinking Italian wine containing methanol brought two actions under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Commission of the European Communities for compensation for damage suffered as a result of the presence of adulterated wine on the wine market .

2 The applicants claim they have suffered damage consisting for some of them in the reduction in exports of Italian wine and the resulting reduction in turnover (Case 326/86) and for others in the loss of a member of their family (Case 66/88).

3 In April 1985 Austrian wine adulterated with diethylene glycol was discovered on the market in the Federal Republic of Germany. At a press conference on 27 August 1985 the Commission stated that very slight traces of diethylene glycol had also been discovered in certain Italian wines.

4 On 19 March 1986 the Italian authorities informed the Commission that certain Italian wines were adulterated with methanol. The next day the Commission conveyed that information to the other Member States . The first deaths as a result of the consumption of Italian wine adulterated with methanol had been reported on 2 March 1986.

5 The applicants consider that the Commission was guilty of a wrongful act or omission. They complain first of all of bad management and failure to supervise the wine market inasmuch as the Commission did not ensure the proper implementation of the general measures governing the wine market in the Member States. The applicants go on to say that those general measures are inappropriate . They submit in that respect that the measures adopted in the wine sector are such as to encourage the manufacture of adulterated wines, inter alia for consumption. Finally, the applicants claim that the Commission ought to have noticed the considerable increase in the quantity of wine in 1984. As early as August 1985 it ought to have adopted appropriate measures to limit the damage suffered by the traders concerned as a result of the scandal caused by the presence of adulterated wines on the market.

6 The Commission denies that there was any wrongful act or admission as claimed by the applicants or that it is possible to establish a causal link between the alleged wrongful act or omission and the damage which the applicants have suffered.

7 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 With a view to considering whether the action is well founded it is appropriate to recall the conditions under which the Community may be held to be liable under the second paragraph of Article 215 of the EEC Treaty . The Court has consistently held (see in particular the judgment of 15 January 1987 in Case 253/84 GAEC de la Ségaude v Council and Commission ((1987)) ECR 123) that Community liability depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the institution, the fact of damage and the existence of a causal link between the wrongful act or conduct and the damage complained of.

9 It must first be determined whether the applicants have established unlawful conduct on the part of the Commission, and if so whether the two other conditions of Community liability are satisfied

10 As a preliminary point it should be observed that it is for the Member States to ensure that the Community provisions in the wine sector are observed.

11 Pursuant to Article 64 of Council Regulation No. 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal 1979, L 54, p. 1) Member States must designate one or

more authorities to be responsible for verifying compliance with these provisions. Moreover, under Article 3 of Council Regulation No 359/79 of 5 February 1979 on direct cooperation between the bodies designated by Member States to verify compliance with Community and national provisions in the wine sector (Official Journal 1979, L 54, p . 136) the competent bodies of the Member States must study in detail any grounds for suspecting that the product does not conform to the wine provisions. It is also the Member States who, pursuant to Council Decision 84/133/EEC of 2 March 1984 introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products (Official Journal 1984, L 70, p. 16), may decide to take urgent steps to prevent the marketing of a product because of the serious and immediate risk which that product presents for the health or safety of consumers.

12 It follows from the terms of that legislation that the Community institutions are required to intervene only if there is evidence that the national bodies are not fulfilling their task of supervision satisfactorily.

13 Before considering the submissions put forward by the applicants it should be observed that the Commission has adopted a certain number of measures in relation to the management structures for the wine market . In particular it adopted Regulation No 2102/84 of 13 July 1984 on harvest production and stock declarations relating to wine-sector products (Official Journal 1984, L 194, p. 1) and Regulation No 2396/84 of 20 August 1984 laying down detailed rules for drawing up the forward estimate in the wine-sector (Official Journal 1984, L 224, p. 14). In addition the Commission procured certain changes to the distillation system by the adoption of Council Regulation No 2687/84 of 18 September 1984 (Official Journal 1984, L 255, p . 1) amending Council Regulation No 2179/83 of 25 July 1983 laying down general rules for distillation operations involving wine and the by-products of wine-making (Official Journal 1983, L 212, p. 1).

14 The applicants claim that the measures thus adopted in the wine sector are inappropriate in so far as they are likely to encourage the manufacture of artificial wines, especially in view of the lack of detailed chemical analysis of products delivered for distillation.

15 As the Commission observed, no link has been established between the system of distillation and the manufacture of adulterated wines. The toxic substances were discovered in wine intended for human consumption and not in wine delivered for distillation.

16 Moreover, the applicants observed at the hearing that only unadulterated wine was delivered for distillation and that adulterated wine came on to the market for human consumption. The applicants' argument that the distillation system absorbed all the natural wine and the manufacture of adulterated wine was necessary in order to satisfy consumption must be rejected, since there is a surplus of natural wine.

17 The same is true of the argument alleging insufficient analysis. Even assuming that adulterated wines were delivered for distillation it is sufficient to observe that pursuant to Article 27 of Council Regulation No 2179/83 it is for the Member States to take the necessary measures to check that the distillation system is properly applied . This checking of the characteristics of products delivered for distillation, which, pursuant to Article 22, relates in particular to quantity, colour and alcoholic strength, is sufficient to allow the competent authorities to oversee the Community system for distillation of wine and detect adulterated wines delivered for distillation.

18 The applicants also consider that the Commission ought to have been aware of the considerable increase in the quantity of wines delivered for distillation in 1984 and the stocks of Italian wines at the end of that year.

19 It did not necessarily follow from the increase in those quantities of wine that adulterated wine had come on to the market. As the Commission has pointed out, the large size of the harvest

in 1983, mistaken estimates of consumption and inaccuracies in declarations of stocks played a significant part.

20 Finally, the applicants submit that the Commission ought the day after the press conference on 27 August 1985 to have taken steps to withdraw wines adulterated with diethylene glycol from the market, inform consumers of the scandal of adulterated wines and increase checking by the competent national authorities in their supervision of the Community system of distillation.

21 It must first of all be observed that the Commission has no power to withdraw adulterated from the market, that being a matter for the national authorities.

22 The Commission is under no obligation to publish the identity of traders who may be involved in scandals. The information system established to detect fraud and irregularities in the wine sector and to avert dangers which might arise from the use of consumable products leaves it to the national authorities to take steps to inform the consumer .

23 Furthermore, on 16 August 1985 the competent United Kingdom authorities gave the authorities of the other Member States information on Italian wine adulterated with diethylene glycol. When the Commission gave its press conference it was aware only of very slight traces of diethylene glycol in some Italian wines. It could therefore legitimately take the view that a reserved approach was preferable to the disclosure of the identity of the companies involved in trade in those wines, which would have led to adverse publicity even more damaging to sales of Italian wine. It must also be borne in mind that when on 26 March 1986 the applicants requested the Commission to disclose the names of the companies concerned Italian wine adulterated with methanol had already been the cause of several deaths . The Commission immediately passed on the information in relation to Italian wine adulterated with methanol which it received in March 1986 from the Italian authorities to the other Member States

24 Finally, it must be held that even after the appearance in 1985 of Italian wine containing traces of diethylene glycol, the Commission had insufficient facts at its disposal to require a review of the Italian monitoring measures in relation to the distillation system. It should be added that inspection pursuant to Article 9 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) would have related to the financing of distillation by the European Agricultural Guidance and Guarantee Fund and not, as the applicants argue, to the sale of wine on the market.

25 It follows from all the above considerations that the applicants have not succeeded in establishing unlawful conduct on the part of the Commission after the discovery of the scandal of Italian wines containing methanol. In consequence there is no need to determine whether the other conditions necessary in order to establish liability on the part of the Community are satisfied.

26 Accordingly the application must be dismissed as unfounded.

Costs

27 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to pay the costs. Mr Francesconi must bear the costs incurred in connection with his application to intervene in Case 66/88, which was rejected by order of 15 March 1989.

On those grounds,

THE COURT (Second Chamber)

hereby :

(1) Dismisses the application;

(2) Orders the applicants to pay the costs and orders Mr Francesconi to pay the costs incurred in connection with his application to intervene.

DOCNUM	61986J0326
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1986 ; J ; judgment
PUBREF	European Court reports 1989 Page 02087
DOC	1989/07/04
LODGED	1986/12/23
JURCIT	11957E215-L2 : N 8 31970R0729-A09 : N 24 31979R0337-A64 : N 11 31979R0359-A03 : N 11 31983R2179-A22 : N 17 31983R2179-A27 : N 17 31983R2179 : N 13 31984D0133 : N 11 31984R2102 : N 13 31984R2396 : N 13 31984R2687 : N 13 61984J0253 : N 8
SUB	Agriculture ; Wine ; Liability
AUTLANG	French
MISCINF	Joined case : 688J0066
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	B NL I
NOTES	Borràs Rodríguez, Alegría: Revista Jurídica de Catalunya 1990 p.531-534

Rosado Pacheco, Santiago: Noticias CEE 1991 no 73 p.107-113

PROCEDU Action for damages - unfounded

ADVGEN Lenz

JUDGRAP Mancini

DATES of document: 04/07/1989
of application: 23/12/1986

**Judgment of the Court
of 21 September 1989
Commission of the European Communities v Hellenic Republic.
Failure of a Member State to fulfil its obligations - Failure to establish and make available the Community's own resources.
Case 68/88.**

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1.Own resources of the European Communities - Establishment and making available by the Member States - Credit to the Commission' s account - Late - Obligation to pay default interest

(Council Regulation No 2891/77, Art. 11)

2.Member States - Obligations - Obligation to penalize infringements of Community law - Scope

(EEC Treaty, Art. 5)

1.There is an inseparable link between the obligation to establish the Community' s own resources, the obligation to credit them to the Commission' s account within the prescribed time-limit and the obligation to pay default interest. The interest is payable regardless of the reason for the delay in making the entry in the Commission' s account.

2.Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member State to take all measures necessary to guarantee the application and effectiveness of Community law.

For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.

In Case 68/88

Commission of the European Communities, represented by J. Forman and D . Gouloussis, Legal Advisers, and by X. A. Yataganas, a member of its Legal Department, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic,

defendant,

APPLICATION for a declaration that, by failing to establish and pay to the Community own resources fraudulently withheld from the Community budget when certain consignments of Yugoslav maize were declared to be of Greek origin on their exportation to another Member State and by refusing to take certain other appropriate measures, the Hellenic Republic has failed to fulfil its obligations under Community law,

THE COURT

composed of : O. Due, President, T. Koopmans, R. Joliet and F. Grévisse (Presidents of Chambers

), Sir Gordon Slynn, C. N. Kakouris, J . C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M . Díez de Velasco, Judges,

Advocate General : G. Tesauro

Registrar : B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 16 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 June 1989,

gives the following

Judgment

1 By an application lodged at the Court Registry on 7 March 1988, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to establish and pay to the Community own resources fraudulently withheld from the Community budget when certain consignments of maize imported from Yugoslavia into Greece without a levy being collected were declared to be of Greek origin on their exportation to another Member State and by refusing to take certain other appropriate measures, the Hellenic Republic has failed to fulfil its obligations under Community law .

2 At the end of 1986, after carrying out a detailed investigation prompted by certain information which came to its notice, the Commission came to the conclusion that two consignments of maize exported from Greece to Belgium in May 1986 by a company called ITCO in fact comprised maize imported from Yugoslavia, although they had been officially declared by the Greek authorities as comprising Greek maize . For that reason the agricultural levy payable to Community own resources had not been collected. According to the Commission that fraud had been committed with the complicity of certain Greek civil servants and, at a later stage, a number of senior civil servants had uttered false documents and made false statements to conceal it.

3 On 21 January 1987 the Commission informed the Greek Government of the conclusions of its investigation and called on it to take the following measures :

(i) payment to the Commission of the agricultural levies on the imports of Yugoslav maize, together with default interest;

(ii) recovery of the unpaid sums from the authors of the fraud;

(iii) the institution of criminal or disciplinary proceedings against the authors of the fraud and their accomplices;

(iv) an investigation into certain import, export and transit operations involving cereals carried out since the beginning of 1985.

The Greek authorities were given a period of two months in which to inform the Commission of the measures which they had taken.

4 The Greek authorities replied that an administrative inquiry had been ordered and that the matter had been placed in the hands of an examining magistrate, and that it was necessary to await the conclusions of the judicial authorities before taking the measures indicated by the Commission.

5 After a further exchange of correspondence without any positive outcome, on 27 July 1987 the Commission initiated the procedure under Article 169 of the EEC Treaty, calling upon the Hellenic Republic to submit its observations. The Hellenic Republic replied by letter of 27 August 1987 in which it repeated, essentially, that it was necessary to await the outcome of the pending administrative and judicial inquiries.

6 On 9 October 1987 the Commission issued a reasoned opinion, to which the Greek Government' s only - and belated - response was to repeat its previous observations.

7 The Commission then brought the present action. The Hellenic Republic, having been duly notified of the proceedings, did not submit any pleadings within the prescribed period. The Commission asked the Court to give judgment by default pursuant to Article 94(1) of the Rules of Procedure.

8 Reference is made to the Report for the Hearing for a fuller account of the course of the procedure and the Commission' s submissions and arguments, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

9 Before the Commission' s submissions are examined, it is appropriate to point out that, in the terms of Article 94(2) of the Rules of Procedure, where, as in the present case, the Court gives judgment by default it need only, in considering the merits of the application, verify "whether the applicant' s submissions appear well founded ".

The first submission

10 The Commission maintains that, by failing to establish and make available to the Community own resources in the form of the agricultural levies due on certain consignments of maize imported from a non-member country, the Hellenic Republic has failed to fulfil its obligations .

11 Under Article 13(1) of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1), a levy "equal... to the threshold price less the cif price" is payable on every import of maize into the Community. That agricultural levy is one of the resources which, by virtue of Council Decision 70/243 of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224) constitute own resources entered in the budget of the Communities. Finally, Council Regulation No 2891/77 of 19 December 1977 implementing the abovementioned decision of 21 April 1970 (Official Journal 1977, L 336, p. 1) provides that own resources are to be established by the Member States and made available to the Commission by being credited to an account in the name of the Commission no later than the 20th day of the second month following the month during which the entitlement was established.

12 It is apparent from the detailed statements made by the Commission, which are not contradicted by any evidence before the Court, that the maize, which was shipped to Belgium aboard the vessels Alfonsina and Flamingo and declared by the Greek authorities on exportation to be of Greek origin, was in fact Yugoslav maize which had earlier been imported from Yugoslavia.

13 It is not necessary for the Court to express any view concerning the circumstances in which the official documents were drawn up or the liability of the persons responsible for doing so. It need merely be stated that payment was thereby evaded of the agricultural levies payable on the Yugoslav maize imported into Greece in May 1986 in the sum of DR 447 053 406, a figure which has not been challenged.

14 By failing to establish the entitlements in respect of Community own resources and to make them available to the Commission by 20 July 1986 at the latest, the Hellenic Republic has failed to fulfil its obligations under Regulations Nos 2727/75 and 2891/77.

15 The Commission' s first submission must therefore be upheld.

The second submission

16 The Commission claims that the Greek authorities' delay in crediting the abovementioned sum to the Commission' s account must give rise to the payment of interest pursuant to Article 11 of

Regulation No 2891/77.

17 It must be recalled that, as is apparent from the judgment of 20 March 1986 in Case 303/84 Commission v Federal Republic of Germany ((1986)) ECR 1171, there is an inseparable link between the obligation to establish the Community' s own resources, the obligation to credit them to the Commission' s account within the prescribed time-limit and the obligation to pay default interest. It is apparent from the same judgment that the interest is payable "regardless of the reason for the delay in making the entry in the Commission' s account ".

18 Accordingly, it must be held that the Hellenic Republic has failed to fulfil its Community obligations by not paying default interest on the sums which it failed to credit to the Commission' s account .

19 The Commission' s second submission must therefore be upheld.

The third submission

20 The Commission claims that the Greek authorities took no action to recover the agricultural levies not collected when the Yugoslav maize was imported into Greece and that they thus failed to fulfil the obligations incumbent on them under Council Regulation No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979, L 197, p. 1).

21 This submission must also be upheld since there is no evidence before the Court which contradicts the Commission' s statements.

The fourth submission

22 According to the Commission, the Member States are required by virtue of Article 5 of the EEC Treaty to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law. The Hellenic Republic failed to fulfil those obligations by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it.

23 It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

24 For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

25 Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.

26 In the present case, it does not appear from the file on the case that the Greek authorities have instituted criminal or disciplinary proceedings against the persons who took part in the commission and concealment of the fraud denounced by the Commission or that there was any impediment to the institution of such proceedings.

27 In the pre-litigation phase the Greek Government contended that the matter had been placed in the hands of the national judicial authorities and that it was necessary to await the outcome of the judicial inquiries. However, the Commission quite properly refutes that argument, observing

that, according to the information in its possession, the legal proceedings in question, which in fact were commenced not by the national authorities but by a competitor of ITCO, relate only to the fraud connected with the consignment carried by the vessel Alfonsina.

28 In those circumstances, the Commission' s submission must be upheld .

The fifth submission

2929 The Commission claims that by failing to carry out the appropriate verifications and inquiries and the additional inspection measures requested by the Commission the Hellenic Republic has failed to fulfil its obligations under Articles 1 and 18 of Council Regulation No 2891/77.

30 According to Article 18 of that regulation :

"(1)Member States shall carry out the verifications and inquiries concerning the establishment and the making available of own resources

(2)Accordingly, the Member States shall :

(i) carry out any additional inspection measures the Commission may ask for in a reasoned request..."

31 It must be noted on the one hand that in the pre-litigation phase the Greek authorities claimed that an administrative inquiry had been put in hand by the Ministry of Finance regarding the two maize export transactions at issue. However, in the absence of precise information as to its nature, scope and results, the Court cannot conclude that such an inquiry can properly be regarded as one of the "verifications and inquiries" prescribed by Article 18(1) of Regulation No 2891/77.

32 It must also be noted that in its letter of 21 January 1987 the Commission asked the Greek authorities to "carry out detailed post-clearance checks on all import, export and transit operations involving cereals since the beginning of 1985 carried out by ITCO or through the ports of Salonica or Kavala ". It does not appear from the documents before the Court that the Hellenic Republic has fulfilled that request for additional inspection measures, even though it was justified by the fact that the investigation conducted by the Commission into the two operations at issue prompted it to call in question the propriety of other operations of the same kind carried out by ITCO or dealt with by the customs authorities at Salonica and Kavala .

33 The Court must therefore uphold the Commission' s last submission

Costs

34 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since judgment is being entered against the defendant, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby declares that :

(1)By failing to establish as Community own resources agricultural levies due on certain consignments of maize imported from a non-member country in May 1986, in the amount of DR 447 053 406, and to make that sum available to the Commission on 20 July 1986 at the latest the Hellenic Republic has failed to fulfil its obligations under Council Regulation No 2727/75 of 29 October 1975 on the common organization of the market in cereals and Council Regulation No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources .

(2)By failing to pay default interest on the abovementioned sum of DR 447 053 406 the Hellenic Republic has failed to fulfil its obligations under Council Regulation No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources .

(3)By failing to effect post-clearance recovery of the abovementioned agricultural levies the Hellenic Republic has failed to fulfil its obligations under Council Regulation No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties .

(4)By failing to institute criminal or disciplinary proceedings against the persons who took part in and helped conceal the transactions which made it possible to evade the abovementioned agricultural levies the Hellenic Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty.

(5)By failing to carry out the necessary verifications and inquiries and the additional checks requested by the Commission the Hellenic Republic has failed to fulfil its obligations under Council Regulation No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources.

(6)The Hellenic Republic shall pay the costs.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1989 Page 02965 Swedish special edition X Page 00153 Finnish special edition X Page 00167
DOC	1989/09/21
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JURCIT	11957E005 : N 22 - 25 31959X0301-A94P1 : N 7 31959X0301-A94P2 : N 9 11970F/DEC/RES : N 11 31970D0243 : N 11 31975R2727-A13P1 : N 11 14 31977R2891-A01 : N 29 31977R2891-A11 : N 16 - 18

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CONCERNS	Failure concerning 11957E005 Failure concerning 31975R2727-A13P1 Failure concerning 31977R2891-A11 Failure concerning 31977R2891-A18 Failure concerning 31979R1697
SUB	Agriculture ; Cereals ; Financial provisions ; Own resources
AUTLANG	Greek
APPLICA	Commission ; Institutions
DEFENDA	Greece ; Member States
NATIONA	Greece
NOTES	Constantinesco, Vlad: Journal du droit international 1990 p.453-454 Tiedemann, Klaus: Europäische Zeitschrift für Wirtschaftsrecht 1990 p.100-101 Tiedemann, Klaus: Neue juristische Wochenschrift 1990 p.2226-2233 Berr, Claude J.: La Semaine juridique - édition entreprise 1990 II 15876 De Franceschi, Paola: Diritto comunitario e degli scambi internazionali 1990 p.403-411 Salazar, Lorenzo: Cassazione penale 1992 p.1658-1668
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Tesauro
JUDGRAP	Grévisse
DATES	of document: 21/09/1989 of application: 07/03/1988

Judgment of the Court
of 9 November 1995
Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft.
Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.
Regulation - Reference for a preliminary ruling - Assessment of validity - National court - Interim relief.
Case C-465/93.

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Acts of the institutions ° Regulations ° Dispute before a national court as to the legality of a regulation during an action brought against a national implementing measure ° Ordering of interim measure provisionally disapplying the regulation ° Whether permissible ° Conditions ° Prima facie case ° Question of validity submitted to the Court by way of a reference for a preliminary ruling on validity ° Serious and irreparable damage ° Account to be taken of the Community interest ° Respect for the relevant decisions of the Community judicature

(EC Treaty, Arts 177, 185 , 186 and 189, second para.)

Article 189 of the Treaty does not preclude national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

The Court has already held, having regard to the requirement of the coherence of the system of interim legal protection, that national courts which have referred such questions for a preliminary ruling are able to order suspension of enforcement of a national administrative measure based on the contested regulation, considering that in the context of actions for annulment, Article 185 of the Treaty enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension: firstly, the Treaty not only, in Article 185, authorizes the Court to order such suspension but also, in Article 186, confers on it the power to prescribe any necessary interim measure, and secondly, the interim legal protection which the national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure or the grant of the interim measures in question, since that grant does not as such have more radical consequences for the Community legal order than the mere suspension of enforcement of a national measure adopted on the basis of a regulation.

For the national court to be able to order such interim relief, it must entertain serious doubts as to the validity of the Community act and state them in its decision; if the validity of the contested act is not already before the Court of Justice, it must itself refer the question to the Court of Justice; there must be urgency, in that the interim relief is necessary in order to avoid serious and irreparable damage being caused to the party seeking the relief; and due account must be taken of the Community interest. Taking such account means that the national court must examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented, and must take account in that respect of the damage which may be caused to the legal regime established by the regulation for the Community as a whole. It also means that if the grant of interim relief represents a financial risk for the Community, the national court must be able to require the applicant to provide adequate guarantees. Finally, in its assessment of all those conditions, the national court must respect any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

In Case C-465/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Frankfurt am Main, Germany, for a preliminary ruling in the proceedings pending before that court between

Atlanta Fruchthandelsgesellschaft mbH and Others

and

Bundesamt fuer Ernaehrung und Forstwirtschaft,

on the interpretation of Article 189 of the EC Treaty, and more particularly on the national court' s power to order interim measures disapplying a regulation pending a preliminary ruling by the Court on its validity,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler (Rapporteur), J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann, J.L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: M.B. Elmer,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Atlanta Fruchthandelsgesellschaft mbH and Others, by E.A. Undritz and G. Schohe, Rechtsanwaelte, Hamburg,

° the German Government, by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Regierungsrat in that Ministry, acting as Agents,

° the Spanish Government, by A. Navarro Gonzalez, Director-General of Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Service, acting as Agents,

° the French Government, by C. de Salins, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and N. Eybalin, Secretary for Foreign Affairs in that Department, acting as Agents,

° the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, and P.G. Ferri, Avvocato dello Stato, acting as Agents,

° the United Kingdom, by S.L. Hudson, Assistant Treasury Solicitor, acting as Agent, and E. Sharpston, Barrister,

° the Commission of the European Communities, by U. Woelker, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Atlanta Fruchthandelsgesellschaft mbH and Others, the German Government, the Spanish Government, the United Kingdom and the Commission at the hearing on 28 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 5 July 1995,

gives the following

Judgment

Costs

52 The costs incurred by the French, German, Italian and Spanish Governments and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by order of 1 December 1993, hereby rules:

1. Article 189 of the Treaty is to be interpreted as not precluding national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

2. Such interim relief can be ordered by the national court only if:

(1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

(2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

(3) the court takes due account of the Community interest; and

(4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

1 By order of 1 December 1993 received at the Court Registry on 14 December 1993, the Verwaltungsgericht (Administrative Court) Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 189 of the EC Treaty, and more particularly on the national court' s power to order interim measures disapplying a regulation pending a preliminary ruling by the Court on its validity.

2 Those questions arose in proceedings between Atlanta Fruchthandelsgesellschaft mbH and 17 other companies in the Atlanta group (hereinafter "the Atlanta companies") and the Bundesamt fuer Ernaehrung und Forstwirtschaft (Federal Office of Food and Forestry, hereinafter "the Bundesamt") on the allocation of import quotas for third-country bananas.

3 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1, hereinafter "the Regulation") established from 1 July 1993 a common import regime replacing the various national arrangements.

4 Title IV of the Regulation, on trade with third countries, provides in Article 18 that a tariff quota of two million tonnes (net weight) is to be opened each year for imports of third-country bananas and non-traditional ACP bananas. Within the framework of that quota, imports of non-traditional ACP bananas are to be subject to a zero duty and imports of third-country bananas to a levy of ECU 100 per tonne. Outside that quota, imports of non-traditional ACP bananas are to be subject to a levy of ECU 750 per tonne and imports of third-country bananas to a levy of ECU 850 per tonne.

5 Article 19(1) subdivides the tariff quota: 66.5% is to be opened to the category of operators

who have marketed third-country and/or non-traditional ACP bananas, 30% to the category of operators who have marketed Community and/or traditional ACP bananas, and 3.5% to the category of operators established in the Community who have started marketing bananas other than Community and/or traditional ACP bananas from 1992.

6 Article 21(2) of the Regulation discontinues the annual duty-free import quota for bananas enjoyed by the Federal Republic of Germany under the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community provided for in Article 136 of the Treaty.

7 In accordance with the Community legislation, the Atlanta companies, which were traditional importers of third-country bananas, received from the Bundesamt provisional import quotas for third-country bananas for the period from 1 July to 30 September 1993.

8 Since they considered that the Regulation had limited their import possibilities, the Atlanta companies lodged complaints with the Bundesamt.

9 The Atlanta companies brought an action against the decisions rejecting those complaints before the Verwaltungsgericht Frankfurt am Main.

10 Since the Verwaltungsgericht shared the Atlanta companies' doubts as to the validity of the Regulation, by a first order, made on 1 December 1993, it stayed the proceedings pending a preliminary ruling by the Court of Justice on its validity (Case C-466/93).

11 The Atlanta companies sought interim relief from the Verwaltungsgericht in the form of an order that the Bundesamt grant additional import licences for third-country bananas for the second half of 1993, over and above the quantities already allocated, until the Court of Justice' s decision in the proceedings for a preliminary ruling on the question of validity.

12 By a second order, which was also made on 1 December 1993 and is the origin of the present reference for a preliminary ruling, the Verwaltungsgericht asked the Court to rule on the following questions:

> "1 May a national court which entertains serious doubts as to the validity of a Community regulation, and has therefore referred the question of the validity of the Community regulation to the Court of Justice under the preliminary-ruling procedure, by making an interim order provisionally settle or regulate the disputed legal positions or relationships, with reference to an administrative act of a national authority based on the Community regulation in respect of which the reference has been made, for the period until the Court of Justice gives its ruling?

2 If Question 1 is answered in the affirmative:

Under what conditions is a national court empowered in such cases to make an interim order? Must a distinction be drawn, with respect to the conditions for making an interim order, between an interim order which is intended to preserve an already existing legal position and one which is intended to create a new legal position?"

13 In the same order the Verwaltungsgericht ordered the Bundesamt provisionally to grant the applicants additional import licences for November and December 1993 at a customs duty of ECU 100 per tonne.

14 The issue of the licences was made subject to the condition that the applicants would for the time being make no use of the import licences which had been allocated to them for 1994 for the importation of third-country bananas at a rate of duty of ECU 100 per tonne, to the extent that, in accordance with the order, they were provisionally granted additional import licences over and above the definitive quota. That condition was intended to ensure that if the applicants lost their case, the additional quotas allocated them for 1993 could be set off against the quotas they were entitled to for 1994.

15 In the order for reference the Verwaltungsgericht observes that in its judgment in Joined Cases C-143/88 and C-92/89 Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest [1991] ECR I-415 the Court held that the coherence of interim legal protection of individuals requires that a national court which has made a reference to the Court of Justice for a preliminary ruling on the validity of a regulation should be able to order suspension of enforcement of a national administrative measure based on that regulation. It notes that the Court has not yet ruled, however, on the power of a national court in such circumstances to order interim measures which create a new legal position for the benefit of the person seeking legal protection. The Verwaltungsgericht suggests that the grant of such interim relief may call into question the full effectiveness of the regulation in all the Member States.

16 The grant of interim relief in the present case is based on the consideration that a refusal would be contrary to the guarantee of legal protection enshrined in Article 19(4) of the Grundgesetz (Basic Law). If the Verwaltungsgericht did not have jurisdiction to grant interim protection against administrative measures of the national authorities which were based on Community law, it would have to refer to the Bundesverfassungsgericht (Federal Constitutional Court) the question of the compatibility with Article 19(4) of the Grundgesetz of the national law approving the EEC Treaty. With reference to the conditions for the grant of interim relief, the Verwaltungsgericht refers to Article 186 of the EC Treaty.

17 By order of 29 June 1993 (Case C-280/93 R Germany v Council [1993] ECR I-3667) the Court, holding that the conditions for the grant of interim measures sought were not met, dismissed an application for interim relief which would permit the Federal Republic of Germany to import the same annual quantities of third-country bananas free of customs duty as in 1992 until the Court' s decision on the substance of the case.

18 By judgment of 5 October 1994 (Case C-280/93 Germany v Council [1994] ECR I-4973) the Court dismissed the application for annulment of the Regulation.

Question 1: The principle of the grant of interim relief

19 By its first question the Verwaltungsgericht essentially asks whether Article 189 of the Treaty is to be interpreted as precluding national courts from ordering interim measures to settle or regulate contested legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

20 The Court held in Zuckerfabrik that the provisions of the second paragraph of Article 189 of the Treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals. In cases where national authorities are responsible for administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to request those courts to refer questions to the Court for a preliminary ruling (paragraph 16).

21 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare a Community regulation invalid (see Case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199, paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered inoperative as regards them (Zuckerfabrik, paragraph 17).

22 As the Court pointed out in Foto-Frost (paragraph 16), references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 185 of the EC Treaty

enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested (Zuckerfabrik, paragraph 18).

23 Furthermore, in its judgment in Case C-213/89 The Queen v Secretary of State for Transport, ex parte Factortame and Others [1990] ECR I-2433, delivered in a case concerning the compatibility of national legislation with Community law, the Court, referring to the effectiveness of Article 177, held that the national court which had referred questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 177 (Zuckerfabrik, paragraph 19).

24 The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself (Zuckerfabrik, paragraph 20).

25 The Court accordingly held in Zuckerfabrik that Article 189 is to be interpreted as not precluding national courts from suspending enforcement of a national administrative measure adopted on the basis of a Community regulation.

26 In the present proceedings for a preliminary ruling, the national court asks the Court for a ruling, not on the question of suspension of enforcement of a national measure adopted on the basis of a Community regulation, but on the making of a positive order provisionally disapplying that regulation.

27 In the context of an action for annulment, the Treaty not only, in Article 185, authorizes the Court to order application of the contested act to be suspended, but also, in Article 186, confers on it the power to prescribe any necessary interim measures.

28 The interim legal protection which the national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit.

29 Contrary to the submissions of the Spanish and Italian Governments, the grant of such interim relief does not as such have more radical consequences for the Community legal order than the mere suspension of enforcement of a national measure adopted on the basis of a regulation. The consequences of the interim measure, whatever it may be, for the Community legal order must be assessed as part of the balancing exercise between the Community interest and the interests of the individual which is the subject of the Verwaltungsgericht' s second question.

30 In the light of the above considerations, the answer to the first question must therefore be that Article 189 of the Treaty is to be interpreted as not precluding national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

Question 2: The conditions for the grant of interim relief

31 The Verwaltungsgericht goes on to ask under what conditions national courts can grant such interim relief.

32 The Court held in Zuckerfabrik that suspension of enforcement of a national administrative measure adopted in implementation of a Community regulation may be granted by a national court only if that court entertains serious doubts as to the validity of the Community act and, where the validity of the contested measure is not already in issue before the Court of Justice, itself refers that question to the Court; if there is urgency and a threat of serious and irreparable damage to the applicant; and if the national court takes due account of the Community interest.

33 Those conditions must be observed when a national court orders any interim relief, including a positive measure rendering the regulation whose validity is challenged provisionally inapplicable as regards the individual.

34 The present case affords the Court an opportunity to clarify those conditions.

35 In Zuckerfabrik (paragraph 23) the Court held that interim measures may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the grant of interim relief.

36 That requirement means that the national court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid.

37 The national court must take into account here the extent of the discretion which, having regard to the Court' s case-law, the Community institutions must be allowed in the sectors concerned.

38 The Court further held in Zuckerfabrik (paragraph 24) that the grant of relief must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore order interim measures and maintain them only for so long as the Court has not ruled that consideration of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of the regulation in question.

39 Since the power of national courts to order interim relief corresponds to the jurisdiction reserved to the Court of Justice by Article 186 in the context of actions brought under Article 173 of the Treaty, those national courts may grant such relief only on the same conditions as apply when the Court of Justice is dealing with an application for interim measures (Zuckerfabrik, paragraph 27).

40 In that respect the Court held in Zuckerfabrik (paragraph 28), on the basis of settled case-law, that interim measures may be ordered only where they are urgent, that is to say, where it is necessary for them to be adopted and take effect before the decision on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them.

41 As to urgency, the damage relied on by the applicant must be such as to materialize before the Court of Justice has been able to rule on the validity of the contested Community act. As to the nature of the damage, purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure with respect to which the application for interim relief is made would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid (Zuckerfabrik, paragraph 29).

42 Furthermore, a national court called upon to apply, within the limits of its jurisdiction, the

provisions of Community law is under an obligation to ensure that full effect is given to Community law and, consequently, where there is doubt as to the validity of Community regulations, to take account of the interest of the Community, namely that such regulations should not be set aside without proper guarantees (Zuckerfabrik, paragraph 30).

43 In order to comply with that obligation, the national court to which an application for interim relief has been made must first examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented (Zuckerfabrik, paragraph 31).

44 In that respect the national court must take account of the damage which the interim measure may cause the legal regime established by that regulation for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant' s situation which distinguish him from the other operators concerned.

45 If the grant of interim relief represents a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security (Zuckerfabrik, paragraph 32).

46 When assessing the conditions for the grant of interim relief, the national court is obliged under Article 5 of the Treaty to respect what the Community court has decided on the questions at issue before it. Thus if the Court of Justice has dismissed on the merits an action for annulment of the regulation in question or has held, in the context of a reference for a preliminary ruling on validity, that the reference disclosed nothing to affect the validity of that regulation, the national court can no longer order interim measures or must revoke existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. The same applies if the Court of First Instance, in a judgment which has become final and binding, has dismissed on the merits an action for annulment of the regulation or a plea of illegality.

47 In the present case the Court, adjudicating on the same factual situation as that which gave rise to the proceedings before the national court, has held that the Member States which bring an action for annulment of the regulation, being responsible for the interests, in particular those of an economic and social nature, which are regarded as general interests at national level, are entitled to take judicial proceedings to defend such interests. They may therefore invoke damage affecting a whole sector of their economy, in particular when the contested Community measure may entail unfavourable repercussions on the level of employment and the cost of living (order in Germany v Council, cited above, paragraph 27).

48 The national court, when called upon to protect the rights of individuals, may indeed assess the extent to which refusal to order an interim measure may be liable to have a serious and irreparable effect on important individual interests.

49 However, if an applicant is unable to show a specific situation which distinguishes him from other operators in the relevant sector, the national court must accept any findings already made by the Court of Justice concerning the serious and irreparable nature of the damage.

50 The national court' s obligation to respect a decision of the Court of Justice applies in particular to the Court' s assessment of the Community interest and the balance between that interest and that of the economic sector concerned.

51 Accordingly, the answer to the second question put to the Court by the Verwaltungsgericht Frankfurt am Main must be that interim relief, with respect to a national administrative measure adopted in implementation of a Community regulation, can be granted by a national court only if:

(1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

(2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

(3) the court takes due account of the Community interest; and

(4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

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SUB AGRICULTURE ; FRUIT AND VEGETABLES ; EXTERNAL RELATIONS

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PROCEDU REFERENCE FOR A PRELIMINARY RULING

ADVGEN Elmer

JUDGRAP Schockweiler

DATES OF DOCUMENT.....: 09/11/1995
OF APPLICATION....: 14/12/1993

Judgment of the Court
of 30 April 1996
CIA Security International SA v Signalson SA and Securitel SPRL.
Reference for a preliminary ruling: Tribunal de commerce de Liège - Belgium.
Interpretation of Article 30 of the EC Treaty and of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations - National legislation on the marketing of alarm systems and networks - Prior administrative approval.
Case C-194/94.

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1. Preliminary rulings ° Reference to the Court ° Scope of national legislation ° Need for a preliminary ruling ° Assessment by the national court

(EC Treaty, Art. 177)

2. Approximation of laws ° Procedure for the provision of information in the field of technical standards and regulations ° Technical regulations within the meaning of Directive 83/189 ° Meaning ° National legislation on security firms and equipment made available by them to consumers

(Council Directive 83/189, Art. 1)

3. Approximation of laws ° Procedure for the provision of information in the field of technical standards and regulations ° Member States' obligation to notify to the Commission any draft regulations ° Possibility for individuals to rely on the corresponding provisions ° Breach of the obligation ° Consequence ° Unnotified regulations not enforceable against individuals

(Council Directive 83/189, Arts 8 and 9)

4. Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Carrying on of business as a security firm made subject to prior administrative approval ° Whether permissible

(EC Treaty, Art. 30)

1. Under the procedure provided for by Article 177 of the Treaty, it is for the national court to assess the scope of national provisions and the manner in which they are to be applied. Since the national court is best placed to assess, in view of the particularities of the case, the need for a preliminary ruling in order to give its judgment, preliminary questions cannot be regarded as having become redundant as a result of national legislation being replaced by other legislation.

2. A national provision according to which only persons with prior ministerial authorization may operate a security firm does not constitute a technical regulation within the meaning of Article 1 of the Directive 83/189, laying down a procedure for the provision of information in the field of technical standards and regulations, in so far as such a provision merely lays down the conditions for the establishment of security firms and contains no specifications defining the characteristics of products.

On the other hand, provisions laying down the procedure for approval of alarm systems and networks which security firms may make available to consumers do constitute such technical regulations in so far as such provisions lay down detailed rules defining in particular the conditions concerning the quality tests and function tests which must be fulfilled in order for an alarm system or network to be approved and marketed in the national territory.

In the case of a rule which provides that the products in question may be marketed only after having being previously approved according to a procedure to be laid down by administrative regulation, classification of such a rule depends on its legal effects under domestic law. If, under domestic law, such a rule merely serves as a basis for enabling administrative regulations containing rules

binding on the persons concerned to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive. If, however, it obliges the undertakings concerned to apply for prior approval of their equipment, it must be classified as a technical regulation, even if the administrative rules envisaged have not been adopted.

3. Articles 8 and 9 of Directive 83/189, laying down a procedure for the provision of information in the field of technical standards and regulations, under which Member States must notify the Commission of all draft technical regulations covered by the directive and, except in particular urgent cases, suspend their adoption and implementation for specified periods, are to be interpreted as meaning that individuals may rely on them before the national court, which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

First, by laying down a precise obligation on Member States to notify draft technical regulations before they are adopted, those provisions are unconditional and sufficiently precise in terms of their content. Secondly, an interpretation of the directive to the effect that breach of the obligation to notify constitutes a substantial defect such as to render the technical regulations in question inapplicable to individuals is such as to ensure the effectiveness of the preventive Community control for which the directive made provision in order to ensure that goods can move freely, which is what it was designed to do.

4. Article 30 of the Treaty does not preclude a national provision according to which only persons with prior ministerial authorization may operate a security firm. Since such a provision imposes a condition for the establishment and carrying on of business as a security firm, it does not fall within the scope of Article 30.

In Case C-194/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Commerce de Liège (Belgium) for a preliminary ruling in the proceedings pending before that court between

CIA Security International SA

and

Signalson SA,

Securitel SPRL,

on the interpretation of Article 30 of the EC Treaty and of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward and J.-P. Puissochet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann (Rapporteur), J.L. Murray, H. Ragnemalm and L. Sevon, Judges,

Advocate General: M.B. Elmer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° CIA Security International SA, by C. van Rutten, of the Liège Bar,

° Signalson SA, by V.-V. Dehin, of the Liège Bar,

° Securitel SPRL, by J.-L. Brandenberg, of the Liège Bar,

° the Belgian Government, by J. Devadder, Director of Administration in the Ministry of Foreign Affairs, acting as Agent,

° the German Government, by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

° the Netherlands Government, by A. Bos, Legal Adviser, acting as Agent,

° the United Kingdom, by S. Braviner, of the Treasury Solicitor' s Department, and E. Sharpston, Barrister, acting as Agents,

° the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and J.-F. Pasquier, national official seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of CIA Security International SA, represented by C. van Rutten; of Signalson SA, represented by V.-V. Dehin; of the Belgian Government, represented by D. Jacob, Deputy Adviser in the Ministry of Home Affairs, acting as Agent; of the Netherlands Government, represented by J.S. van Oosterkamp, Deputy Legal Adviser; of the United Kingdom, represented by S. Braviner and E. Sharpston; and of the Commission of the European Communities, represented by R. Wainwright and J.-F. Pasquier at the hearing on 5 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1995,

gives the following

Judgment

Costs

60 The costs incurred by the Belgian, German and Netherlands Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal de Commerce, Liège, by judgment of 20 June 1994, hereby rules:

1. A rule such as Article 4 of the Belgian Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services does not constitute a technical regulation within the meaning of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Council Directive 88/182/EEC of 22 March 1988, whereas provisions such as those contained in the Belgian Royal Decree of 14 May 1991 laying down the procedure for approval of the alarm systems and networks referred to in the Law of 10 April 1990 do constitute technical regulations and classification of a rule such as Article 12 of the Law of 10 April 1990 depends on the legal effects which it has under domestic law.

2. Articles 8 and 9 of Directive 83/189, as amended by Directive 88/182, are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply

a national technical regulation which has not been notified in accordance with the directive.

3. Article 30 of the EC Treaty does not preclude a national provision such a Article 4 of the Law of 10 April 1990.

1 By judgment of 20 June 1994, received at the Court on 4 July 1994, the Tribunal de Commerce (Commercial Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Article 30 of that Treaty and of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8, hereinafter "Directive 83/189"), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75).

2 Those questions have been raised in two sets of proceedings between (i) CIA Security International SA (hereinafter "CIA Security") and Signalson SA (hereinafter "Signalson") and (ii) CIA Security and Securitel SPRL (hereinafter "Securitel"), those three companies being security firms within the meaning of the Belgian Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services (hereinafter "the 1990 Law").

3 Article 1(3) of the 1990 Law provides: "Any legal or natural person pursuing an activity consisting in supplying to third parties, on a permanent or occasional basis, design, installation and maintenance services for alarm systems and networks shall be considered to be a security firm for the purposes of this Law."

4 Article 1(4) of the 1990 Law provides: "The alarm systems and networks referred to in this article are those intended to prevent or record crimes against persons or property".

5 Article 4 of the 1990 Law provides: "Only persons with prior authorization from the Home Affairs Ministry may operate a security firm. Authorization shall be granted only if the firm meets the requirements laid down in this Law and the conditions concerning financial means and technical equipment prescribed by royal decree ...".

6 Article 12 of the 1990 Law provides: "The alarm systems and networks referred to in Article 1(4) and their components may be marketed or otherwise made available to users only after prior approval has been granted under a procedure to be laid down by royal decree ...".

7 That procedure was laid down by Royal Decree of 14 May 1991 laying down the procedure for approval of the alarm systems and networks referred to in the 1990 Law (hereinafter "the 1991 Decree").

8 Article 2(1) of the 1991 Decree provides: "No manufacturer, importer, wholesaler or any other natural or legal person may market new equipment or otherwise make it available to users in Belgium if it has not been previously approved by a committee established for that purpose (the 'equipment committee')."

9 Articles 4 to 7 of the 1991 Decree provide for equipment to be examined and tested before it can be approved.

10 According to Article 5, that examination is to consist of identifying the equipment, checking electrical circuits against the documents submitted by the manufacturer and checking the minimum required functions. The tests carried out on the equipment, provided for by Article 6 of the 1991 Decree, concern functional adequacy, mechanical aspects, mechanical and/or electronic reliability, sensitivity to false alarms, and protection against fraud or attempts to neutralize the equipment. For that purpose, equipment is subjected to the tests prescribed in Annexes 3 and 4 to the 1991 Decree.

11 Article 8 of the 1991 Decree provides that: "If the applicant establishes by means of the necessary documents that his equipment has already undergone tests which are at least equivalent to those

described in Article 7 in an authorized laboratory in another Member State of the EEC according to EEC rules and that it has been approved at most three years before the date of the current application, a body referred to in Article 4(1) shall carry out on the equipment only such tests as have not yet been carried out in the other Member State of the EEC."

12 The case-file also shows that the 1991 Decree was not notified to the Commission in accordance with the procedure for the provision of information on technical regulations laid down in Directive 83/189 and that, in February 1993, following delivery of a reasoned opinion by the Commission pursuant to Article 169 of the EEC Treaty, the Belgian Government notified a new draft royal decree laying down the procedure for approval of alarm systems and networks. That draft, adopted on 31 March 1994, is substantially identical to the 1991 Decree which it repealed, Article 8 of the 1991 Decree having, however, been amended in accordance with suggestions made by the Commission.

13 The three companies involved in the main proceedings are competitors whose business is, in particular, the manufacture and sale of alarm systems and networks.

14 On 21 January 1994 CIA Security applied to the Liège Commercial Court for orders requiring Signalson and Securitel to cease alleged unfair trading practices pursued in January 1994. It based its claims on Articles 93 and 95 of the Belgian Law of 14 July 1991 on Commercial Practices which prohibits unfair trading practices. CIA Security claims that Signalson and Securitel have libelled it by claiming in particular that the Andromède alarm system which it markets did not fulfil the requirements laid down by Belgian legislation on security systems.

15 Signalson and Securitel have lodged counterclaims, the main one being for an order restraining CIA Security from continuing to carry on business on the ground that it is not authorized as a security firm and that it is marketing an alarm system which has not been approved.

16 In an interim judgment the Liège Commercial Court held that, although the main claims and counterclaims seek orders restraining unfair practices prohibited by the Law on Commercial Practices, those practices must still be assessed by reference to the provisions of the 1990 Law and the 1991 Decree.

17 It then found that if CIA Security has infringed the 1990 Law and the 1991 Decree, the actions which it has brought could be declared inadmissible for lack of locus standi or sufficient legal interest in bringing proceedings whilst if the 1990 Law and the 1991 Decree are incompatible with Community law, Signalson and Securitel will not be able to base their counterclaims for restraining orders on breach of those legal provisions.

18 Unsure whether the Belgian provisions in question are compatible with Article 30 of the Treaty and having found that those provisions had not been previously notified to the Commission in accordance with Directive 83/189, the Liège Commercial Court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> "1. Does the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services and, more particularly, Articles 4 and 12 thereof, create quantitative restrictions on imports or does it contain measures having an effect equivalent to a quantitative restriction prohibited by Article 30 of the EEC Treaty?

2. Is the Royal Decree of 14 May 1991 laying down the procedure for approving alarm systems and networks, which is referred to in the Law of 10 April 1990, and in particular Articles 2 and 8 thereof, compatible with Article 30 of the Treaty which prohibits quantitative restrictions on imports and all measures having an effect equivalent to a quantitative restriction?

3. Does the abovementioned Law of 10 April 1990, in particular Articles 4 and 12 therefore, contain technical regulations which should have been communicated to the Commission beforehand in accordance with Article 8 of Directive 83/189/EEC?

4. Does the Royal Decree of 14 May 1991, in particular Articles 2 and 8 thereof, contain technical regulations which should have been communicated to the Commission beforehand in accordance with Article 8 of Directive 83/189/EEC?

5. Are the provisions of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, in particular Articles 8 and 9 thereof, unconditional and sufficiently precise to be relied upon by individuals in proceedings before national courts?

6. Do Community law and the protection which it affords to individuals require a national court to refuse to apply a national technical regulation which has not been communicated to the Commission by the Member State which adopted it, in accordance with the obligation laid down in Article 8 of Council Directive 83/189/EEC?"

Preliminary observations

19 According to the Belgian Government, Signalson and Securitel, any question as to the compatibility of the 1991 Decree with Community law is now redundant since in the type of case before it the national court must apply the law in force at the time when it gives its ruling and that, since the time when proceedings were commenced, the 1991 Decree has been replaced by the Royal Decree of 31 March 1994, which, according to the Commission, is in accordance with Community law.

20 That argument cannot be accepted. According to the case-law of the Court, it is for the national court to assess the scope of the national provisions and the manner in which they must be applied (see, in particular, the judgment in Case C-45/94 Ayuntamiento de Ceuta [1995] ECR I-4385, paragraph 26). Since the national court is best placed to assess, in view of the particularities of the case, the need for a preliminary ruling in order to give its judgment, the preliminary questions cannot be regarded as having become redundant as a result of the Decree of 14 May 1991 being replaced by the Royal Decree of 31 March 1994.

21 That being so, the third, fourth, fifth and sixth questions should be answered first.

The third and fourth questions

22 By its third and fourth questions the national court asks in substance whether provisions such as Articles 4 and 12 of the 1990 Law and the 1991 Decree constitute technical regulations which should have been notified to the Commission prior to their adoption, in accordance with Article 8 of Directive 83/189.

23 "Technical regulation" is defined in point (5) of Article 1 of Directive 83/189 as "technical specifications, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, except those laid down by local authorities". "Technical specification" is defined in point (1) of that article as "a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling...".

24 The first point which must be examined is whether a provision such as Article 4 of the 1990 Law constitutes a technical regulation within the meaning of Directive 83/189.

25 The answer to that question must be negative since according to Directive 83/189 technical regulations are specifications defining the characteristics of products and Article 4 is confined to laying down conditions governing the establishment of security firms.

26 As regards the 1991 Decree, it contains detailed rules defining, in particular, the conditions

concerning the quality tests and function tests which must be fulfilled in order for an alarm system or network to be approved and marketed in Belgium. Those rules therefore constitute technical regulations within the meaning of Directive 83/189.

27 As regards Article 12 of the 1990 Law, it is to be recalled that it provides that the products in question may be marketed only after having been previously approved according to a procedure to be laid down by royal decree, which was laid down by the 1991 Decree.

28 According to the Commission and CIA Security, Article 12 of the 1990 Law constitutes a technical regulation within the meaning of Directive 83/189 whilst Signalson, the United Kingdom and the Belgian Government, in their written observations, submit that this article is merely a framework law not comprising any technical regulation within the meaning of Directive 83/189.

29 A rule is classified as a technical regulation for the purposes of Directive 83/189 if it has legal effects of its own. If, under domestic law, the rule merely serves as a basis for enabling administrative regulations containing rules binding on interested parties to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive (see the judgment in Case C-317/92 Commission v Germany [1994] ECR I-2039, paragraph 26). It should be recalled here that, according to the first subparagraph of Article 8(1) of Directive 83/189, the Member States must communicate, at the same time as the draft technical regulation, the enabling instrument on the basis of which it was adopted, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

30 However, a rule must be classified as a technical regulation within the meaning of Directive 83/189 if, as the Belgian Government submitted at the hearing, it requires the undertakings concerned to apply for prior approval of their equipment, even if the administrative rules envisaged have not been adopted.

31 The reply to be given to the third and fourth questions must therefore be that a rule such as Article 4 of the 1990 Law does not constitute a technical regulation within the meaning of Directive 83/189 whereas provisions such as those contained in the 1991 Decree do constitute technical regulations and that classification of a rule such as Article 12 of the 1990 Law depends on the legal effects which it has under domestic law.

The fifth and sixth questions

32 By its fifth and sixth questions the national court asks in substance whether the provisions of Directive 83/189, and particularly Articles 8 and 9 thereof, are unconditional and sufficiently precise for individuals to be able to rely on them before a national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

33 Article 8(1) and (2) of Directive 83/189 provides:

> "1. Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft. Where appropriate, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

The Commission shall immediately notify the other Member States of any draft it has received; it may also refer this draft to the Committee referred to in Article 5 and, if appropriate, to the Committee responsible for the field in question for its opinion.

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation."

34 Article 9 of Directive 83/189 provides:

"1. Without prejudice to paragraphs 2 and 2a, Member States shall postpone the adoption of a draft technical regulation for six months from the date of notification referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods. The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

2. The period in paragraph 1 shall be 12 months if, within three months following the notification referred to in Article 8(1), the Commission gives notice of its intention of proposing or adopting a Directive on the subject.

2a. If the Commission ascertains that a communication pursuant to Article 8(1) relates to a subject covered by a proposal for a directive or regulation submitted to the Council, it shall inform the Member State concerned of this fact within three months of receiving the communication.

Member States shall refrain from adopting technical regulations on a subject covered by a proposal for a directive or regulation submitted by the Commission to the Council before the communication provided for in Article 8(1) for a period of 12 months from the date of its submission.

Recourse to paragraphs 1, 2 and 2a of this Article cannot be accumulative.

3. Paragraphs 1, 2 and 2a shall not apply in those cases where, for urgent reasons relating to the protection of public health or safety, the protection of health and life of animals or plants, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible. The Member State shall give, in the communication referred to in Article 8, the reasons which warrant the urgency of the measures taken. The Commission shall take appropriate action in cases where improper use is made of this procedure."

35 Article 10 of Directive 83/189 provides that: "Articles 8 and 9 shall not apply where the Member States fulfil their obligations as arising out of Community directives and regulations; the same shall apply in the case of obligations arising out of international agreements which result in the adoption of uniform technical specifications in the Community."

36 In 1986, in Communication 86/C 245/05 (OJ 1986 C 245, p. 4) the Commission defined its position on the point raised by the Liège Commercial Court in its last two questions. In that communication the Commission stated that Directive 83/189 enabled it, as well as the Member States, to play an important role in preventing the creation of new technical barriers to trade and that the obligations of the Member States created by the directive are clear and unequivocal in that:

° the Member States must notify all draft technical regulations falling under the Directive;

° they must suspend the adoption of the draft technical regulations automatically for three months, other than in the special cases covered by Article 9(3) of the Directive;

° they must suspend the adoption of the draft technical regulation for a further period of three or nine months depending on whether objections have been raised or whether Community legislation is envisaged.

Finally, the Commission stated that failure by Member States to respect the obligations arising

under the directive would lead to the creation of serious loopholes in the internal market, with potentially damaging trade effects.

37 In the communication the Commission deduces from the points made therein that "when a Member State enacts a technical regulation falling within the scope of Directive 83/189/EEC without notifying the draft to the Commission and respecting the standstill obligation, the regulation thus adopted is unenforceable against third parties in the legal system of the Member State in question. The Commission therefore considers that litigants have a right to expect national courts to refuse to enforce national technical regulations which have not been notified as required by Community law".

38 In the present case the Commission has maintained that interpretation of Directive 83/189, which CIA Security has endorsed.

39 The German and Netherlands Governments and the United Kingdom do not agree with that interpretation. They consider that technical regulations within the meaning of Directive 83/189 may be enforced against individuals even if they were adopted in breach of the obligations which the directive entails. The arguments on which that interpretation is based are examined below.

40 The first point which must be made is that Directive 83/189 is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling public interest requirements. The control is also effective in that all draft technical regulations covered by the directive must be notified and, except in the case of those regulations whose urgency justifies an exception, their adoption or entry into force must be suspended during the periods laid down by Article 9.

41 The notification and the period of suspension therefore afford the Commission and the other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade contrary to the EC Treaty or obstacles which are to be avoided through the adoption of common or harmonized measures and also to propose amendments to the national measures envisaged. This procedure also enables the Commission to propose or adopt Community rules regulating the matter dealt with by the envisaged measure.

42 It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 Becker [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357.

43 The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

44 That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.

45 It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that

they may not be enforced against individuals.

46 The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

47 The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

48 For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

49 That interpretation of the directive is in accordance with the judgment given in Case 380/87 Enichem Base and Others v Comune di Cinisello Balsamo [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

50 In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonizing directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

51 Finally, it must be examined whether, as the United Kingdom in particular observes, there are reasons specific to Directive 83/189 which preclude it from being interpreted as rendering technical regulations adopted in breach of the directive inapplicable to third parties.

52 In this regard, it has already been observed that if such regulations were not enforceable against third parties, this would create a legislative vacuum in the national legal system in question and could therefore entail serious drawbacks, particularly where safety regulations were concerned.

53 This argument cannot be accepted. A Member State may use the urgent-case procedure provided for in Article 9(3) of Directive 83/189 where, for reasons defined by that provision, it considers it necessary to prepare technical regulations in a very short space of time which must be enacted and brought into force immediately without any consultations being possible.

54 In view of the foregoing considerations, it must be concluded that Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals.

55 The answer to the fifth and sixth questions must therefore be that Articles 8 and 9 of Directive 83/189 are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

The first two questions

56 By its first and second questions the national court asks in substance whether Article 30 of the Treaty precludes national provisions such as Articles 4 and 12 of the 1990 Law and the 1991 Decree.

57 In view of the answers given to the third, fourth, fifth and sixth questions, it is not necessary to reply to the first two questions in so far as they relate to Article 12 of the 1990 Law and the 1991 Decree since those provisions are not enforceable against individuals. Therefore, only the part of the first question that inquires whether a provision such as Article 4 of the 1990 Law, which provides that no one may run a security firm without approval from the Home Affairs Ministry, is compatible with Article 30 of the Treaty need be answered.

58 Since such a provision imposes a condition for the establishment and carrying on of business as a security firm, it does not fall directly within the scope of Article 30 of the Treaty which concerns the free movement of goods between Member States. Furthermore, the case-file does not contain the slightest indication that such a provision has restrictive effects on the free movement of goods or is otherwise contrary to Community law.

59 The answer to the first preliminary question must therefore be that Article 30 of the Treaty does not preclude a national provision such as Article 4 of the 1990 Law.

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NATCOUR

A9 Président du tribunal de commerce de Liège, jugement du 20/06/94 (155/94 - 180/94)

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PROCEDU Reference for a preliminary ruling

ADVGEN Elmer

JUDGRAP Gulmann

DATES of document: 30/04/1996
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Judgment of the Court
of 24 November 1992
Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp..
Reference for a preliminary ruling: Kriminal- og Skifteretten i Hjørring - Denmark.
Conservation of fishery resources - Salmon caught in the North Atlantic outside the waters under the sovereignty and jurisdiction of the Member States - Prohibition on transporting and storing fish in the areas under the sovereignty and jurisdiction of the Member States - Application of that prohibition to a vessel flying the flag of a non-member country.
Case C-286/90.

++++

1. Fisheries ° Conservation of the resources of the sea ° Technical measures for conservation ° Prohibition on the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States ° Applicability of the prohibition to a vessel registered in a non-member country ° Existence of a genuine link with a Member State ° No effect

(Council Regulation (EEC) No 3094/86, Art. 6(1)(b))

2. Fisheries ° Conservation of the resources of the sea ° Technical measures for conservation ° Prohibition on the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States ° Vessel registered in a non-member country ° Crew members nationals of a Member State ° No effect

(Council Regulation (EEC) No 3094/86, Art. 6(1)(b))

3. Fisheries ° Conservation of the resources of the sea ° Technical measures for conservation ° Prohibition on the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States ° Areas covered with respect to vessels registered in a non-member country ° Exclusive economic zone or territorial waters of a Member State ° Excluded ° Inland waters or port of a Member State ° Included

4. Fisheries ° Conservation of the resources of the sea ° Technical measures for conservation ° Prohibition on the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States ° Confiscation of a cargo of salmon found on board in breach of the prohibition ° Applicability to a vessel registered in a non-member country belonging to a company established in that country ° Condition ° Presence of the vessel in the inland waters or a port of a Member State

(Council Regulation (EEC) No 3094/86, Art. 6(1)(b))

5. Fisheries ° Conservation of the resources of the sea ° Technical measures for conservation ° Prohibition on the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States ° Application in respect of vessels from non-member countries which have entered a port of a Member State owing to a situation of distress ° No Community legislation ° Determination by the national court in compliance with international law

(Council Regulation (EEC) No 3094/86, Art. 6(1)(b))

1. For the purpose of Article 6(1)(b) of Regulation No 3094/86 which prohibits, pursuant to certain technical measures for the conservation of fishery resources, the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States, a vessel registered in a non-member country may not be treated as a vessel with the nationality of a Member State on the ground that it has a genuine link with that Member State.

2. Article 6(1)(b) of Regulation No 3094/86 which prohibits, pursuant to certain technical measures

for the conservation of fishery resources, the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States, may not be applied to the master and other crew members of a vessel registered in a non-member country qua nationals of a Member State, irrespective of the State in which the vessel is registered and the sea area in which the vessel is located.

3. Article 6(1)(b) of Regulation No 3094/86 which prohibits, pursuant to certain technical measures for the conservation of fishery resources, the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States, may not be applied to a vessel on the high seas, registered in a non-member country which is not a signatory to the Convention for the Conservation of Salmon in the North Atlantic. Nor may that provision be applied in respect of such a vessel sailing in the exclusive economic zone of a Member State or crossing the territorial waters of a Member State in so far as the vessel is exercising the right of innocent passage in those areas. Conversely, it may in principle be applied to such a vessel in the inland waters or in a port of a Member State.

4. The national court may in principle order the confiscation of a cargo of salmon caught in the areas referred to in Article 6(1)(b) of Regulation No 3094/86 prohibiting, pursuant to certain technical measures for the conservation of fishery resources, the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States, which is in transit in waters under Community jurisdiction and is kept aboard a vessel registered in a non-member country and belonging to a company established in that State, only when that vessel is in the inland waters or in a port of a Member State.

5. Community law contains no rules on compliance with the prohibition contained in Article 6(1)(b) of Regulation No 3094/86 which prohibits, pursuant to certain technical measures for the conservation of fishery resources, the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States, with respect to vessels from non-member countries which have entered a port of a Member State because they are in distress. It is for the national court to determine, in accordance with international law, the legal consequences flowing from such a situation.

In Case C-286/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kriminal-og Skifteret (Criminal and Probate Court), Hjoerring, for a preliminary ruling in the proceedings pending before that court between

Anklagemyndigheden [Public Prosecutor]

and

Peter Michael Poulsen,

Diva Navigation Corp.,

on the interpretation of Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 (OJ 1986 L 288, p. 1), laying down certain technical measures for the conservation of fishery resources,

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias and M. Zuleeg (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator

after considering the written observations submitted on behalf of:

° Peter Michael Poulsen and Diva Navigation Corp., by B. Nielsen and C. Dyvig, of the Copenhagen Bar;

° the Danish Government, by J. Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

° the Commission, by R.C. Fischer and H.P. Hartvig, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Peter Michael Poulsen and Diva Navigation Corp., the Danish Government, represented by J. Molde and T. Lehmann, Director in the Legal Service of the Ministry of Foreign Affairs, and the Commission, at the hearing on 21 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 31 March 1992,

gives the following

Judgment

Costs

40 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Kriminal- og Skifteret, by order of 10 August 1990, hereby rules:

1. A vessel registered in a non-member country may not be treated, for the purposes of Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, as a vessel having the nationality of a Member State on the ground that it has a genuine link with that Member State.

2. Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources may not be applied to the master and other crew members qua nationals of a Member State, irrespective of the State in which the vessel is registered and the sea area in which the vessel is located.

3. Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources may in principle be applied to a vessel registered in a non-member country only when that vessel is in the inland waters or in a port of a Member State.

4. The national court may in principle order the confiscation of a cargo of salmon caught in the areas referred to in Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, which is in transit in waters under Community jurisdiction and is kept aboard a vessel registered in a non-member country

and belonging to a company established in that State, only when that vessel is in the inland waters or in a port of a Member State.

5. Community law contains no rules on compliance with the prohibition contained in Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources with respect to vessels from non-member countries which have entered a port of a Member State because they are in distress. It is for the national court to determine, in accordance with international law, the legal consequences flowing from such a situation.

1 By order of 10 August 1990, received at the Court on 19 September 1990, the Kriminal- og Skifteret, Hjoerring, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of Article 6 (1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986, laying down certain technical measures for the conservation of fishery resources (OJ 1986 L 288, p. 1), (hereinafter "the Regulation").

2 These questions were raised in the course of criminal proceedings brought by the Anklagemyndigheden (Danish Public Prosecutor) against Peter Michael Poulsen (hereinafter "Mr Poulsen") and Diva Navigation Corp. (hereinafter "Diva Navigation"), who are being prosecuted on a charge that the crew of the vessel "Onkel Sam", of which Mr Poulsen is the master and Diva Navigation the owner, had retained, transported and stored on board salmon caught in the North Atlantic in contravention of the Regulation.

3 The "Onkel Sam" is registered in Panama and flies the Panamanian flag. It belongs to Diva Navigation, a company governed by Panamanian law, and wholly owned by a Danish national. Mr Poulsen is the master of the vessel; like the rest of the crew, he is Danish and is paid in Denmark. Between voyages, the vessel is normally berthed in a Danish port.

4 At the beginning of 1990, the "Onkel Sam" caught 22 332 kg of salmon in the North Atlantic outside the waters under the sovereignty and jurisdiction of the Member States. While under way to Poland in order to sell its cargo there, its carburettor became clogged and, in view of the difficult weather conditions, the master decided to head for a Danish port in order to carry out the necessary repairs. While the "Onkel Sam" was moored in that port, it was inspected by the Danish fishery officers, its cargo was seized and then sold on the Danish market, and its master and also its owner were summoned to appear before the Kriminal- og Skifteret to answer a charge that they had contravened Article 6(1)(b) of the Regulation.

5 According to Article 1, the Regulation concerns the catching and landing of fish stocks in all maritime waters under the sovereignty or jurisdiction of the Member States and within one of Regions 1 to 8 defined in the Regulation.

6 By derogation from this provision, Article 6(1) of the Regulation provides, with regard to salmon and sea trout, that, even where those fish have been caught outside waters under the sovereignty or jurisdiction of the Member States in Regions 1, 2, 3 and 4, as defined in Article 1, they may not be retained on board, transshipped, landed, transported, stored, sold, displayed or offered for sale, but must be returned immediately to the sea.

7 The Kriminal- og Skifteret, being uncertain whether that provision was applicable in the case in question, requested the Court to give a preliminary ruling on the five following questions:

(1) Must the prohibition in Article 6 of Regulation No 3094/86 be understood as covering all masters and possibly other crew members who are nationals of a Member State of the Communities, whatever the country in which the fishing vessel concerned is registered and whatever flag it flies, and regardless of where the vessel is located?

(2) Must the prohibition in Article 6 of Regulation No 3094/86 be understood as covering the owners

who are nationals of non-member countries, where catches are brought into Community territory only temporarily?

If the reply to question 1 is that the prohibition in Article 6 does not cover fishing by Community nationals on the high seas on board vessels registered in non-member countries, the Court is requested to answer the following questions:

(3) Must registration in a non-member country of a fishing vessel which undertakes activities contrary to Regulation No 3094/86 be respected in relation to the prohibition in Article 6, regard being had to the fact that:

° the vessel belongs to a Panamanian company wholly owned by an EC national;

° the master and the other crew members are EC nationals;

° the vessel is operated from a Member State of the Communities and

° between voyages, the vessel normally lies in a harbour in an EC country?

(4) If the ship' s registration must be respected, the Court is requested to state the areas in which a vessel registered in a non-member country falls within the prohibition on the transport and storage of salmon caught in the North Atlantic:

(a) when the vessel is in European Community fishery waters;

(b) when the vessel is in the territorial waters of a Member State;

(c) when the vessel is in the inland waters of a Member State; or

(d) not at all?

(5) If the ship' s registration must be respected and the prohibition on the transport and storage of salmon caught in the North Atlantic is applicable, the Court is requested to state whether European Community law contains rules on compliance with the prohibition in respect of vessels from non-member countries that have put into port in a Member State because of an emergency.

Is it relevant in this connection whether the emergency arose within the geographical scope of the prohibition or outside it?

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.

10 In this connexion, account must be taken of the Geneva Conventions of 29 April 1958 on the Territorial Sea and the Contiguous Zone (United Nations Treaty Series, vol. 516, p. 205), on the High Seas (United Nations Treaty Series, vol. 450, p. 11) and on Fishing and Conservation of the Living Resources of the High Seas (United Nations Treaty Series, vol. 559, p. 285), in so far as they codify general rules recognized by international custom, and also of the United Nations Convention of 10 December 1982 on the Law of the Sea (Third Conference of the United Nations on the Law of the Sea ° Official Documents, vol. XVII, 1984, Document A/Conf. 62/122 and corrections, hereinafter "the United Nations Convention on the Law of the Sea"). It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law (see judgments of the International Court of Justice in the Delimitation

of the Maritime Boundary in the Gulf of Maine Region Case, Canada v United States of America, ICJ [1984], p. 294, paragraph 94; Continental Shelf Case, Libyan Arab Jamahiriya v Malta, ICJ [1985], p. 30, paragraph 27; Military and Paramilitary Activity in and against Nicaragua Case, Nicaragua v United States of America, substantive issues, ICJ [1986], p. 111-112, paragraphs 212 and 214).

11 The object of the prohibition in question is to conserve protected species. Its basis is to be found in particular in a multilateral convention signed by the European Community in 1982, that is the Convention for the Conservation of Salmon in the North Atlantic (OJ 1982 L 378, p. 25), which prohibits fishing for salmon beyond the limits of the zones of fisheries jurisdiction of the coastal States. That Convention meets the obligation of all members of the international community to cooperate in conserving and managing the living resources of the high seas, as provided for by Article 118 of the United Nations Convention on the Law of the Sea. Moreover, Article 6 of the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas recognizes the interest of coastal States in the living resources in the part of the high sea adjacent to the waters within their jurisdiction. In the light of the aims of the prohibition laid down in Article 6(1)(b) of the Regulation, this provision must be interpreted so as to give it the greatest practical effect, within the limits of international law.

Nationality of the vessel

12 In its third question, the national court seeks to know whether a vessel registered in a non-member country may be treated, for the purpose of Article 6(1)(b) of the Regulation, as a vessel with the nationality of a Member State on the grounds that there is a genuine link between it and the Member State.

13 In answer to that question, under international law a vessel in principle has only one nationality, that of the State in which it is registered (see in particular Articles 5 and 6 of the Geneva Convention on the High Seas of 29 April 1958 and Articles 91 and 92 of the United Nations Convention on the Law of the Sea).

14 It follows that a Member State may not treat a vessel which is already registered in a non-member country and therefore has the nationality of that country as a vessel flying the flag of that Member State.

15 The fact that the sole link between a vessel and the State of which it holds the nationality is the administrative formality of registration cannot prevent the application of that rule. It was for the State that conferred its nationality in the first place to determine at its absolute discretion the conditions on which it would grant its nationality (see in particular Article 5 of the Geneva Convention on the High Seas of 29 April 1958 and also Article 91 of the United Nations Convention on the Law of the Sea).

16 It follows from these considerations that the answer to the third question must be that a vessel registered in a non-member country may not be treated, for the purpose of Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, as a vessel with the nationality of a Member State on the ground that it has a genuine link with that Member State.

Applicability of Article 6 to nationals of a Member State on board a vessel flying the flag of a non-member country

17 In the first question the national court asks whether Article 6(1)(b) of the Regulation can be applied to the master and other members of the crew on the ground that they are nationals of a Member State, regardless of the country in which the vessel is registered and of the sea area

where the vessel is located.

18 In that connection, it must be emphasized that the law governing the crew' s activities does not depend on the nationality of the crew members, but on the State in which the vessel is registered and, where appropriate, the sea area in which the boat is located.

19 Besides, nothing in the text or reasoning of the Regulation suggests that the European Community meant to impose obligations on Community nationals by virtue of its personal jurisdiction.

20 Consequently, the answer to the first question must be that Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, may not be applied to the master and other crew members qua nationals of a Member State, irrespective of the State in which the vessel is registered and the sea area in which the vessel is located.

Applicability of Article 6 in different sea areas

21 In its fourth question, the national court asks the Court to determine the sea areas in which Article 6(1)(b) of the Regulation is to be applied to a vessel registered in a non-member country.

22 In answer to that question, the abovementioned provision may not be applied to a vessel on the high seas registered in a non-member country, since in principle such a vessel is there governed only by the law of its flag.

23 It is true that in 1982 the European Community signed the abovementioned Convention for the Conservation of Salmon in the North Atlantic. However, that Convention may not be invoked against non-signatory States and cannot, therefore, be applied to vessels registered in those States.

24 As far as the other sea areas are concerned, the Community has the power to adopt rules classifying as illegal the transport and storage in the exclusive economic zone, the territorial sea, inland waters and ports of the Member States of salmon caught within the regions referred to in Article 6(1)(b) of the Regulation.

25 However, the jurisdiction of the coastal State in some of those areas is not absolute. Thus, although the territorial sea falls under the sovereignty of the coastal State, the latter must respect the right of innocent passage through it of vessels flying the flag of other States (Articles 14 to 23 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958; Articles 17 to 32 of the United Nations Convention on the Law of the Sea). As far as the exclusive economic zone is concerned, the coastal State must in exercising its powers observe in particular freedom of navigation (see Article 58(1) of the United Nations Convention on the Law of the Sea).

26 It follows that Community legislation may not be applied in respect of a vessel registered in a non-member country and sailing in the exclusive economic zone of a Member State, since that vessel enjoys freedom of navigation in that area.

27 Nor may it be applied in respect of such a vessel crossing the territorial waters of a Member State in so far as the vessel is exercising the right of innocent passage in those waters.

28 Conversely, Community legislation may be applied to it when it sails in the inland waters or, more especially, is in a port of a Member State, where it is generally subject to the unlimited jurisdiction of that State.

29 For those reasons, the answer to the fourth question must be that Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources may in principle be applied to a vessel registered in a non-member country only when that vessel is in the inland waters or in the port of a Member State.

Confiscation of the cargo

30 It is apparent from the order for reference that, in its second question, the national court seeks to ascertain whether it may order the confiscation of a cargo of salmon caught in the areas referred to in Article 6(1)(b) of the Regulation and kept on board a vessel registered in a non-member country and belonging to a company established in that State, where the cargo is in transit in waters under the jurisdiction of the European Community.

31 The confiscation of a cargo of fish forms part of the panoply of measures that Member States are bound to provide for in order to ensure that Community legislation is observed and to deprive those who contravene it of the financial benefit gained from such contravention. Confiscation is thus an ancillary measure which may be ordered only where there has been an infringement of Community legislation.

32 As is apparent from the answer given to the preceding questions, neither the nationality of the vessel' s owner nor the temporary nature of the cargo' s presence in waters under Community jurisdiction has any effect on the illegality of the transport.

33 Finally, since the prohibition on transporting and storing salmon caught in the areas mentioned in Article 6(1)(b) of the Regulation can in principle be applied to a vessel registered in a non-member country only when the vessel is in the inland waters or in the port of a Member State, confiscation of the cargo temporarily transported into waters under Community jurisdiction may be ordered only in that situation.

34 Consequently, the answer to the second question must be that the national court may in principle order the confiscation of a cargo of salmon caught in the areas referred to in Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, which is in transit in waters under Community jurisdiction and is kept aboard a vessel registered in a non-member country and belonging to a company established in that State, only when that vessel is in the inland waters or in the port of a Member State.

Existence of Community rules on distress

35 In its fifth question, the national court asks whether Community law contains rules concerning compliance with the prohibition contained in Article 6(1)(b) of the Regulation in the case of vessels from non-member countries which have entered a port of a Member State owing to a situation of distress.

36 As to that, none of the regulations adopted by the Council for the purposes of establishing or implementing a Community scheme for the conservation and management of fishery resources contains any provision allowing a vessel in a situation of distress to escape the prohibition.

37 Moreover, the question concerning the legal consequences of the situation of distress does not concern the determination of the sphere of application of Community legislation, but rather the implementation of that legislation by the authorities of the Member States.

38 In those circumstances, it is for the national court to determine, in accordance with international law, the legal consequences which flow, for the purpose of the abovementioned Article 6, from a situation of distress involving a vessel from a non-member country.

39 Therefore, the answer to the fifth question must be that Community law contains no rules on compliance with the prohibition contained in Article 6(1)(b) of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources, with respect to vessels from non-member countries which have entered a port of a Member State because they are in distress. It is for the national court to determine, in accordance with international law, the legal consequences flowing from such a situation.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1990 ; J ; judgment
PUBREF	European Court reports 1992 Page I-06019 Swedish special edition XIII Page I-00189 Finnish special edition XIII Page I-00191
DOC	1992/11/24
LODGED	1990/09/19
JURCIT	21982A0302(01) : N 11 23 31986R3094-A01 : N 5 31986R3094-A06P1LB : N 1 - 39
CONCERNS	Interprets 31986R3094-A06P1LB
SUB	Agriculture ; Fisheries policy
AUTLANG	Danish
OBSERV	Commission ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Kriminal- og Skifteretten i Hjørring, skrivelse af 10/08/1990 (186/1990) *P1* Kriminal- og Skifteretten i Hjørring, dom af 28/10/1993 (186/1990)
NOTES	Sanchez Rodríguez, Luis Ignacio: Revista de Instituciones Europeas 1993 p.141-153 Charles Le Bihan, Danielle: Revue trimestrielle de droit européen 1993 p.421-438 Cataldi, Giuseppe: Il Foro italiano 1993 IV Col.249-258 Brandtner, Barbara ; Folz, Hans-Peter: European Journal of International Law / Journal européen de droit international 1993 Vol.4 no 3 p.442-445 Slot, P.J.: Common Market Law Review 1994 p.147-153 Verhoeven, Joe: La loyauté : mélanges offerts à Etienne Cerexhe (Ed. Larcier - Bruxelles) 1997 p.407-425
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Joliet
DATES	of document: 24/11/1992 of application: 19/09/1990

Judgment of the Court
of 11 May 1989
Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA.
Reference for a preliminary ruling: Tribunal de grande instance de Bobigny - France.
Free movement of goods.
Case 25/88.

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Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Provision requiring the person responsible for placing a product on the market for the first time to verify its conformity with the rules regarding the health and safety of persons, fair trading and consumer protection - Whether permissible - Conditions - Proportionality of the obligation imposed on importers - Account to be taken of certificates issued by the authorities of the Member State of production

(EEC Treaty, Arts 30 and 36)

As Community law stands at present, a provision requiring the person responsible for placing a product on the national market for the first time to verify its conformity with the rules in force on the said market regarding the health and safety of persons, fair trading and consumer protection and rendering that person liable in criminal law for breach of that requirement is compatible with Articles 30 and 36 of the EEC Treaty on condition that its application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the objective pursued, having regard, on the one hand, to the public interest in question and, on the other, to the means of proof normally available to an importer . With regard, in particular, to the verification of information on a product' s composition supplied to consumers when the product is released for sale, the importer must be entitled to rely on certificates issued by the authorities of the Member State of production or by a laboratory approved by the said authorities for that purpose, or, if the legislation of that Member State does not require the production of such certificates, on other attestations providing a like degree of assurance.

In Case 25/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de grande instance de Bobigny for a preliminary ruling in the criminal proceedings pending before that court against

Esther Renée Bouchara, née Wurmser, and Norlaine SA

on the interpretation of Articles 30 and 36 of the Treaty,

THE COURT

composed of : O. Due, President, R. Joliet, T. F. O' Higgins and F . Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F . A. Schockweiler, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General : W. Van Gerven

Registrar : H. A. Ruehl, Principal Administrator

after considering the observations submitted on behalf of

Esther Renée Bouchara, defendant in the main proceedings, and the parties civilly liable, by J. P. Sulzer, of the Paris Bar,

the French Republic, in the written procedure, by E. Belliard, Deputy Director at the Directorate of Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by M. Giacomini, Secretary for Foreign Affairs in the Directorate of Legal Affairs of the Ministry of Foreign

Affairs, acting as Deputy Agent, and in the oral procedure, by M. Giacomini, acting as Agent, assisted by Mr Tibilan, an official of the Ministry of Finance (Anti-Fraud Department) and Mr Dobking, an official of the Ministry of Justice,

the Commission of the European Communities, by R. Wainwright, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 22 November 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 December 1988,

gives the following

Judgment

1 By orderof 29 October 1987, which was received at the Court on 25 January 1988, the tribunal de grande instance de Bobigny (Regional Court, Bobigny), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30 and 36 of the Treaty in order to determine the compatibility with Community law of a French legislative provision requiring importers to verify the conformity of the imported products with the rules in force and imposing criminal liability for failure to do so .

2 Those questions arose in criminal proceedings brought against the management of Norlaine SA, charged with the offence of deceit for having offered for sale or caused to be offered for sale textile products bearing false information as to their composition, an offence punishable under the Law of 1 August 1905 on frauds and misrepresentation with respect to products and services, as amended by Law No 83-660 of 21 July 1983 on consumer protection (Journal officiel de la République française, p. 2262).

3 It is apparent from the documents before the Court that in 1984, Norlaine, the buying office for shops trading under the "Bouchara" name, imported fabrics supplied by Italian and German manufacturers with invoices indicating the composition of the products. When the company sold those fabrics to its customers, it reproduced on its invoices the information provided by its foreign suppliers, which was subsequently placed on the fabrics sold to consumers by the "Bouchara" shops .

4 After having samples taken in one of those shops analysed, the Consumer and Prevention of Fraud Department discovered that the composition of the fabrics did not correspond to what was indicated. The ministère public (Public Prosecutor' s Department) therefore brought criminal proceedings before the tribunal de grande instance, Bobigny, on the basis, in particular, of Article 11-4 of the above-mentioned law, which provides as follows :

> "Products must, upon being placed on the market for the first time, conform to the rules in force regarding the health and safety of persons, fair trading and consumer protection.

It is therefore the duty of the person responsible for placing the product on the market for the first time to verify its conformity with the rules in force."

5 Since the accused alleged that that provision was incompatible with Article 30 of the EEC Treaty, the court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling :

> "(1) Is Article 11-4 of the Law of 1 August 1905, as amended, on frauds and misrepresentation with respect to products or services compatible with Article 30 of the Treaty of Rome prohibiting quantitative restrictions on imports and all measures having equivalent effect?

(2) If the first question is answered in the negative, do the French rules constitute an exception to Article 30 of the Treaty of Rome justified by Article 36 of that Treaty?"

6 Reference is made to the Report for the Hearing for a fuller account of the legal background to and facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 In its questions, the national court seeks essentially to ascertain whether the application to products imported from another Member State of a provision requiring the person who first places products on the national market verify their conformity with the rules in force on that market regarding the health and safety of persons, fair trading and consumer protection and imposing criminal liability if they fail to do so, is compatible with Articles 30 and 36 of the EEC Treaty .

8 According to Article 30 of the Treaty, "quantitative restrictions on imports and all measures having equivalent effect shall... be prohibited between Member States ". According to the settled case-law of the Court (see, initially, the judgment of 11 July 1974 in Case 8/74 Procureur du Roi v Dassonville ((1974)) ECR 837), all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

9 It must be accepted that a rule requiring the person who places a product on the national market for the first time to verify its conformity with the rules in force on that market could induce traders who distribute similar domestic and imported products to prefer the domestic products, in regard to which verification is the responsibility not of the distributor but of the manufacturer. It must therefore be considered whether the application of such a rule to products imported from another Member State may none the less be justified in the light of Articles 30 and 36 of the Treaty.

10 In that regard, it should first be noted that among the general interests expressly protected by the national provision at issue in the main proceedings, only the protection of the health and safety of persons is covered by Article 36. On the other hand, fair trading and consumer protection are among the imperative requirements which, in accordance with a line of decisions of the Court (see, initially, the judgment of 20 February 1979 in Case 120/78 Rewe v Bundesmonopolverwaltung fuer Branntwein ((1979)) ECR 649 (" Cassis de Dijon ")), may justify a measure liable to hinder intra-Community trade, on condition that that measure is applied without distinction to domestic and imported products.

11 A measure which, in regard both to domestic products and imported products, imposes an obligation to verify on the person who first places the product on the market is, in principle, applicable without distinction to both categories of products. It may therefore be justified both under Article 36 and under Article 30 of the Treaty as interpreted by the Court in the abovementioned decisions.

12 However, the justification under the abovementioned provisions of the Treaty of a unilateral measure impeding intra-Community trade presupposes that the sphere in question is not the subject of Community rules. In that regard, it should be noted that there are no general rules at the Community level concerning verification of the conformity of products with the rules in force on the relevant market . Although there are harmonizing directives in regard to misleading advertising and the designation of certain products, their provisions do not govern the question at issue in the main proceedings. It follows that, as Community law stands at present, that question is still subject to national law within the limits laid down in Articles 30 and 36 of the Treaty.

13 For a national rule capable of having a restrictive effect on imports to be justified under Article 36 of the Treaty or on the basis of the imperative requirements mentioned above, it must however be necessary for the purposes of providing effective protection of the public interest involved and it must not be possible to achieve that objective by measures less restrictive of intra-Community

trade. It must therefore be considered whether a national provision such as that concerned in the main proceedings is in accordance with the principle of proportionality thus expressed.

14 As an instance of a measure less restrictive of trade, the defendants in the main proceedings and the Commission refer to the possibility of bringing a criminal prosecution against the foreign manufacturer before the courts of the Member State of importation in the same way as against a domestic manufacturer.

15 In that regard, it should be pointed out that even when the criminal law of the Member State of importation provides for such a possibility, its application presupposes that exports to that State are carried out by the manufacturer himself and not by a trader independent of him. Moreover, as Community law stands at present, there is no obligation to enforce a criminal sentence imposed by the courts of another Member State. In those circumstances, the possibility of imposing criminal liability on a foreign manufacturer who has not carried out the same verification as is required of a domestic manufacturer cannot suffice to achieve the objective pursued by a provision such as that at issue in the main proceedings.

16 Even if, in principle, an obligation on the person who places a product on a national market for the first time to verify the conformity of that product with the rules in force on the said market may, as Community law stands at present, be justified on grounds concerning the health and safety of persons, fair trading and consumer protection, the application of such an obligation to products manufactured in another Member State must, in accordance with the principle of proportionality, take account, on the one hand, of the importance of the public interest in question and, on the other, of the means of proof normally available to an importer.

17 In regard in particular to the verification of information supplied to consumers as to the composition of a product when it is released for sale, the importer may not, as a general rule, be required to have the product analysed for the purposes of that verification. Such an obligation would impose on the importer a burden considerably greater than that imposed on a domestic manufacturer, who himself has control of the composition of the product, and it would often be disproportionate to the objective to be achieved, having regard to the existence of other forms of verification equally reliable and less burdensome.

18 As the Court has held, in particular in its judgment of 17 December 1981 in Case 272/80 Frans-Nederlandse Maatschappij voor Biologische Produkten ((1981)) ECR 3277, although Member States are not prohibited from requiring prior approval of certain products, even if those products have already been approved in another Member State, the authorities of the State of importation are however not entitled unnecessarily to require technical or chemical analyses when the same analyses or tests have already been carried out in another Member State and their results are available to those authorities. That rule is a particular application of a more general principle of mutual trust between the authorities of the Member States and must therefore also apply when the verification is the responsibility of the importer himself . It follows that the latter must be able to discharge his responsibility by producing a certificate concerning the composition of the product issued by the authorities of the Member State of production or by a laboratory authorized to issue such certificates by those authorities.

19 With regard to products in regard to which the legislation of the Member State of production does not require official certificates concerning the composition of the product to be supplied, the importer must also be entitled to rely on other attestations providing a like degree of assurance. It is for the national court to determine whether, having regard to all the circumstances of the case, the attestations provided by the importer are sufficient to establish that the latter has fulfilled his obligation to verify.

20 The reply to the questions referred to the Court for a preliminary ruling should therefore be that, as Community law now stands, a provision requiring the person responsible for placing a product on the national market for the first time to verify its conformity with the rules in force on the said market regarding the health and safety of persons, fair trading and consumer protection and rendering that person liable in criminal law for breach of that requirement is compatible with Articles 30 and 36 of the EEC Treaty on condition that its application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the objective pursued, having regard, on the one hand, to the public interest in question and, on the other, to the means of proof normally available to an importer. With regard in particular to the verification of information on a product' s composition supplied to consumers when the product is released for sale, the importer must be entitled to rely on certificates issued by the authorities of the Member State of production or by a laboratory approved by the said authorities for that purpose, or, if the legislation of that Member State does not require the production of such certificates, on other attestations providing like degree of assurance .

Costs

21 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the tribunal de grande instance de Bobigny, by order of 29 October 1987, hereby rules :

As Community law stands at present, a provision requiring the person responsible for placing a product on the national market for the first time to verify its conformity with the rules in force on the said market regarding the health and safety of persons, fair trading and consumer protection and rendering that person liable in criminal law for breach of that requirement is compatible with Articles 30 and 36 of the EEC Treaty on condition that its application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the objective pursued, having regard, on the one hand, to the public interest in question and, on the other, to the means of proof normally available to an importer . With regard, in particular, to the verification of information on a product' s composition supplied to consumers when the product is released for sale, the importer must be entitled to rely on certificates issued by the authorities of the Member State of production or by a laboratory approved by the said authorities for that purpose, or, if the legislation of that Member State does not require the production of such certificates, on other attestations providing a like degree of assurance.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1989 Page 01105
DOC	1989/05/11
LODGED	1988/01/25
JURCIT	11957E030 : N 1 5 - 20 11957E036 : N 1 5 - 20 61974J0008 : N 8 61978J0120 : N 10 61980J0272 : N 18
CONCERNS	Interprets 11957E030 Interprets 11957E036
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect
AUTLANG	French
OBSERV	France ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A9* Tribunal de grande instance de Bobigny, 16e chambre correctionnelle, jugement du 29/10/87 (85/46 354)
NOTES	Berr, Claude J.: Journal du droit international 1990 p.468-469 Merola, Massimo: Il Foro italiano 1990 IV Col.261-275 Keur, D.J.: S.E.W. ; Sociaal-economische wetgeving 1991 p.571-575
PROCEDU	Reference for a preliminary ruling
ADVGEN	Van Gerven
JUDGRAP	Due
DATES	of document: 11/05/1989 of application: 25/01/1988

Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters

assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 43 and 235 thereof,

Having regard to Council Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (1), and in particular Article 8 (3) thereof,

Having regard to the proposal from the Commission (2),

Having regard to the opinion of the European Parliament (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas combating fraud in the context of the customs union and the common agricultural policy calls for close cooperation between the administrative authorities responsible in each Member State for the application of provisions adopted in those fields; whereas it also calls for appropriate cooperation between these national authorities and the Commission, which is responsible for ensuring the application of the Treaty and the provisions adopted by virtue thereof; whereas effective cooperation in this field strengthens the protection of the financial interests of the Community;

Whereas rules should therefore be drawn up whereby the Member States' administrative authorities assist each other and cooperate with the Commission in order to guarantee the proper application of customs and agricultural regulations and legal protection for the Community's financial interests, in particular by preventing and investigating breaches of those regulations and by investigating operations which are or appear contrary to those regulations;

Whereas Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (5) established close cooperation between the said authorities and the Commission; whereas that system has proved effective;

Whereas it is nevertheless necessary, in the light of the experience gained, to replace Regulation (EEC) No 1468/81 in its entirety with the aim of strengthening cooperation both among the administrative authorities of the Member States responsible for the application of the provisions adopted in the field of customs union and the common agricultural policy and between those authorities and the Commission; whereas, to that end, new rules should be laid down at Community level;

Whereas the introduction of Community provisions on mutual assistance between Member States' administrations and their cooperation with the Commission in order to guarantee the proper application of customs or agricultural regulations is without prejudice to the application of the 1967 Convention for mutual assistance between customs administrations in fields which remain the sole province of the Member States; whereas these Community provisions are not such as to affect the application in the Member States of rules on judicial cooperation in criminal cases;

Whereas, furthermore, the general Community rules establishing a system of mutual assistance and cooperation among the administrative authorities of the Member States and between them and the

Commission do not apply where they overlap with those laid down by specific regulations, save where the general rules improve or reinforce administrative cooperation; whereas, in particular, the implementation of the customs information system does not in any way affect the Member States' obligations to provide information to the Commission, laid down inter alia under Regulations (EEC, Euratom) No 1552/89 (6) and (EEC) No 595/91 (7), or the established use of fraud information sheets to circulate information of Community interest;

Whereas greater cooperation between the Member States requires the coordination of enquiries and other activities carried out by the bodies concerned; whereas it is therefore essential that the Commission should be given more detailed information concerning such activities by the Member States;

Whereas the Commission must ensure that economic operators are treated equally and that the application by the Member States of the mutual administrative assistance system does not lead to discrimination between economic operators in different Member States;

Whereas it is appropriate to define the Member States' obligations under the mutual administrative assistance system in respect of cases in which representatives of the Member States' national administrations conduct enquiries concerning the application of customs or agricultural legislation with a mandate from, or under the authority of, the legal authorities;

Whereas the powers of national representatives conducting enquiries in other Member States should be defined; whereas provision should also be made for Commission representatives to be present, where justified, at national enquiries concerning mutual administrative assistance, and for their powers to be defined;

Whereas it is necessary for the successful functioning of administrative cooperation that the Commission be informed of information exchanged between Member States and third countries in cases of particular interest for the Community;

Whereas, with a view to securing the rapid and systematic exchange of information forwarded to the Commission, there is a need to set up a computerized customs information system at Community level; whereas in that context sensitive data concerning frauds and irregularities in the customs and agricultural domains should be stored in a central database accessible to the Member States, while ensuring that the confidential nature of the information exchanged, in particular data of a personal nature, is respected; whereas, given the justifiable sensitivity of the issue, there should be clear and transparent rules to protect the freedom of the individual;

Whereas customs authorities have daily to apply both Community and non-Community provisions; whereas it is therefore desirable to have available a single infrastructure for applying these provisions;

Whereas the information exchanged may concern physical persons and this Regulation must therefore implement, in its scope, the principles of protection of persons with regard to processing, by automatic means or otherwise, of personal data; whereas these principles, as set out in 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 (8) should themselves, in compliance with the terms and conditions of this Directive, be specified and supplemented in this Regulation; whereas pending implementation of the national measures transposing that Directive certain Member States which have no protection rules for personal data exchanged by non-automatic means should be exempted from applying the provisions of this Regulation concerning the non-automatic exchange of data;

Whereas, in order to take part in the Customs Information System, the Member States and the Commission must adopt legislation on the rights and freedoms of individuals with regard to the processing of personal data; whereas, pending implementation of the national measures transposing Directive 95/46/EC,

it is important that the Member States and the Commission guarantee a level of protection based on the principles contained in that Directive;

Whereas, in order to ensure that the rights of the persons concerned are sufficiently protected, there needs to be a guarantee of independent supervision of the processing of the personal data in the Customs Information System both a Member State level and in respect of the Commission;

Whereas the Commission, in close cooperation with the Member States, should facilitate the installation and management of computer systems in the Member States;

Whereas the Commission should be notified of legal and administrative proceedings brought for infringements of the law on customs or agricultural matters;

Whereas, with the aim of implementing certain provisions of this Regulation, enabling the installation and functioning of the Customs Information System and examining possible problems in connection with the development of administrative cooperation as provided for in this Regulation, it is necessary to establish a Committee;

Whereas the provisions of this Regulation refer both to the application of the rules of the common agricultural policy and to the application of customs legislation; whereas the system set up under this Regulation constitutes an integral Community entity; whereas, since the provisions of the Treaty specifically covering customs matters do not empower the Community to set up such a system, it is necessary to invoke Article 235,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation lays down the ways in which the administrative authorities responsible for implementation of the legislation on customs and agricultural matters in the Member States shall cooperate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system.

2. The provisions of this Regulation shall not apply where they overlap with the specific provisions of other legislation on mutual assistance between Member States' administrative authorities and cooperation between the latter and the Commission for the application of customs or agricultural legislation.

Article 2

1. For the purposes of this Regulation:

- 'customs legislation` means the body of Community provisions and the associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9 (2) of the Treaty or goods subject to additional controls or investigations for the purposes of establishing their Community status,
- 'agricultural legislation` means the body of provisions adopted under the common agricultural policy and the special rules adopted with regard to goods resulting from the processing of agricultural products,

- 'applicant authority` means the competent authority of a Member State which makes a request for assistance,
- 'requested authority` means the competent authority of a Member State to which a request for assistance is made,
- 'administrative enquiry` means all controls, checks and other action taken by the staff of the administrative authorities specified in Article 1 (1) in the performance of their duties with a view to ensuring proper application of customs and agricultural legislation and, where necessary, checking the irregular nature of operations which appear to breach that legislation, except action taken at the request of or under a direct mandate from a judicial authority; the expression 'administrative enquiry` also covers the Community missions referred to in Article 20,
- 'personal data` means all information relating to an identified or identifiable individual; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity.

2. Each Member State shall communicate to the other Member States and the Commission a list of the competent authorities it has appointed for the purposes of applying this Regulation.

For the purposes of this Regulation 'competent authorities` means the authorities appointed in accordance with the preceding subparagraph.

Article 3

Where national authorities decide, in response to a request for administrative assistance or a communication based on this Regulation, to take action involving measures which may be implemented only with the authorization or at the demand of a judicial authority:

- any information thus obtained concerning the application of customs and agricultural legislation, or at least
- that part of the file required to put a stop to a fraudulent practice,

shall be communicated as part of the administrative cooperation provided for by this Regulation.

However, any such communication must have the prior authorization of the judicial authority if the necessity of such authorization derives from national law.

TITLE I

ASSISTANCE ON REQUEST

Article 4

1. At the request of the applicant authority, the requested authority shall transmit to it any information which may enable it to ensure compliance with the provisions of customs or agricultural legislation, and in particular those concerning:

- the application of customs duties and charges having equivalent effect together with agricultural levies and other charges provided for under the common agricultural policy or the special arrangements applicable to certain goods resulting from the processing of agricultural products,

- operations forming part of the system of financing by the European Agricultural Guidance and Guarantee Fund.

2. In order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own country.

Article 5

At the request of the applicant authority, the requested authority shall supply it with any attestation, document or certified true copy of a document in its possession or obtained in the manner referred to in Article 4 (2) which relates to operations covered by customs or agricultural legislation.

Article 6

1. At the request of the applicant authority, the requested authority shall, while observing the rules in force in the Member State in which it is based, notify the addressee or have it notified of all instruments or decisions which emanate from the administrative authorities and concern the application of customs or agricultural legislation.

2. Requests for notification, mentioning the subject of the instrument or decision to be communicated, shall be accompanied by a translation in the official language or an official language of the Member State in which the requested authority is based, without prejudice to the latter's right to waive such a translation.

Article 7

At the request of the applicant authority, the requested authority shall as far as possible keep a special watch or arrange for a special watch to be kept within its operational area:

(a) on persons, and more particularly their movements, where there are reasonable grounds for believing that they are breaching customs or agricultural legislation;

(b) on places where goods are stored in a way that gives grounds to suspect that they are intended to supply operations contrary to customs or agricultural legislation;

(c) on the movements of goods indicated as being the object of potential breaches of customs or agricultural legislation;

(d) on means of transport, where there are reasonable grounds for believing that they are being used to carry out operations in breach of customs or agricultural legislation.

Article 8

At the request of the applicant authority, the requested authority shall make available any information in its possession or obtained in the manner referred to in Article 4 (2), and particularly reports and other documents or certified true copies or extracts thereof, concerning operations detected

or planned which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation or, where applicable, concerning the findings of the special watch carried out pursuant to Article 7.

However, original documents and items shall be provided only where this is not contrary to the legislation in force in the Member State in which the requested authority is based.

Article 9

1. The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, the appropriate administrative enquiries concerning operations which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation.

The requested authority or the administrative authority to which it has recourse shall conduct administrative enquiries as though acting on its own account or at the request of another authority in its own country.

The requested authority shall communicate the results of such administrative enquiries to the applicant authority.

2. By agreement between the applicant authority and the requested authority, officials appointed by the applicant authority may be present at the administrative enquiries referred to in paragraph 1.

Administrative enquiries shall at all times be carried out by staff of the requested authority. The applicant authority's staff may not, of their own initiative, assume powers of inspection conferred on officials of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out.

In so far as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, the applicant authority's staff shall not take part in such acts. In any event, they shall not participate in particular in searches of premises or the formal questioning of persons under criminal law. They shall, however, have access to the information thus obtained subject to the conditions laid down in Article 3.

Article 10

By agreement between the applicant authority and the requested authority and in accordance with the arrangements laid down by the latter, officials duly authorized by the applicant authority may obtain, from the offices where the administrative authorities of the Member State in which the requested authority is based exercise their functions, information concerning the application of the law on customs and agricultural matters which is needed by the applicant authority and which is derived from documentation to which the staff of those offices have access. These officials shall be authorized to take copies of the said documentation.

Article 11

Staff of the applicant authority present in another Member State in accordance with Articles 9 and 10 must at all times be able to produce written authority stating their identity and their official functions.

Article 12

Findings, certificates, information, documents, certified true copies and any intelligence obtained by the staff of the requested authority and communicated to the applicant authority in the course of the assistance provided for in Articles 4 to 11 may be invoked as evidence by the competent bodies of the Member States of the applicant authority.

TITLE II

SPONTANEOUS ASSISTANCE

Article 13

The competent authorities of each Member State shall, as laid down in Articles 14 and 15, provide assistance to the competent authorities of the other Member States without prior request.

Article 14

Where they consider it useful for ensuring compliance with customs or agricultural legislation, each Member State's competent authorities shall:

(a) as far as is possible keep, or have kept, the special watch described in Article 7;

(b) communicate to the competent authorities of the other Member States concerned all information in their possession, and in particular reports and other documents or certified true copies or extracts thereof, concerning operations which constitute, or appear to them to constitute, breaches of customs or agricultural legislation.

Article 15

The competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all relevant information concerning operations which constitute, or appear to them to constitute, breaches of customs or agricultural legislation, and in particular concerning the goods involved and new ways and means of carrying out such operations.

Article 16

Information obtained by staff of one Member State and communicated to another Member State in the course of the assistance provided for in Articles 13 to 15 may be invoked as evidence by the competent bodies of the Member State receiving the information.

TITLE III

RELATIONS WITH THE COMMISSION

Article 17

1. The competent authorities of each Member State shall communicate to the Commission as soon as it is available to them:

(a) any information they consider relevant concerning:

- goods which have been or are suspected of having been the object of breaches of customs or agricultural legislation,
- methods or practices used or suspected of having been used to breach customs or agricultural legislation,
- requests for assistance, action taken and information exchanged in application of Articles 4 to 16 which are capable of revealing fraudulent tendencies in the field of customs and agriculture;

(b) any information on shortcomings or gaps in customs and agricultural legislation that become apparent or may be deduced from the application of that legislation.

2. The Commission shall communicate to the competent authorities in each Member State, as soon as it becomes available, any information that would help them to enforce customs or agricultural legislation.

Article 18

1. Where a Member State's competent authorities become aware of operations which constitute, or appear to constitute, breaches of customs or agricultural legislation that are of particular relevance at Community level, and especially:

- where they have, or might have, ramifications in other Member States, or
- where it appears likely to the above authorities that similar operations have also been carried out in other Member States,

they shall communicate to the Commission as soon as possible, either on their own initiative or in response to a reasoned request from the Commission, any relevant information, be it in the form of documents or copies or extracts thereof, needed to determine the facts so that the Commission may coordinate the steps taken by the Member States.

The Commission shall convey this information to the competent authorities of the other Member States.

2. Where a Member State's competent authorities invoke paragraph 1, they need not communicate information as provided in Articles 14 (b) and 15 to the competent authorities of the other member States concerned.

3. In response to a reasoned request from the Commission, the Member State's competent authorities shall act in the manner laid down in Articles 4 to 8.

4. Where the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall

at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions laid down in Articles 9 (2) and 11 of this Regulation.

The Member State or States concerned shall, as soon as possible, communicate to the Commission the findings of the enquiry.

5. Officials of the Commission may collect the information specified in Article 10 under conditions laid down in that Article by common accord.

6. This Article is without prejudice to the Commission's right to information and scrutiny by virtue of other legislation in force.

TITLE IV

RELATIONS WITH THIRD COUNTRIES

Article 19

Provided the third country concerned has given a legal undertaking to provide the assistance required to gather proof of the irregular nature of operations which appear to constitute breaches of customs or agricultural legislation or to determine the scope of operations which have been found to constitute breaches of that legislation, information obtained under this Regulation may be communicated to that third country as part of a concerted action, subject to the agreement of the competent authorities supplying the information, in accordance with their internal provisions concerning the communication of personal data to third countries.

The information shall be communicated either by the Commission or by the Member States as part of the concerted action referred to in the first paragraph; in either case appropriate steps shall be taken in the third country concerned to ensure a degree of protection equivalent to that laid down by Article 45 (1) and (2).

Article 20

1. In pursuit of the objectives of this Regulation, the Commission may, under the conditions laid down in Article 19, conduct Community administrative and investigative cooperation missions in third countries in coordination and close cooperation with the competent authorities of the Member States.

2. The Community missions to third countries referred to in paragraph 1 shall be governed by the following conditions:

(a) they may be undertaken at the Commission's initiative, where appropriate on the basis of information supplied by the European Parliament, or at the request of one or more Member States;

(b) they shall be carried out by Commission officials appointed for that purpose and by officials appointed for that purpose by the Member State(s) concerned;

(c) they may also, by agreement with the Commission and the Member States concerned, be carried out on behalf of the Community by officials of a Member State, in particular under a bilateral assistance agreement with a third country; in that event the Commission shall be informed of the results of the mission;

(d) mission expenses shall be paid by the Commission.

3. The Commission shall inform the Member States and the European Parliament of the results of missions carried out pursuant to this Article.

Article 21

1. The findings and information obtained in the course of the Community missions referred to in Article 20 of this Regulation, and in particular documents passed on by the competent authorities of the third countries concerned, shall be handled in accordance with Article 45 of this Regulation.

2. Article 12 shall apply mutatis mutandis to the findings and information referred to in paragraph 1.

3. For the purposes of their use pursuant to Article 12, original documents obtained or certified true copies thereof shall be forwarded by the Commission to the competent authorities of the Member States if they so request.

Article 22

Member States shall notify the Commission of information exchanged within the framework of mutual administrative assistance with third countries wherever, within the meaning of Article 18 (1), it is particularly relevant to the effectiveness of customs or agricultural legislation pursuant to this Regulation and the information falls within the scope of this Regulation.

TITLE V

CUSTOMS INFORMATION SYSTEM

Chapter 1

Establishment of a Customs Information System

Article 23

1. An automated information system, the 'Customs Information System`, hereinafter referred to as the 'CIS`, is hereby established to meet the requirements of the administrative authorities responsible for applying the legislation on customs or agricultural matters, as well as those of the Commission.

2. The aim of the CIS, in accordance with the provisions of this Regulation, shall be to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation, by increasing, through more rapid dissemination of information, the effectiveness of the cooperation and control procedures of the competent authorities referred to in this Regulation.

3. The customs authorities of the Member States may use the technical infrastructure of the CIS in the performance of their duties in the framework of the customs cooperation referred to in Article K.1 (8) of the Treaty on European Union.

In such a case, the Commission shall ensure the technical management of the infrastructure.

4. Those operations in connection with the application of agricultural regulations which require the introduction of information into the CIS shall be determined by the Commission in accordance with the procedure set out in Article 43 (2).

5. The exchange of information provided for under Articles 17 and 18 is not covered by the provisions of this Title.

6. The Member States and the Commission, hereinafter referred to as the 'CIS partners`, shall take part in the CIS under the conditions laid down in this Title.

Chapter 2

Operation and use of the CIS

Article 24

The CIS shall consist of a central database facility and it shall be accessible via terminals in each Member State and at the Commission. It shall comprise exclusively data necessary to fulfil its aim as stated in Article 23 (2), including personal data, in the following categories:

(a) commodities;

(b) means of transport;

(c) businesses;

(d) persons;

(e) fraud trends;

(f) availability of expertise.

Article 25

The items to be included in the CIS relating to each of categories (a) to (f) in Article 24 shall be determined in accordance with the procedure provided for in Article 43 (2) to the extent that this is necessary to achieve the aim of the System. No items of personal data shall be included in any event in categories (e) and (f) of Article 24. In categories (a) to (d) of Article 24 the items to be included in respect of personal data shall comprise no more than:

(a) name, maiden name, forenames and aliases;

(b) date and place of birth;

(c) nationality;

(d) sex;

(e) any particular objective and permanent physical characteristics;

(f) reason for inclusion of data;

(g) suggested action;

(h) a warning code indicating any history of being armed, violent or escaping;

(i) registration number of the means of transport.

In all cases, personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning the health or sex life of an individual shall not be included.

Article 26

The following principles must be observed in the implementation of the CIS where personal data are concerned:

(a) collection and any other operation for processing personal data must be carried out fairly and lawfully;

(b) data must be collected for the purposes defined in Article 23 (2) and not subsequently processed in a manner incompatible with those purposes;

(c) data must be adequate, relevant and not excessive in relation to the purposes for which they are processed;

(d) data must be accurate and, where necessary, kept up to date;

(e) data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes in view.

Article 27

1. Data in categories (a) to (d) of Article 24 shall be included in the CIS only for the purpose of sighting and reporting, discreet surveillance or specific checks.

2. For the purposes of the actions referred to in paragraph 1, personal data within any of categories (a) to (d) of Article 24 may be included in the CIS only if, especially on the basis of prior illegal activities, there is evidence to suggest that the person concerned has committed, is committing or will commit actions which are in breach of customs or agricultural legislation and which are of particular relevance at Community level.

Article 28

1. If the actions referred to in Article 27 (1) are carried out, the following information may, in whole or in part, be collected and transmitted to the CIS partner which suggested the actions:

(a) the fact that the commodity, means of transport, business or person reported has been found;

(b) the place, time and reason for the check;

(c) route and destination of the journey;

(d) persons accompanying the person concerned or occupants of the means of transport;

(e) means of transport used;

(f) objects carried;

(g) the circumstances under which the commodity, means of transport, business or person was found.

When such information is collected in the course of discreet surveillance, steps must be taken to ensure that the secret nature of the surveillance is not jeopardized.

2. In the context of the specific checks referred to in Article 27 (1), persons, means of transport and objects may be searched to the extent permissible and in accordance with the laws, regulations and procedures of the Member State in which the search takes place. If the specific checks are not permitted by the law of a Member State, they shall automatically be converted by that Member State into sighting and reporting or discreet surveillance.

Article 29

1. Direct access to data included in the CIS shall be reserved exclusively for the national authorities designated by each Member State and the departments designated by the Commission. These national authorities shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the aim stated in Article 23 (2).

2. Each Member State shall send the Commission a list of its designated competent authorities which have direct access to the CIS stating, for each authority, to which data it may have access and for what purposes.

The Commission shall inform the other Member States accordingly. It shall also inform all the Member States of the corresponding details concerning the Commission departments authorized to have access to the CIS.

The list of national authorities and Commission departments thus designated shall be published for information by the Commission in the Official Journal of the European Communities.

3. Notwithstanding the provisions of paragraphs 1 and 2, the Council, acting on a proposal from the Commission, may decide to permit access to the CIS by international or regional organizations, provided that, where relevant, a protocol is at the same time concluded with those organizations in conformity with Article 7 (3) of the Convention between Member States of the Community on the use of information technology for customs purposes. In reaching the decision account shall be taken in particular of any existing bilateral or Community arrangements and of the adequacy of the level of data protection.

Article 30

1. CIS partners may use data obtained from the CIS only in order to achieve the aim stated in Article 23 (2); however, they may use it for administrative or other purposes with the prior authorization of the CIS partner which introduced the data into the system subject to conditions imposed by it or, where applicable, the Commission, which included it in the System. Such other use shall be in accordance with the laws, regulations and procedures of the Member State which seeks to use it and, where appropriate, the corresponding provisions applicable to the Commission in this connection and should take into account the principles set out in the Annex.

2. Without prejudice to paragraphs 1 and 4 of this Article and Article 29 (3), data obtained from the CIS shall be used only by national authorities or departments in each Member State and by departments designated by the Commission competent, in accordance with the laws, regulations and procedures applicable to them, to act in order to achieve the aim stated in Article 23 (2).

3. Each Member State shall send the Commission a list of the authorities or departments referred to in paragraph 2.

The Commission shall inform the other Member States accordingly. It shall also inform all the Member States of the corresponding details concerning the Commission departments authorized to have access to the CIS.

The list of the authorities or departments thus designated shall be published for information by the Commission in the Official Journal of the European Communities.

4. Data obtained from the CIS may, with the prior authorization of, and subject to any conditions imposed by, the Member State which included them in the System, be communicated for use by national authorities other than those referred to in paragraph 2, third countries and international or regional organizations wishing to make use of them. Each Member State shall take special measures to ensure the security of such data when they are being transmitted or supplied to departments located outside its territory.

The provisions referred to in the first subparagraph shall apply mutatis mutandis to the Commission where it has entered the data in the System.

Article 31

1. The inclusion of data in the CIS shall be governed by the laws, regulations and procedures of the supplying Member State and, where appropriate, the corresponding provisions applicable to the Commission in this connection, unless this Regulation lays down more stringent provisions.

2. The processing of data obtained from the CIS, including their use or performance of any action under Article 27 (1) suggested by the supplying CIS partner, shall be governed by the laws, regulations and procedures of the Member State processing or using such data and the corresponding provisions applicable to the Commission in this connection, unless this Regulation lays down more stringent provisions.

Chapter 3

Amendment of data

Article 32

1. Only the supplying CIS partner shall have the right to amend, supplement, correct or delete data which it has included in the CIS.

2. Should a supplying CIS partner note, or have drawn to its attention, that the data it included are factually inaccurate or were included or are stored contrary to this Regulation, it shall amend, supplement, correct or delete the data, as appropriate, and shall advise the other CIS partners accordingly.

3. If a CIS partner has evidence to suggest that an item of data is factually inaccurate, or was included or is stored in the CIS contrary to this Regulation, it shall advise the supplying CIS partner as soon as possible. The latter shall check the data concerned and, if necessary, correct or delete the item without delay. The supplying CIS partner shall advise the other partners of any correction or deletion affected.

4. If, when including data in the CIS, a CIS partner notes that its report conflicts with a previous report with regard to content or suggested action, it shall immediately advise the partner which made the previous report. The two partners shall then attempt to resolve the matter. In the event of disagreement, the first report shall stand but those parts of the new report which do not conflict shall be included in the System.

5. Subject to the other provisions of this Regulation, where in any Member State a court, or other authority designated for the purpose within that Member State, makes a final decision to amend, supplement, correct or delete data in the CIS, the CIS partners shall align their action thereon.

In the event of conflict between such decisions of courts or other authorities designated for the purpose including those referred to in Article 36 concerning correction or deletion, the Member State which included the data in question shall delete them from the System.

The provisions in the first subparagraph shall apply mutatis mutandis where a Commission decision on data contained in the CIS is declared void by the Court of Justice.

Chapter 4

Retention of data

Article 33

1. Data included in the CIS shall be kept only for the time necessary to achieve the purpose for which they were included. The need for their retention shall be reviewed at least annually by the supplying CIS partner.

2. The supplying CIS partner may, within the review period, decide to retain data until the next review if their retention is necessary for the purposes for which they were included. Without prejudice to Article 36, if there is no decision to retain data they shall automatically be transferred to that part of the CIS to which access shall be limited in accordance with paragraph 4.

3. The CIS shall automatically inform the supplying CIS partner of a scheduled transfer of data from the CIS under paragraph 2, giving one month's notice.

4. Data transferred under paragraph 2 shall continue to be retained for one year within the CIS but, without prejudice to Article 36, shall be accessible only to a representative of the Committee referred to in Article 43 in connection with the application of the seventh, eighth and ninth indents of paragraph 4 thereof, and paragraph 5 thereof, or to the supervisory authorities referred to in Article 37. During that period the data may be consulted only for the purposes of checking their accuracy and lawfulness. They must thereafter be deleted.

Chapter 5

Personal-data protection

Article 34

1. Each CIS partner intending to receive personal data from, or include them in, the CIS shall, no later than the date of application of this Regulation, adopt national legislation, or internal rules applicable to the Commission, guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data.

2. A CIS partner may receive personal data from, or include them in, the CIS only where the arrangements for the protection of such data provided for in paragraph 1 have entered into force. Each Member State shall also have previously designated a national supervisory authority or authorities as provided for in Article 37.

3. In order to ensure the proper application of the personal-data protection provisions in this Regulation, each Member State and the Commission shall regard the CIS as a system for processing personal data subject to the provisions referred to in paragraph 1 and the more stringent provisions contained in this Regulation.

The internal rules applicable to the Commission, as referred to in paragraph 1, shall be published in the Official Journal of the European Communities.

Article 35

1. Subject to Article 30 (1), CIS partners shall be prohibited from using personal data from the CIS other than for the purpose stated in Article 23 (2).

2. Data may be duplicated only for technical purposes, provided that such duplication is necessary for searching by the authorities referred to in Article 29. Subject to Article 30 (1), personal data included by other Member States or the Commission may not be copied from the CIS into other data files for which the Member States or the Commission have responsibility.

Article 36

1. The rights of persons with regard to the personal data in the CIS, in particular their right of access, shall be put into effect:

- in accordance with the laws, regulations and procedures of the Member State in which such rights are invoked,
- in accordance with the internal rules applicable to the Commission referred to in Article 34 (1).

If laid down in the laws, regulations and procedures of the Member State concerned, the national supervisory authority provided for in Article 37 shall decide whether information is to be communicated and the procedure for doing so.

2. A CIS partner to which an application for access to personal data is made may refuse access if communication would be likely to prejudice the prevention, investigation and prosecution of operations which are in breach of customs or agricultural legislation. A Member State may also refuse access as provided for in its laws, regulations and procedures in relation to cases where such refusal constitutes a measure necessary to safeguard national security, defence, public safety and the rights and freedoms of others. The Commission may refuse access where such refusal constitutes a measure necessary to safeguard the rights and freedoms of others.

Access shall be refused in any event during the period in which action is taken for the purposes of sighting and reporting or discreet surveillance.

3. If the personal data for which an application for access has been made have been supplied by another CIS partner, access shall be permitted only if the supplying partner has been given the

opportunity to state its position.

4. Any person may, in accordance with the laws, regulations and procedures of each Member State or with the internal rules applicable to the Commission, have personal data relating to himself corrected or deleted by each CIS partner if those data are factually inaccurate, or were included or are stored in the CIS contrary to the aim stated in Article 23 (2) or if the principles of Article 26 have not been observed.

5. In the territory of each Member State, any person may, in accordance with the laws, regulations and procedures of the Member State in question, bring an action or, if appropriate, a complaint before the courts or the authority designated for the purpose, in accordance with those laws, regulations and procedures, in connection with personal data relating to himself in the CIS, in order to:

(a) correct or delete factually inaccurate personal data;

(b) correct or delete personal data included or stored in the CIS contrary to this Regulation;

(c) obtain access to personal data;

(d) obtain compensation under Article 40 (2).

With regard to data included by the Commission, an action may be brought before the Court of Justice in accordance with Article 173 of the Treaty.

The Member States and the Commission undertake mutually to enforce the final decisions taken by a court, the Court of Justice or another authority designated to that end which concern points (a), (b) and (c) of the first subparagraph.

6. The references in this Article and in Article 32 (5) to a 'final decision` do not imply any obligation on the part of any Member State or the Commission to appeal against a decision taken by a court or other authority designated for the purpose.

Chapter 6

Personal-data protection supervision

Article 37

1. Each Member State shall designate a national supervisory authority or authorities responsible for personal-data protection to carry out independent supervision of such data included in the CIS.

The supervisory authorities, in conformity with their respective national legislations, shall carry out independent supervision and checks to ensure that the processing and use of data held in the CIS do not violate the rights of data subjects. For this purpose the supervisory authorities shall have access to the CIS.

2. Any person may ask any national supervisory authority to check personal data relating to himself in the CIS and the use which has been or is being made of those data. The right shall be governed by the laws, regulations and procedures of the Member State in which the request is made. If the data have been included by another Member State or the Commission, the check shall be carried out in close coordination with that Member State's national supervisory authority or with the authority provided for in paragraph 4.

3. The Commission shall take every step within its departments to ensure personal-data protection supervision which offers safeguards of a level equivalent to that resulting from paragraph 1.

4. Pending the appointment of any authority or authorities set up for the Community institutions and bodies, the Commission's activities as regards the data-protection rules laid down in Article 34 (1), Article 36 (1) and Article 37 (3) shall be supervised by the Ombudsman provided for in Article 138e of the Treaty establishing the European Community in the context of the task allotted to him by that Treaty.

Chapter 7

Security of the CIS

Article 38

1. All appropriate technical and organizational measures necessary to maintain security shall be taken:

(a) by the Member States and the Commission, each insofar as it concerns them, in respect of the terminals of the CIS located on their respective territories and in the Commission's offices;

(b) by the Committee referred to in Article 43 in respect of the CIS and the terminals located on the same premises as the CIS and used for technical purposes and the checks required by paragraph 3.

2. In particular, the Member States, the Commission and the Committee referred to in Article 43 shall take measures:

(a) to prevent any unauthorized person from having access to installations used for the processing of data;

(b) to prevent data and data media from being read, copied, modified or deleted by unauthorized persons;

(c) to prevent the unauthorized entry of data and any unauthorized consultation, modification or deletion of data;

(d) to prevent data in the CIS from being accessed by unauthorized persons by means of data-transmission equipment;

(e) to guarantee that, with respect to the use of the CIS, authorized persons have right of access only to data for which they have competence;

(f) to guarantee that it is possible to check and establish to which authorities data may be transmitted by data-transmission equipment;

(g) to guarantee that it is possible to check and establish ex post facto what data have been introduced into the CIS, when and by whom, and to monitor interrogation;

(h) to prevent the unauthorized reading, copying, modification or deletion of data during the transmission of data and the transport of data media.

3. In accordance with Article 43, the Committee shall verify that the searches carried out were authorized and were carried out by authorized users. At least 1 % of all searches made shall be verified. A record of such searches and verifications shall be entered into the system and shall be used only for the said verifications. It shall be deleted after six months.

Article 39

1. Each of the Member States shall designate a department which shall be responsible for the security measures set out in Article 38, in relation to the terminals located in its territory, the review functions set out in Article 33 (1) and (2), and, in general, for the proper implementation of this Regulation insofar as is necessary under its laws, regulations and procedures.

2. The Commission, for its part, shall designate those of its departments which are to be responsible for the measures referred to in paragraph 1.

Chapter 8

Responsibilities and publication

Article 40

1. Each CIS partner that has included data in the System shall be responsible for the accuracy, currency and lawfulness of those data. Each Member State or, where applicable, the Commission shall also be responsible for complying with the provisions of Article 26 of this Regulation.

2. Each CIS partner shall be liable, in accordance with national laws, regulations and procedures or the equivalent Community provisions, for injury caused to a person through the use of the CIS in the Member State concerned or at the Commission.

This shall also be the case where the injury was caused by the supplying CIS partner entering inaccurate data or entering data contrary to this Regulation.

3. If the CIS partner against which an action in respect of inaccurate data is brought did not supply them, the partners concerned shall seek agreement as to what proportion, if any, of the sums paid out in compensation shall be reimbursed by the supplying partner to the other partner. Any such sums agreed shall be reimbursed on request.

Article 41

The Commission shall publish a communication in the Official Journal of the European Communities concerning the implementation of the CIS.

TITLE VI

PROTECTION OF DATA DURING THE NON-AUTOMATIC EXCHANGE OF DATA

Article 42

The provisions applying to the automatic exchange and processing of data shall apply mutatis mutandis to non-automatic exchange and processing of data.

TITLE VII

FINAL PROVISIONS

Article 43

1. The Commission shall be assisted by a Committee made up of representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the provisions to be adopted. The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission, except in cases where the Council has decided by a simple majority against such measures.

3. The procedure laid down in paragraph 2 shall apply in particular to:

(a) decisions on items to be included in the CIS as provided for in Article 25;

(b) determination of operations concerning the application of agricultural legislation in respect of which information is to be entered in the CIS, as provided for in Article 23 (4).

4. The committee shall examine all matters relating to the application of this Regulation which may be raised by its chairman, either on his own initiative or at the request of the representative of a Member State, in particular concerning:

- the general working of the mutual assistance arrangements provided for in this Regulation,
- the adoption of practical arrangements for forwarding the information referred to in Articles 16 and 17,
- the information sent to the Commission pursuant to Articles 17 and 18 to see if anything can be learnt from it, decide on the measures required to put an end to practices found to be in breach of customs or agricultural legislation and, where appropriate, suggest amendments to existing Community provisions or the drafting of additional ones,
- the preparation of enquiries carried out by the Member States and coordinated by the Commission and Community missions as provided for in Article 20,
- measures taken to safeguard the confidentiality of information, in particular personal data, exchanged under this Regulation, other than that provided for in Title V,
- the implementation and proper operation of the CIS and all the technical and operational measures required to ensure the security of the system,
- the necessity of storing information in the CIS,
- the measures taken to safeguard the confidentiality of information entered in the CIS under

this Regulation, particularly personal data, and to ensure compliance with the obligations of those responsible for processing,

- the measures adopted pursuant to Article 38 (2).

5. The committee shall examine all problems connected with the operation of the CIS which are encountered by the supervisory authorities referred to in Article 37. In such cases, the committee shall meet in an ad hoc formation comprising representatives nominated by each Member State from its national supervisory authority or authorities. The Ombudsman referred to in Article 37 (4) or his representative may also participate, on his own initiative, insofar as he considers it compatible with his duties, in the meetings of the committee in such ad hoc formation. The committee shall meet in its ad hoc formation at least once a year.

6. For the purposes of this Article the committee shall have direct access to, and may make direct use of, data from the CIS.

Article 44

Without prejudice to the provisions in Title V on the CIS, the documents provided for in this Regulation may be replaced by computerized information produced in any form for the same purpose.

Article 45

1. Regardless of the form, any information transmitted pursuant to this Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities.

In particular, the information referred to in the first subparagraph may not be sent to persons other than those in the Member States or within the Community institutions whose functions require them to know or use it. Nor may it be used for purposes other than those provided for in this Regulation, unless the Member State, or the Commission, which supplied it or entered it in the CIS has expressly agreed, subject to the conditions laid down by that Member State or by the Commission and insofar as such communication or use is not prohibited by the provisions in force in the Member State in which the recipient authority is based.

2. Without prejudices to the provisions in Title V on the CIS, information concerning natural and legal persons shall be transmitted under this Regulation only where strictly necessary to prevent, investigate or take proceedings in respect of operations in breach of customs or agricultural legislation.

3. Paragraphs 1 and 2 shall not preclude the use of information obtained under this Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation.

The competent authority which supplied that information shall be notified of such use forthwith.

4. Where the Commission is notified by a Member State that further enquiries have exonerated from involvement in irregularities a natural or legal person whose name was transmitted under this Regulation, the Commission shall forthwith notify all parties to whom these personal data have been transmitted on the basis of this Regulation. The person concerned shall then cease to be regarded as being

involved in the irregularity that gave rise to the initial notification.

Where the personal data relating to the person concerned are in the CIS, they shall be removed from it.

Article 46

For the purposes of applying this Regulation, Member States shall take all necessary steps to:

(a) ensure effective internal coordination between the administrative authorities referred to in Article 1 (1);

(b) establish in their mutual relations all necessary direct cooperation between the authorities empowered specifically for that purpose.

Article 47

Member States may decide by common accord whether procedures are needed to ensure the smooth operation of the mutual-assistance arrangements provided for in this Regulation, in particular in order to avoid any interruption of surveillance of persons or goods where this might be prejudicial to the detection of operations in breach of customs and agricultural legislation.

Article 48

1. This Regulation shall not bind Member States' administrative authorities to grant each other assistance where that would be likely to be injurious to public policy (ordre public) or other fundamental interests, in particular with regard to data protection, of the Member State in which they are based.

2. Reasons shall be stated for any refusal to grant assistance.

The Commission shall be informed as early as possible of any refusal to grant assistance and the reasons given for refusal.

Article 49

Without prejudice to the Commission's right to be notified under other regulations in force, Member States shall transmit to the Commission administrative or legal decisions or the main elements thereof relating to the application of penalties for breaches of customs or agricultural legislation in cases which have been the subject of communications under Articles 17 or 18.

Article 50

Without prejudice to the expenses associated with the implementation of the CIS or damages under Article 40, Member States and the Commission shall waive all claims for the reimbursement of expenses

incurred under this Regulation save, where appropriate, in respect of fees paid to experts.

Article 51

This Regulation shall not affect the application in the Member States of rules on criminal procedure and mutual assistance in criminal matters, including those on secrecy of judicial inquiries.

Article 52

1. Regulation (EEC) No 1468/81 is hereby repealed.

2. References made to the repealed Regulation shall be understood as referring to the present Regulation.

Article 53

1. This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities.

It shall apply from 13 March 1998.

2. However, Article 42 will not apply to Denmark, Ireland, Sweden or the United Kingdom until Community rules exist applicable to all the data covered by this Regulation.

As from the date when the rules referred to in the first subparagraph apply in all the Member States, Article 42 will be repealed and the derogation provided for in the first subparagraph will cease to have effect.

If after 5 years the rules in question have not yet become applicable, the Commission shall prepare a report, together with any proposals it deems necessary.

For as long as the four Member States concerned do not apply the provisions of Article 42, the Member States and the Commission may subject the non-automatic processing of personal data which they may communicate to those four Member States to compliance with rules on data protection equivalent to those which they apply themselves to the non-automatic processing of such data.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 March 1997.

For the Council

The President

M. PATIJN

(1) OJ No L 94, 28. 4. 1970, p. 13. Regulation as last amended by Regulation (EEC) No 2048/88 (OJ No L 185, 15. 7. 1988, p. 1).

(2) OJ No C 56, 26. 2. 1993, p. 1; OJ No C 262, 28. 9. 1993, p. 8, and OJ No C 80, 17. 3. 1994, p. 12.

(3) OJ No C 20, 24. 1. 1994, p. 85, and Opinion of 16 January 1997 (OJ No C 33, 3. 2. 1997).

(4) OJ No C 161, 14. 6. 1993, p. 15.

(5) OJ No L 144, 2. 6. 1981, p. 1. Regulation as amended by Regulation (EEC) No 945/87 (OJ No L 90, 2. 4. 1987, p. 3).

(6) Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ No L 155, 7. 6. 1989, p. 1). Regulation last amended by Regulation (EC, Euratom) No 2729/94 (OJ No L 293, 12. 11. 1994, p. 5).

(7) Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of money wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ No L 67, 14. 3. 1991, p. 11).

(8) OJ No L 281, 23. 11. 1995, p. 31.

ANNEX

COMMUNICATION OF DATA (Article 30 (1))

1. Communication to other public bodies

Communication of data to public bodies should be permissible only if, in a particular case:

(a) there exists a clear legal obligation or authorization, or with the authorization of the supervisory authority; or

(b) these data are essential for the recipient to fulfil his own lawful task, provided that the aim of the collection or processing to be carried out by the recipient is not incompatible with the original aim and that it is not precluded by the legal obligations of the communicating body.

Communication is exceptionally permissible if, in a particular case:

(a) communication is undoubtedly in the interest of the data subject and the data subject has consented or if circumstances are such as to allow a clear presumption of such consent; or

(b) communication is necessary so as to prevent a serious and imminent danger.

2. Communication to private individuals

The communication of data to private individuals should be permissible only if, in a particular case, there is a clear legal obligation or authorization, or with the authorization of the supervisory authority.

Communication to private individuals is exceptionally permissible if, in a particular case:

(a) communication is undoubtedly in the interest of the data subject and the data subject has consented or circumstances are such as to allow a clear presumption of such consent; or

(b) communication is necessary so as to prevent a serious and imminent danger.

3. International communication

Communication of data to foreign authorities should be permissible only:

(a) if there exists a clear legal provision under national or international law;

(b) in the absence of such a provision, if communication is necessary for the prevention of a serious and imminent danger;

and provided that domestic regulations for the protection of the data subject are not prejudiced.

4.1. Requests for communication

Subject to specific provisions contained in national legislation or in international agreements, requests for communication of data should provide indications as to the body or person requesting them as well as the reason for the request and its objective.

4.2. Conditions governing communication

As far as possible, the quality of data should be verified at the latest before their communication. As far as possible, in all communications of data, judicial decisions, as well as decisions not to prosecute, should be indicated and data based on opinions or personal assessments should be checked at source before being communicated and their degree of accuracy or reliability indicated.

If it is discovered that the data are no longer accurate and up-to-date, they should not be communicated; if outdated or inaccurate data have been communicated, the communicating body should inform as far as possible all the recipients of the data of their non-conformity.

4.3. Safeguards for communication

The data communicated to other bodies, private individuals and foreign authorities should not be used for purposes other than those indicated in the request for communication.

Use of the data for other purposes should, without prejudice to paragraphs 1 to 4.2, be made subject to the agreement of the communicating body.

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Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties

COUNCIL DIRECTIVE of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (76/308/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (1), as last amended by Regulation (EEC) No 2788/72 (2), and in particular Article 8 (3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas it is not at present possible to enforce in one Member State a claim for recovery substantiated by a document drawn up by the authorities of another Member State;

Whereas the fact that national provisions relating to recovery are applicable only within national territories is in itself an obstacle to the establishment and functioning of the common market ; whereas this situation prevents Community rules from being fully and fairly applied, particularly in the area of the common agricultural policy, and facilitates fraudulent operations;

Whereas it is therefore necessary to adopt common rules on mutual assistance for recovery;

Whereas these rules must apply both to the recovery of claims resulting from the various measures which form part of the system of total or partial financing of the European Agricultural Guidance and Guarantee Fund and to the recovery of agricultural levies and customs duties within the meaning of Article 2 of Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (5), and of Article 128 of the Act of Accession ; whereas they must also apply to the recovery of interest and costs incidental to such claims;

Whereas mutual assistance must consist of the following : the requested authority must on the one hand supply the applicant authority with the information which the latter needs in order to recover claims arising in the Member State in which it is situated and notify the debtor of all instruments relating to such claims emanating from that Member State, and on the other hand it must recover, at the request of the applicant authority, the claims arising in the Member State in which the latter is situated; (1)OJ No L 94, 28.4.1970, p. 13. (2)OJ No L 295, 30.12.1972, p. 1. (3)OJ No C 19, 12.4.1973, p. 38. (4)OJ No C 69, 28.8.1973, p. 3. (5)OJ No L 94, 28.4.1970, p. 19.

Whereas these different forms of assistance must be afforded by the requested authority in compliance with the laws, regulations and administrative provisions governing such matters in the Member State in which it is situated;

Whereas it is necessary to lay down the conditions in accordance with which requests for assistance must be drawn up by the applicant authority and to give a limitative definition of the particular circumstances in which the requested authority may refuse assistance in any given case;

Whereas when the requested authority is required to act on behalf of the applicant authority to recover a claim, it must be able, if the provisions in force in the Member State in which it is situated so permit and with the agreement of the applicant authority, to allow the debtor time to pay or authorize payment by instalment ; whereas any interest charged on such payment facilities must also be remitted to the Member State in which the applicant authority is situated;

Whereas, upon a reasoned request from the applicant authority, the requested authority must also be able, in so far as the provisions in force in the Member State in which it is situated so permit, to take precautionary measures to guarantee the recovery of claims arising in the applicant Member State ; whereas such claims must not however be given any preferential treatment in the Member State in which the requested authority is situated;

Whereas it is possible that during the recovery procedure in the Member State in which the requested authority is situated the claim or the instrument authorizing its enforcement issued in the Member State in which the applicant authority is situated may be contested by the person concerned ; whereas it should be laid down in such cases that the person concerned must bring the action contesting the claim before the competent body of the Member State in which the applicant authority is situated and that the requested authority must suspend any enforcement proceedings which it has begun until a decision is taken by the aforementioned body;

Whereas it should be laid down that documents and information communicated in the course of mutual assistance for recovery may not be used for other purposes;

Whereas this Directive should not curtail mutual assistance between particular Member States under bilateral or multilateral agreements or arrangements;

Whereas it is necessary to ensure that mutual assistance functions smoothly and to this end to lay down a Community procedure for determining the detailed rules for the application of such assistance within an appropriate period ; whereas it is necessary to set up a committee to organize close and effective collaboration between the Member States and the Commission in this area,

HAS ADOPTED THIS DIRECTIVE:

Article 1

This Directive lays down the rules to be incorporated into the laws, regulations and administrative provisions of the Member States to ensure the recovery in each Member State of the claims referred to in Article 2 which arise in another Member State.

Article 2

This Directive shall apply to all claims relating to: (a) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guidance and Guarantee Fund, including sums to be collected in connection with these actions;

(b) agricultural levies, within the meaning of Article 2 (a) of Decision 70/243/ECSC, EEC, Euratom and Article 128 (a) of the Act of Accession;

(c) customs duties, within the meaning of Article 2 (b) of the said Decision and Article 128 (b) of the Act of Accession;

(d) interest and costs incidental to the recovery of the claims referred to above.

Article 3

In this Directive: - "applicant authority" means the competent authority of a Member State which makes a request for assistance concerning a claim referred to in Article 2;

- "requested authority" means the competent authority of a Member State to which a request for assistance is made.

Article 4

1. At the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim.

In order to obtain this information, the requested authority shall make use of the powers provided under the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State where that authority is situated.

2. The request for information shall indicate the name and address of the person to whom the information to be provided relates and the nature and amount of the claim in respect of which the request is made.

3. The requested authority shall not be obliged to supply information: (a) which it would not be able to obtain for the purpose of recovering similar claims arising in the Member State in which it is situated;

(b) which would disclose any commercial, industrial or professional secrets ; or

(c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the State.

4. The requested authority shall inform the applicant authority of the grounds for refusing a request for information.

Article 5

1. The requested authority shall, at the request of the applicant authority, and in accordance with the rules of law in force for the notification of similar instruments or decisions in the Member State in which the requested authority is situated, notify to the addressee all instruments and decisions, including those of a judicial nature, which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or to its recovery.

2. The request for notification shall indicate the name and address of the addressee concerned, the nature and the subject of the instrument or decision to be notified, if necessary the name and address of the debtor and the claim to which the instrument or decision relates, and any other useful information.

3. The requested authority shall promptly inform the applicant authority of the action taken on its request for notification and, more especially, of the date on which the instrument or decision

was forwarded to the addressee.

Article 6

1. At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

2. For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, except where Article 12 applies.

Article 7

1. The request for recovery of a claim which the applicant authority addresses to the requested authority must be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State in which the applicant authority is situated and, if appropriate, by the original or a certified copy of other documents necessary for recovery.

2. The applicant authority may not make a request for recovery unless: (a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which it is situated;

(b) it has, in the Member State in which it is situated, applied the recovery procedure available to it on the basis of the instrument referred to in paragraph 1, and the measures taken have not resulted in the payment in full of the claim.

3. The request for recovery shall indicate the name and address of the person concerned, the nature of the claim, the amount of the principal and the interest and costs due, as well as any other relevant information.

4. The request for recovery shall contain in addition a statement by the applicant authority indicating the date from which enforcement is possible under the laws in force in the Member State in which it is situated and confirming that the conditions set out in paragraph 2 are fulfilled.

5. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority it shall forward it to the requested authority.

Article 8

The instrument permitting enforcement of the claim shall, where appropriate, and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted, recognized, supplemented, or replaced by an instrument authorizing enforcement in the territory of that Member State.

Such acceptance, recognition, supplementing or replacement must take place as soon as possible following the date of receipt of the request for recovery. They may not be refused if the instrument

permitting enforcement in the Member State in which the applicant authority is situated is properly drawn up.

If any of these formalities should give rise to an examination or contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.

Article 9

1. Claims shall be recovered in the currency of the Member State in which the requested authority is situated.

2. The requested authority may, where the laws, regulations or administrative provisions in force in the Member State in which it is situated so permit, and after consultations with the applicant authority, allow the debtor time to pay or authorize payment by instalment. Any interest charged by the requested authority in respect of such extra time to pay shall be remitted to the Member State in which the applicant authority is situated.

Any other interest charged for late payment under the laws, regulations and administrative provisions in force in the Member State in which the requested authority is situated shall also be remitted to the Member State in which the applicant authority is situated.

Article 10

The claims to be recovered shall not be given preferential treatment in the Member State in which the requested authority is situated.

Article 11

The requested authority shall inform the applicant authority immediately of the action it has taken on the request for recovery.

Article 12

1. If, in the course of the recovery procedure, the claim and/or the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated are contested by an interested party, the action shall be brought by the latter before the competent body of the Member State in which the applicant authority is situated, in accordance with the laws in force there. This action must be notified by the applicant authority to the requested authority. The party concerned may also notify the requested authority of the action.

2. As soon as the requested authority has received the notification referred to in paragraph 1 either from the applicant authority or from the interested party, it shall suspend the enforcement procedure pending the decision of the body competent in the matter. Should the requested authority deem it necessary, and without prejudice to Article 13, that authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the Member State in which

it is situated allow such action for similar claims.

3. Where it is the enforcement measures taken in the Member State in which the requested authority is situated that are being contested the action shall be brought before the competent body of that Member State in accordance with its laws and regulations.

4. Where the competent body before which the action has been brought in accordance with paragraph 1 is a judicial or administrative tribunal, the decision of that tribunal, in so far as it is favourable to the applicant authority and permits recovery of the claim in the Member State in which the applicant authority is situated shall constitute the "instrument permitting enforcement" within the meaning of Articles 6, 7 and 8 and the recovery of the claim shall proceed on the basis of that decision.

Article 13

On a reasoned request by the applicant authority, the requested authority shall take precautionary measures to ensure recovery of a claim in so far as the laws or regulations in force in the Member State in which it is situated so permit.

In order to give effect to the provisions of the first paragraph, Articles 6, 7 (1), (3) and (5), 8, 11, 12 and 14 shall apply mutatis mutandis.

Article 14

The requested authority shall not be obliged: (a) to grant the assistance provided for in Articles 6 to 13 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the Member State in which that authority is situated;

(b) to undertake recovery of a claim if the applicant authority has not exhausted the means of recovery in the territory of the Member State in which it is situated.

The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance. Such reasoned refusal shall also be communicated to the Commission.

Article 15

1. Questions concerning periods of limitation shall be governed solely by the laws in force in the Member State in which the applicant authority is situated.

2. Steps taken in the recovery of claims by the requested authority in pursuance of a request for assistance, which, if they had been carried out by the applicant authority, would have had the effect of suspending or interrupting the period of limitation according to the laws in force in the Member State in which the applicant authority is situated, shall be deemed to have been taken in the latter State, in so far as that effect is concerned.

Article 16

Documents and information sent to the requested authority pursuant to this Directive may only be

communicated by the latter to: (a) the person mentioned in the request for assistance;

(b) those persons and authorities responsible for the recovery of the claims, and solely for that purpose;

(c) the judicial authorities dealing with matters concerning the recovery of the claims.

Article 17

Requests for assistance and relevant documents shall be accompanied by a translation in the official language, or one of the official languages of the Member State in which the requested authority is situated, without prejudice to the latter authority's right to waive the translation.

Article 15

Member States shall renounce all claims upon each other for the reimbursement of costs resulting from mutual assistance which they grant each other pursuant to this Directive.

However, the Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for costs incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned.

Article 19

Member States shall provide each other with a list of authorities authorized to make or receive requests for assistance.

Article 20

1. A Committee on Recovery (hereinafter called "the committee") is hereby set up and shall consist of representatives of the Member States with a Commission representative as chairman.

2. The committee shall adopt its own rules of procedure.

Article 21

The committee may examine any matter concerning the application of this Directive raised by its chairman either on his own initiative or at the request of the representative of a Member State.

Article 22

1. The detailed rules for implementing Articles 4 (2) and (4), 5 (2) and (3), 7 (1), (3) and (5), 9, 11 and 12 (1) and the rules on conversion, transfer of sums recovered, and the fixing of a minimum amount for claims which may give rise to a request for assistance, shall be adopted in accordance with the procedure laid down in paragraph 2 and 3.

2. The Commission representative shall submit to the committee a draft of the measures to be adopted. The committee shall deliver its opinion on the draft within a time limit set by the chairman, having regard to the urgency of the matter. Opinions shall be adopted by a majority of 41 votes, the votes of the Member States being weighted as provided in Article 148 (2) of the Treaty. The chairman shall not vote.

3. (a) The Commission shall adopt the proposed measures where they are in accordance with the opinion of the committee.

(b) Where the proposed measures are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall without delay propose to the Council the measures to be adopted. The Council shall act by a qualified majority.

(c) If within three months of the proposal being submitted to it, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 23

The provisions of this Directive shall not prevent a greater measure of mutual assistance being afforded either now or in the future by particular Member States under any agreements or arrangements, including those for the notification of legal or extralegal acts.

Article 24

Member States shall bring into force the measures necessary to comply with this Directive not later than 1 January 1978.

Article 25

Each Member State shall inform the Commission of the measures which it has adopted to implement this Directive. The Commission shall forward this information to the other Member States.

Article 26

This Directive is addressed to the Member States.

Done at Brussels, 15 March 1976.

For the Council

The President

R. VOUEL

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Amended by.... 32001L0044..... Completion ART 12.2 from 18/07/2001
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FI02/;0/1/03/1996 SV01;01/03/1996 SV02/;

BELPROV 1. - Loi du 20/07/1979 concernant l'assistance mutuelle en matière de recouvrement dans la Communauté économique européenne, des créances résultant d'opérations faisant partie du système de financement du Fonds européen d'Orientation et de Garantie agricole, ainsi que de prélèvements agricoles et de droits de douane - Wet betreffende de wederzijdse bijstand inzake de invordering van schuldvorderingen in de Europese Economische Gemeenschap, die voortvloein uit verrichtingen, die deel uitmaken van het financieringsstelsel van het Europees Orientatie en Garantiefonds voor de Landbouw, alsmede van landbouwheffingen en douanerechten.

DEUPROV 1. - Gesetz vom 10/08/1979.

DNKPROV 1. - Lov nr. af 18/01/1978

ESPPROV 1. - Real decreto legislativo numero 1299/86 de 28/06/1986, por el que se modifica el texto refundido de los impuestos integrantes de la Renta de Aduanas.
2. - Real Decreto numero 1068/88 de 16/09/1988, por el que se desarrollan determinadas directivas comunitarias sobre asistencia mutua en materia de recaudacion. Boletín Oficial del Estado numero 228 de 22/09/1988 Pagina 27831

FRAPROV 1. - Décret Numéro 79-1025 du 28/11/1979 concernant l'assistance mutuelle en matière de recouvrement de créances résultant d'opérations faisant partie du système de financement du fonds européen d'orientation et de garantie agricole ainsi que des prélèvements agricoles et de droits de douane.

GRCPROV 1. - Loi numéro 1402 du 18/11/1983 Chapitre I A,
2. - Décision ministérielle du 07/03/1984, numéro protocole T/1243/319

IRLPROV 1. - European Communities (Value -added Tax) (Mutual Assistance as Regards the Recovery of Claims) Regulations, 1980. Statutory Instruments number 406 of 1980

ITAPROV 1. - Decreto ministeriale del 19/06/1981, norme per la conversione ed il trasferimento delle somme da recuperare e recuperate, in attuazione della direttiva del Consiglio delle Comunità europee n. 76/308/CEE in data 15 marzo 1981 relativa all'assistenza reciproca in materia di recupero di crediti. Gazzetta Ufficiale - Serie generale - del 03/07/1981 n. 181
2. - Decreto ministeriale del 28/12/1978, norme di esecuzione del decreto del Presidente della Repubblica 9 gennaio 1978, n. 35, concernente attuazione della direttiva del Consiglio delle Comunità europee n. 76/308/CEE in data 15 marzo 1976 relativa all'assistenza reciproca in materia di recupero di crediti. Gazzetta Ufficiale - Serie generale - del 13/01/1979 n. 13 pag. 422
3. - Decreto del Presidente della Repubblica del 09/01/1978 n. 35, attuazione della direttiva n. 76/308/CEE del 15 marzo 1976, relativa all'assistenza reciproca in materia di recupero dei crediti,

LUXPROV 1. - Règlement grand-ducal du 18/05/1979 concernant l'assistance mutuelle en matière de recouvrement dans la Communauté Européenne des créances résultant d'opérations faisant partie du système de financement du fonds européen d'orientation et de garantie agricole, ainsi que le prélèvements agricoles et de droits de douane.

NLDPROV 1. - Wet van 23/10/1979, Houdende Vaststelling van de Wet Wederzijdse bijstand inzake de invordering van schuldvorderingen die voortvloeien uit verrichtingen die deel uitmaken van het financieringsstelsel van het Europees Orientatie-en Garantiefonds voor de Landbouw, alsmede van landbouwheffingen en douanerechten
2. - Beschikking van 09/11/1979 nummer 079/2383, Staatscourant nummer 221 van 13/11/1979

PRTPROV 1. - Portaria de 22/10/1986. Diario da Republica I Série B
2. - Decreto-Lei n. 504-N/85 de 30/12/1985. Estabelece regras sobre a assistência mutua em matéria de cobrança de créditos resultantes de operaçoes que fazem parte do sistema de financiamento do Fundo Europeu de Orientaçao e de Garantia Agrícola.

GBRPROV 1. - The Finance Act 1977
2. - The Finance Act 1980

Implementing SIs
['*' indicates information added by Context]

- The Finance Act 1977
- The Finance Act 1980
- *The Recovery of Agricultural Levies Due in Other Member States Regulations 2004, SI 2004/800

Related SIs
['*' indicates information added by Context]

- *The Recovery of Duties and Taxes Etc. Due in Other Member States (Corresponding UK Claims, Procedure and Supplementary) Regulations 2004, SI 2004/674

AUTPROV NO REFERENCE AVAILABLE

SVEPROV 1. - Lag om ändring i lagen (1969:200) om uttagande av utländsk tull, annan skatt, avgift eller pålaga, Svensk författningssamling
2. - Lag om ömsesidig handräckning i skatteärenden, Svensk författningssamling SFS) 1990:314

FINPROV 1. - Laki keskinäisestä virka-avusta eräiden saatavien, maksujen ja tullien

sekä verojen perinnässä Suomen ja muiden Euroopan unionin jäsenvaltioiden toimivaltaisten viranomaisten välilla.
2. - Asetus eräiden Suomen liittymisestä Euroopan unioniin tehtyyn sopimukseen liittyvien verotusta, tulleja ja ulkomaankauppaa sekä tullilaitosta koskevien lakien voimaantulosta (1542/94) 31/12/1994

41998A0123(01) Official Journal C 024 , 23/01/1998 P. 0002 - 0022

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations

CONVENTION drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations

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

REFERRING to the Act of the Council of the European Union of 18 December 1997,

RECALLING the need to strengthen the commitments contained in the Convention on mutual assistance between customs administrations, signed in Rome on 7 September 1967,

CONSIDERING that customs administrations are responsible on the customs territory of the Community and, in particular at its points of entry and exit, for the prevention, investigation and suppression of offences not only against Community rules, but also against national laws, in particular the cases covered by Articles 36 and 223 of the Treaty establishing the European Community,

CONSIDERING that a serious threat to public health, morality and security is constituted by the developing trend towards illicit trafficking of all kinds,

CONSIDERING that particular forms of cooperation involving cross-border actions for the prevention, investigation and prosecution of certain infringements of both the national legislation of the Member States and Community customs regulations should be regulated, and that such cross-border actions must always be carried out in compliance with the principles of legality (conforming with the relevant law applicable in the requested Member State and with the Directives of the competent authorities of that Member State), subsidiarity (such actions to be launched only if it is clear that other less significant actions are not appropriate) and proportionality (the scale and duration of the action to be determined in the light of the seriousness of the presumed infringement),

CONVINCED that it is necessary to reinforce cooperation between customs administrations, by laying down procedures under which customs administrations may act jointly and exchange data concerned with illicit trafficking activities,

BEARING IN MIND that the customs administrations in their day-to-day work have to implement both Community and national provisions, and that there is consequently an obvious need to ensure that the provisions of mutual assistance and cooperation in both sectors evolve as far as possible in parallel,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

TITLE I GENERAL PROVISIONS

Article 1 Scope

1. Without prejudice to the competences of the Community, the Member States of the European Union shall provide each other with mutual assistance and shall cooperate with one another through their customs administrations, with a view to:

- preventing and detecting infringements of national customs provisions,

and

- prosecuting and punishing infringements of Community and national customs provisions.

2. Without prejudice to Article 3, this Convention shall not affect the provisions applicable regarding mutual assistance in criminal matters between judicial authorities, more favourable provisions in bilateral or multilateral agreements between Member States governing cooperation as provided for in paragraph 1 between the customs authorities or other competent authorities of the Member

States, or arrangements in the same field agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance.

Article 2 Powers

The customs administrations shall apply this Convention with the limits of the powers conferred upon them under national provisions. Nothing in this Convention may be construed as affecting the powers conferred under national provisions upon the customs administrations within the meaning of this Convention.

Article 3 Relationship to mutual assistance provided by the judicial authorities

1. This Convention covers mutual assistance and cooperation in the framework of criminal investigations concerning infringements of national and Community customs provisions, concerning which the applicant authority has jurisdiction on the basis of the national provisions of the relevant Member State.

2. Where a criminal investigation is carried out by or under the direction of a judicial authority, that authority shall determine whether requests for mutual assistance or cooperation in that connection shall be submitted on the basis of the provisions applicable concerning mutual assistance in criminal matters or on the basis of this Convention.

Article 4 Definitions

For the purposes of this Convention, the following definitions shall apply:

1. 'national customs provisions`: all laws, regulations and administrative provisions of a Member State the application of which comes wholly or partly within the jurisdiction of the customs administration of the Member State concerning:

- cross-border traffic in goods subject to bans, restrictions or controls, in particular pursuant to Articles 36 and 223 of the Treaty establishing the European Community,
- non-harmonised excise duties;

2. 'Community customs provisions`:

- the body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purposes of establishing their Community status,
- the body of provisions adopted at Community level under the common agricultural policy and the specific provisions adopted with regard to goods resulting from the processing of agricultural products,
- the body of provisions adopted at Community level for harmonised excise duties and for value-added tax on importation together with the national provisions implementing them;

3. 'infringement`: acts in conflict with national or Community customs provisions, including, inter alia:

- participation in, or attempts to commit, such infringements,
- participation in a criminal organization committing such infringements,
- the laundering of money deriving from the infringements referred to in this paragraph;

4. 'mutual assistance`: the granting of assistance between customs administrations as provided for in this Convention;

5. 'applicant authority`: the competent authority of the Member State which makes a request for assistance;

6. 'requested authority`: the competent authority of the Member State to which a request for assistance is made;

7. 'customs administrations`: Member States' customs authorities as well as other authorities with jurisdiction for implementing the provisions of this Convention;

8. 'personal data`: all information relating to an identified or identifiable natural person; a person is considered to be identifiable if he or she can be directly or indirectly identified, inter alia by means of an identification number or of one or more specific elements which are characteristic of his or her physical, physiological, psychological, economic, cultural or social identity;

9. 'cross-border cooperation`: cooperation between customs administrations across the borders of each Member State.

Article 5 Central coordinating units

1. Member States shall appoint in their customs authorities a central unit (coordinating unit). It shall be responsible for receiving all applications for mutual assistance under this Convention and for coordinating mutual assistance, without prejudice to paragraph 2. The unit shall also be responsible for cooperation with other authorities involved in an assistance measure under this Convention. The coordinating units of the Member States shall maintain the necessary direct contact with each other, particularly in the cases covered by Title IV.

2. The activity of the central coordinating units shall not exclude, particularly in an emergency, direct cooperation between other services of the customs authorities of the Member States. For reasons of efficiency and consistency, the central coordinating units shall be informed of any action involving such direct cooperation.

3. If the customs authority is not, or not completely, competent to process a request, the central coordinating unit shall forward the request to the competent national authority and inform the applicant authority that it has done so.

4. If it is not possible to accede to the request for legal or substantive reasons, the coordinating unit shall return the request to the applicant authority with an explanation as to why the request could not be processed.

Article 6 Liaison officers

1. Member States may make agreements between themselves on the exchange of liaison officers for limited or unlimited periods, and on mutually-agreed conditions.

2. Liaison officers shall have no powers of intervention in the host country.

3. In order to promote cooperation between Member States' customs administrations, liaison officers may, with the agreement or at the request of the competent authorities of the Member States, have the following duties:

(a) promoting and speeding up the exchange of information between the Member States;

(b) providing assistance in investigations which relate to their own Member State or the Member State they represent;

(c) providing support in dealing with requests for assistance;

(d) advising and assisting the host country in preparing and carrying out cross-border operations;

(e) any other duties which Member States may agree between themselves.

4. Member States may agree bilaterally of multilaterally on the terms of reference and the location of the liaison officers. Liaison officers may also represent the interests of one or more Member States.

Article 7 Obligation to prove identity

Unless otherwise specified in this Convention, officers of the applicant authority present in another Member State in order to exercise the rights laid down in this Convention shall at all times be able to produce written authority stating their identity and their official functions.

TITLE II ASSISTANCE ON REQUEST

Article 8 Principles

1. In order to provide the assistance required under this Title, the requested authority or the competent authority which it has addressed shall proceed as though it were acting on its own account or at the request of another authority in its own Member State. In so doing it shall avail itself of all the legal powers at its disposal within the framework of its national law in order to respond to the request.

2. The requested authority shall extend this assistance to all circumstances of the infringement which have any recognisable bearing on the subject of the request for assistance without this requiring any additional request. In case of doubt, the requested authority shall firstly contact the applicant authority.

Article 9 Form and content of the request for assistance

1. Requests for assistance shall always be made in writing. Documents necessary for the execution of such requests shall accompany the request.

2. Requests pursuant to paragraph 1 shall include the following information:

(a) the applicant authority making the request;

(b) the measure requested;

(c) the object of, and the reason for, the request;

(d) the laws, rules and other legal provisions involved;

(e) indications as exact and comprehensive as possible on the natural or legal persons being the target of the investigations;

(f) a summary of the relevant facts, except in cases provided for in Article 13.

3. Requests shall be submitted in an official language of the Member State of the requested authority or in a language acceptable to such authority.

4. When required because of the urgency of the situation, oral requests shall be accepted, but must be confirmed in writing as soon as possible.

5. If a request does not meet the formal requirements, the requested authority may ask for it to be corrected or completed; measures necessary to comply with the request may be commenced in the meantime.

6. The requested authority shall agree to apply a particular procedure in response to a request, provided that that procedure is not in conflict with the legal and administrative provisions of the requested Member State.

Article 10 Requests for information

1. At the request of the applicant authority, the requested authority shall communicate to it all information which may enable it to prevent, detect and prosecute infringements.

2. The information communicated is to be accompanied by reports and other documents, or certified copies or extracts of the same, on which that information is based and which are in the possession of the request authority or which were produced or obtained in order to execute the request for information.

3. By agreement between the applicant authority and the requested authority, officers authorised by the applicant authority may, subject to detailed instructions from the requested authority, obtain information pursuant to paragraph 1 from the offices of the requested Member State. This shall apply to all information derived from the documentation to which the staff of those offices have access. Those officers shall be authorised to take copies of the said documentation.

Article 11 Requests for surveillance

At the request of the applicant authority, the requested authority shall as far as possible keep a special watch or arrange for a special watch to be kept on persons where there are serious grounds for believing that they have infringed Community or national customs provisions or that they are committing or have carried out preparatory acts with a view to the commission of such infringements. At the request of the applicant authority, the requested authority shall also keep a watch on places, means of transport and goods connected with activities which might be in breach of the abovementioned customs provisions.

Article 12 Requests for enquiries

1. The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, appropriate enquiries concerning operations which constitute, or appear to the applicant authority to constitute, infringements.

The requested authority shall communicate the results of such enquiries to the applicant authority. Article 10(2) shall apply mutatis mutandis.

2. By agreement between the applicant authority and the requested authority, officers appointed by the applicant authority may be present at the enquiries referred to in paragraph 1. Enquiries shall at all times be carried out by officers of the requested authority. The applicant authority's officers may not, of their own initiative, assume the powers conferred on officers of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the enquiry being carried out.

Article 13 Notification

1. At the request of the applicant authority, the requested authority shall, in accordance with the national rules of the Member State in which it is based, notify the addressee or have it notified of all instruments or decisions which emanate from the competent authorities of the Member State in which the applicant authority is based and concern the application of this Convention.

2. Requests for notification, mentioning the subject of the instrument or decision to be notified, shall be accompanied by a translation in the official language or an official language of the Member State in which the requested authority is based, without prejudice to the latter's right to waive such a translation.

Article 14 Use as evidence

Findings, certificates, information, documents, certified true copies and other papers obtained

in accordance with their national law by officers of the requested authority and transmitted to the applicant authority in the cases of assistance provided for in Articles 10 to 12 may be used as evidence in accordance with national law by the competent bodies of the Member State where the applicant authority is based.

TITLE III SPONTANEOUS ASSISTANCE

Article 15 Principle

The competent authorities of each Member State shall, as laid down in Articles 16 and 17, subject to any limitations imposed by national law, provide assistance to the competent authorities of the other Member States without prior request.

Article 16 Surveillance

Where it serves the prevention, detection and prosecution of infringements in another Member State, each Member State's competent authorities shall:

(a) as far as is possible keep, or have kept, the special watch described in Article 11;

(b) communicate to the competent authorities of the other Member States concerned all information in their possession and, in particular, reports and other documents or certified true copies or extracts thereof, concerning operations which are connected with a planned or committed infringement.

Article 17 Spontaneous information

The competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all relevant information concerning planned or committed infringements and, in particular, information concerning the goods involved and new ways and means of committing such infringements.

Article 18 Use as evidence

Surveillance reports and information obtained by officers of one Member State and communicated to another Member State in the course of the spontaneous assistance provided for in Articles 15 to 17 may be used in accordance with national law as evidence by the competent bodies of the Member State receiving the information.

TITLE IV SPECIAL FORMS OF COOPERATION

Article 19 Principles

1. Customs administrations shall engage in cross-border cooperation in accordance with this Title. They shall provide each other with the necessary assistance in terms of staff and organisational support. Requests for cooperation shall, as a rule, take the form of requests for assistance in accordance with Article 9. In specific cases referred to in this Title, officers of the applicant authority may engage in activities in the territory of the requested State, with the approval of the requested authority.

Coordination and planning of cross-border operations shall be the responsibility of the central coordinating units in accordance with Article 5.

2. Cross-border cooperation within the meaning of paragraph 1 shall be permitted for the prevention, investigation and prosecution of infringements in cases of:

(a) illicit traffic in drugs and psychotropic substances, weapons, munitions, explosive materials, cultural goods, dangerous and toxic waste, nuclear material or materials or equipment intended for the manufacture of atomic, biological and/or chemical weapons (prohibited goods);

(b) trade in substances listed in Tables I and II of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and intended for the illegal manufacture of drugs (precursor substances);

(c) illegal cross-border commercial trade in taxable goods to evade tax or to obtain unauthorised State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable;

(d) any other trade in goods prohibited by Community or national rules.

3. The requested authority shall not be obliged to engage in the specific forms of cooperation referred to in this Title if the type of investigation sought is not permitted or not provided for under the national law of the requested Member State. In this case, the applicant authority shall be entitled to refuse, for the same reason, the corresponding type of cross-border cooperation in the reverse case, where it is requested by an authority of the requested Member State.

4. If necessary under the national law of the Member States, the participating authorities shall apply to their judicial authorities for approval of the planned investigations. Where the competent judicial authorities make their approval subject to certain conditions and requirements, the participating authorities shall ensure that those conditions and requirements are observed in the course of the investigations.

5. Where officers of a Member State engage in activities in the territory of another Member State by virtue of this Title and cause damage by their activities, the Member State in whose territory the damage was caused shall make good the damage, in accordance with its national legislation in the same way as it would have done if the damage had been caused by its own officers. That Member State will be reimbursed in full by the Member State whose officers have caused the damage for the amounts it has paid to the victims or to other entitled persons or institutions.

6. Without prejudice to the exercise of its rights vis-à-vis third parties and notwithstanding the obligation to make good damages according to the second sentence of paragraph 5, each Member State shall refrain, in the case provided for in the first sentence of paragraph 5, from requesting reimbursement of the amount of damages it has sustained from another Member State.

7. Information obtained by officers during cross-border cooperation provided for in Articles 20 to 24 may be used, in accordance with national law and subject to particular conditions laid down by the competent authorities of the State in which the information was obtained, as evidence by the competent bodies of the Member State receiving the information.

8. In the course of the operations referred to in Articles 20 to 24, officers on mission in the territory of another Member State shall be treated in the same way as officers of that State as regards infringements committed against them or by them.

Article 20 Hot pursuit

1. Officers of the customs administration of one of the Member States pursuing in their country, an individual observed in the act of committing one of the infringements referred to in Article 19(2) which could give rise to extradition, or participating in such an infringement, shall be authorised to continue pursuit in the territory of another Member State without prior authorisation where, given the particular urgency of the situation, it was not possible to notify the competent authorities of the other Member State prior to entry into that territory or where these authorities have been unable to reach the scene in time to take the pursuit.

The pursuing officers shall, not later than when they cross the border, contact the competent authorities of the Member State in whose territory the pursuit is to take place. The pursuit shall cease as

soon as the Member State in whose territory the pursuit is taking place so requests. At the request of the pursuing officers, the competent authorities of the said Member State shall challenge the pursued person so as to establish his identity or to arrest him. Member States shall inform the depositary of the pursuing officers to whom this provision applies; the depositary shall inform the other Member States.

2. The pursuit shall be carried out in accordance with the following procedures, defined by the declaration provided for in paragraph 6:

(a) the pursuing officers shall not have the right to apprehend;

(b) however, if no request to cease the pursuit is made and if the competent authorities of the Member State in whose territory the pursuit is taking place are unable to intervene quickly enough, the pursuing officers may apprehend the person pursued until the officers of the said Member State, who must be informed without delay, are able to establish his identity or arrest him.

3. Pursuit shall be carried out in accordance with paragraphs 1 and 2 in one of the following ways as defined by the declaration provided for in paragraph 6:

(a) in an area or during a period, as from the crossing of the border, to be established in the declaration;

(b) without limit in space or time.

4. Pursuit shall be subject to the following general conditions:

(a) the pursuing officers shall comply with the provisions of this Article and with the law of the Member State in whose territory they are operating; they shall obey the instructions of the competent authorities of the said Member State;

(b) when the pursuit takes place on the sea, it shall, where it extends to the high sea or the exclusive economic zone, be carried out in conformity with the international law of the sea as reflected in the United Nations Convention on the Law of the Sea, and, when it takes place in the territory of another Member State, it shall be carried out in accordance with the provisions of this Article;

(c) entry into private homes and places not accessible to the public shall be prohibited;

(d) the pursuing officers shall be easily identifiable, either by their uniform or an armband or by means of accessories fitted to their means of transport; the use of civilian clothes combined with the use of unmarked means of transport without the aforementioned identification is prohibited; the pursuing officers shall at all times be able to prove that they are acting in an official capacity;

(e) the pursuing officers may carry their service weapons, save (i) where the requested Member State has made a general declaration that weapons may never be carried into its territory or (ii) where specifically decided otherwise by the requested Member State. When officers of another Member State are permitted to carry their service weapons, their use shall be prohibited save in cases of legitimate self-defence;

(f) once the pursued person has been apprehended as provided for in paragraph 2(b), for the purpose of bringing him before the competent authorities of the Member State in whose territory the pursuit took place he may be subjected only to a security search; handcuffs may be used during his transfer; objects carried by the pursued person may be seized;

(g) after each operation mentioned in paragraphs 1, 2 and 3, the pursuing officers shall present themselves before the competent authorities of the Member State in whose territory they were

operating and shall give an account of their mission; at the request of those authorities, they must remain at their disposal until the circumstances of their action have been adequately elucidated; this condition shall apply even where the pursuit has not resulted in the arrest of the pursued person;

(h) the authorities of the Member State from which the pursuing officers have come shall, when requested by the authorities of the Member State in whose territory the pursuit took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.

5. A person who, following the action provided for in paragraph 2, has been arrested by the competent authorities of the Member State in whose territory the pursuit took place may, whatever his nationality, be held for questioning. The relevant rules of national law shall apply mutatis mutandis.

If the person is not a national of the Member State in whose territory he was arrested, he shall be released no later than six hours after his arrest, not including the hours between midnight and 9 a.m., unless the competent authorities of the said Member State have previously received a request for his provisional arrest for the purposes of extradition in any form.

6. On signing this convention, each Member State shall make a declaration in which it shall define, on the basis of paragraphs 2, 3 and 4, the procedures for implementing pursuit in its territory.

A Member State may at any time replace its declaration by another declaration, provided the latter does not restrict the scope of the former.

Each declaration shall be made after consultations with each of the Member States concerned and with a view to obtaining equivalent arrangements in those States.

7. Member States may, on a bilateral basis, extend the scope of paragraph 1 and adopt additional provisions in implementation of this Article.

8. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or by part thereof. Such declaration may be withdrawn at any time.

Article 21 Cross-border surveillance

1. Officers of the customs administration of one of the Member States who are keeping under observation in their country persons in respect of whom there are serious grounds for believing that they are involved in one of the infringements referred to in Article 19(2) shall be authorised to continue their observation in the territory of another Member State where the latter has authorised cross-border observation in response to a request for assistance which has previously been submitted. Conditions may be attached to the authorisation.

Member States shall inform the depositary of the officers to whom this provision applies; the depositary shall inform the other Member States.

On request, the observation shall be entrusted to officers of the Member State in whose territory it is carried out.

The request referred to in the first subparagraph shall be sent to an authority designated by each of the Member States empowered to grant the requested authorisation or pass on the request.

Member States shall inform the depositary of the authority designated for this purpose; the depositary shall inform the other Member States.

2. Where, for particularly urgent reasons, prior authorisation of the other Member State cannot be requested, the officers conducting the observation shall be authorised to continue beyond the border the observation of persons in respect of whom there are serious grounds for believing that

they are involved in one of the infringements referred to in Article 19(2), provided that the following conditions are met:

(a) the competent authorities of the Member State in whose territory the observation is to be continued shall be notified immediately of the crossing of the border, during the observation;

(b) a request submitted in accordance with paragraph 1 and outlining the grounds for crossing the border without prior authorisation shall be submitted without delay.

Observation shall cease as soon as the Member State in whose territory it is taking place so requests, following the notification referred to in (a) or the request referred to in (b), or where authorisation has not been obtained five hours after the border was crossed.

3. The observation referred to in paragraph 1 and 2 shall be carried out only under the following general conditions:

(a) the officers conducting the observation shall comply with the provisions of this Article and with the law of the Member State in whose territory they are operating; they must obey the instructions of the competent authorities of the said Member State;

(b) except in the situations provided for in paragraph 2, the officers shall, during the observation, carry a document certifying that authorisation has been granted;

(c) the officers conducting the observation shall be able at all times to provide proof that they are acting in an official capacity;

(d) the officers conducting the observation may carry their service weapons during the observation save (i) where the requested Member State has made a general declaration that weapons may never be carried into its territory or (ii) where specifically decided otherwise by the requested Member State. When officers of another Member State are permitted to carry their service weapons, their use shall be prohibited save in cases of legitimate self-defence;

(e) entry into private homes and places not accessible to the public shall be prohibited;

(f) the officers conducting the observation may neither challenge nor arrest the person under observation;

(g) all operations shall be the subject of a report to the authorities of the Member State in whose territory they took place; the officers conducting the observation may be required to appear in person;

(h) the authorities of the Member State from which the observing officers have come shall, when requested by the authorities of the Member State in whose territory the observation took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.

4. The Member States may, at bilateral level, extend the scope of this Article and adopt additional measures in implementation thereof.

5. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or by part thereof. Such declaration may be withdrawn at any time.

Article 22 Controlled delivery

1. Each Member State shall undertake to ensure that, at the request of another Member State, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences.

2. The decision to carry out controlled deliveries shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that

State.

3. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State.

The requested authority shall take over control of the delivery when the goods cross the border or at an agreed hand-over point in order to avoid any interruption of surveillance. During the rest of the journey it shall ensure that the goods are kept permanently under surveillance in such a way that at any time it has the possibility of arresting the perpetrators and seizing the goods.

4. Consignments the controlled delivery of which is agreed to may, with the consent of the Member States concerned, be intercepted and allowed to continue with the initial contents intact or removed or replaced in whole or in part.

Article 23 Covert investigations

1. At the request of the applicant authority, the requested authority may authorise officers of the customs administration of the requesting Member State or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested Member State. The applicant authority shall make the request only where it would be extremely difficult to elucidate the facts without recourse to the proposed investigative measures. The officers in question shall be authorised in the course of their activities to collect information and make contact with subjects or other persons associated with them.

2. Covert investigations in the requested Member State shall have a limited duration. The preparation and supervision of the investigations shall take place in close cooperation between the relevant authorities of the requested and applicant Member States.

3. The conditions under which a covert investigation is allowed, as well as the conditions under which it is carried out, shall be determined by the requested authority in accordance with its national law. If, in the course of a covert investigation, information is acquired in relation to an infringement other than that covered by the original request, then the conditions concerning the use to which such information may be put shall also be determined by the requested authority in accordance with its national law.

4. The requested authority shall provide the necessary manpower and technical support. It shall take measures to protect the officers referred to in paragraph 1, while they are active in the requested Member State.

5. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or part thereof. Such declaration may be withdrawn at any time.

Article 24 Joint special investigation teams

1. By mutual agreement, the authorities of several Member States may set up a joint special investigation team based in a Member State and comprising officers with the relevant specialisations.

The joint special investigation team shall have the following tasks:

- implementation of difficult and demanding investigations of specific infringements, requiring simultaneous, coordinated action in the Member States concerned,
- coordination of joint activities to prevent and detect particular types of infringement and obtain information on the persons involved, their associates and the methods used.

2. Joint special investigation teams shall operate under the following general conditions:

(a) they shall be set up only for a specific purpose and for a limited period;

(b) an officer from the Member State in which the team's activities take place shall head the team;

(c) the participating officers shall be bound by the law of the Member State in whose territory the team's activities take place;

(d) the Member State in which the team's activities take place shall make the necessary organisational arrangements for the team to operate.

3. Membership of the team shall not bestow on officers any powers of intervention in the territory of another Member State.

TITLE V DATA PROTECTION

Article 25 Data protection for the exchange of data

1. When information is exchanged, the customs administrations shall take into account in each specific case the requirements for the protection of personal data. They shall respect the relevant provisions of the Convention of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data. In the interest of data protection, a Member State may, in accordance with paragraph 2, impose conditions concerning the processing of personal data by another Member State to which such personal data may be passed.

2. Without prejudice to the provisions of the Convention concerning the use of information technology for customs purposes, the following provisions shall apply to personal data which are communicated pursuant to the application of this Convention:

(a) processing of the personal data by the recipient authority shall be authorised only for the purpose referred to in Article 1(1). That authority may forward them, without prior consent from the Member State supplying them, to its customs administrations, its investigative authorities and its judicial bodies to enable them to prosecute and punish infringements within the meaning of Article 4(3). In all other cases of data transmission, the consent of the Member State which supplied the information is necessary;

(b) the authority of the Member State which communicates data shall ensure that they are accurate and up-to-date. If it emerges that inaccurate data have been communicated or data have been communicated which should not have been communicated or that lawfully communicated data are required at a later stage to be erased in accordance with the law of the communicating Member State, the recipient authority shall be immediately informed thereof. It shall be obliged to correct such data or have them erased. If the recipient authority has reason to believe that communicated data are inaccurate or should be erased, it shall inform the communicating Member State;

(c) in cases where communicated data should, according to the law of the communicating Member State, be erased or amended, the persons concerned must be given the effective right to correct the data;

(d) the forwarding and receipt of exchanged data shall be recorded by the authorities concerned;

(e) if so requested, the communicating and recipient authorities shall inform the person concerned, at that person's request, of the personal data communicated and the use to which they are to be put. There is no obligation to provide the information if it is found, on consideration of the matter, that the importance to the public of the information being withheld outweighs the importance to the person concerned of receiving it. Moreover, the right of the person concerned to receive information about the personal data communicated shall be determined in accordance with the national laws, regulations and procedures of the Member State in whose territory the information is requested. Before any decision is taken on providing information, the communicating

authority shall be given the opportunity of stating its position;

(f) Member States shall be liable, in accordance with their own laws, regulations and procedures, for injury caused to a person through the processing of data communicated in the Member State concerned. This shall also be the case where the injury was caused by the communication of inaccurate data or the fact that the communicating authority communicated data in violation of the Convention;

(g) the data communicated shall be kept for a period not exceeding that necessary for the purposes for which they were communicated. The need to keep them shall be examined at the appropriate moment by the Member State concerned;

(h) in any event, the data shall enjoy at least the same protection as is given to similar data in the Member State which received them;

(i) every Member State shall take the appropriate measures to ensure compliance with this Article by the application of effective controls. Every Member State may assign the task of control to the national supervisory authority mentioned in Article 17 of the Convention concerning the use of information technology for customs purposes.

3. For the purposes of this Article, 'the processing of personal data` shall be understood in accordance with the definition in Article 2(b) of 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 (1).

TITLE VI INTERPRETATION OF THE CONVENTION

Article 26 Court of Justice

1. The Court of Justice of the European Communities shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of this Convention whenever it has proved impossible for the dispute to be settled by the Council within six months of its being referred to the Council by one of its members.

2. The Court of Justice of the European Communities shall have jurisdiction to rule on any dispute between Member States and the Commission concerning the interpretation or application of this Convention which it has proved impossible to settle through negotiation. The dispute may be submitted to the Court of Justice after the expiry of a period of six months from the data on which one of the parties notified the other of the existence of a dispute.

3. The Court of Justice shall have jurisdiction, subject to the conditions laid down in paragraphs 4 to 7, to give preliminary rulings on the interpretation of this Convention.

4. By a declaration made at the time of the signing of this Convention or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of this Convention as specified in either paragraph 5(a) or (b).

5. A Member State which has made a declaration pursuant to paragraph 4 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of this Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgement, or

(b) any court or tribunal of that State may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning

the interpretation of this Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

6. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of that Court of Justice shall apply.

7. Any Member State, whether or not it has made a declaration pursuant to paragraph 4, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 5.

8. The Court of Justice shall not have jurisdiction to check the validity or proportionality of operations carried out by competent law enforcement agencies under this Convention nor to rule on the exercise of responsibilities which devolve upon Member States for maintaining law and order and for safeguarding internal security.

TITLE VII IMPLEMENTATION AND FINAL PROVISIONS

Article 27 Confidentiality

The customs administrations shall take account, in each specific case of exchange of information, of the requirements of investigation secrecy. To that end, a Member State may impose conditions covering the use of information by another Member State to which that information may be passed.

Article 28 Exemptions from the obligation to provide assistance

1. This Convention shall not oblige the authorities of Member States to provide mutual assistance where such assistance would be likely to harm the public policy or other essential interests of the State concerned, particularly in the field of data protection, or where the scope of the action requested, in particular in the context of the special forms of cooperation provided for in Title IV, is obviously disproportionate to the seriousness of the presumed infringement. In such cases, assistance may be refused in whole or in part or made subject to compliance with certain conditions.

2. Reasons must be given for any refusal to provide assistance.

Article 29 Expenses

1. Member States shall normally waive all claims for reimbursement of costs incurred in the implementation of this Convention, with the exception of expenses for fees paid to experts.

2. If expenses of a substantial and extraordinary nature are, or will be, required to execute the request, the customs administrations involved shall consult to determine the terms and conditions under which a request shall be executed as well as the manner in which the costs shall be borne.

Article 30 Reservations

1. Save as provided in Article 20(8), Article 21(5) and Article 23(5), this Convention shall not be the subject of any reservations.

2. Member States which have already established agreements between them covering matters regulated in Title IV of this Convention may make reservations pursuant to paragraph 1 only in so far as such reservations do not affect their obligations under such agreements.

3. Accordingly, the obligations arising out of the provisions of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders which provide for closer cooperation shall not be affected by this Convention in the context of relations between the Member States which are bound by those provisions.

Article 31 Territorial application

1. This Convention shall apply to the territories of the Member States as referred to in Article 3(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (2), as revised by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (3) and in Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (4), including, for the Federal Republic of Germany, the Island of Heligoland and the territory of Büsingen (within the framework of and pursuant to the Treaty of 23 November 1964 between the Federal Republic of Germany and the Swiss Confederation on the inclusion of the commune of Büsingen am Hochrhein in the customs territory of the Swiss Confederation, or the current version thereof) and, for the Italian Republic, the municipalities of Livigno and Campione d'Italia, and to the territorial waters, the inland maritime waters and the airspace of the territories of the Member States.

2. The Council, acting unanimously by the procedure provided for in Title VI of the Treaty on European Union, may adapt paragraph 1 to any amendment of the provisions of Community law referred to therein.

Article 32 Entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the depositary of the completion of the constitutional procedures for the adoption of this Convention.

3. This convention shall enter into force 90 days after the notification referred to in paragraph 2 by the State, Member of the European Union at the time of adoption by the Council of the Act drawing up this Convention, which is last to complete that formality.

4. Until this Convention enters into force, any Member State may, when giving the notification referred to in paragraph 2, or at any other later time, declare that as far as it is concerned this Convention, with the exception of Article 23 thereof, shall apply to its relations with Member States that have made the same declaration. Such declarations shall take effect 90 days after the date of deposit thereof.

5. This Convention shall apply only to requests submitted after the date on which it enters into force or is applied as between the requested Member State and the applicant Member State.

6. On the date of entry into force of this Convention, the Convention on the provision of mutual assistance between customs administrations of 7 September 1967 shall be repealed.

Article 33 Accession

1. This Convention shall be open to accession by any State that becomes a Member State of the European Union.

2. The text of the Convention in the language of the acceding Member State, as 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 Convention shall come into force with respect to any State that accedes to it 90 days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force upon expiry of the said period of 90 days.

5. Where this Convention has not yet entered into force at the time of the deposit of their instrument of accession, Article 32(4) shall apply to acceding Member States.

Article 34 Amendments

1. Amendments to this Convention may be proposed by any Member State that is a High Contracting Party. Any proposed amendment shall be sent to the depositary, who shall communicate it to the Council and the Commission.

2. Without prejudice to Article 31(2), the amendments to the Convention shall be adopted by the Council, which shall recommend them to the Member States for adoption in accordance with their respective constitutional requirements.

3. Amendments adopted in accordance with paragraph 2 shall come into force in accordance with Article 32(3).

Article 35 Depositary

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

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

En fe de lo cual los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschrift unter dieses Übereinkommen gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ouiâaoç.

In witness whereof, the undersigned Plenipotentiaries have hereunto set their hands.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.

Da Fhianu sin, chuir la Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che, i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder deze Overeenkomst hebben gesteld.

Em fé do que, os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente Convençao.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän yleissopimuksen.

Till bekräftelse härav har undertecknade befullmäktigade ombud undertecknat denna konvention.

Hecho en Bruselas, el dieciocho de diciembre de mil novecientos noventa y siete, en un ejemplar unico, en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, cuyos textos son igualmente auténticos y que sera depositado en los archivos de la Secretaría General del Consejo de la Union Europea.

Udfærdiget i Bruxelles, den attende december nitten hundrede og syvoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk og tysk, idet hver af disse tekster har samme gyldighed; de deponeres i arkiverne i Generalsekretariatet

for Rådet for Den Europæiske Union.

Geschehen zu Brüssel am achtzehnten Dezember neunzehnhundertsiebenundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist; die Urschrift wird im Archiv des Generalsekretariats des Rates der Europäischen Union hinterlegt.

êaéíå ïôéo Añoi¡eeåo, oôéo äåêaïêô¦ Æåêåiâñßïo eéa åííéaêüoéa åíåí«íôa å=ôÜ, oå ¡ía iüíï aíôßôo=ï oôçí aaaeéê«, aaeeéê«, aåñiaíéê«, äaíéê«, åeeçíéê«, éñeaíäéê«, éo=aíéê«, éôaeéê«, ïeeaíäéê«, =ïñôïaaeéê«, oïoçäéê« êaé öéíeaíäéê« ae¦ooa 7 êÜèå êåßiåíï åßíaé åißoïo aoèåíôéêü êaé êaôaôßèåôaé oôa añ ßa ôço Aåíéê«o Añaiiaôåßao ôïo Ooiâïoeßïo ôço Åoñù=auê«o êíùoço.

Done at Brussels on the eighteenth day of December in the year one thousand nine hundred and ninety-seven 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, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union.

Fait à Bruxelles, le dix-huit décembre mil neuf cent quatre-vingt-dix-sept, en un exemplaire unique, en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, chaque texte faisant également foi, exemplaire qui est déposé dans les archives du Secrétariat général du Conseil de l'Union européenne.

Arna dhéanamh sa Bhruiséil ar an ochtu la déag de Nollaig sa bhliain míle naoi gcéad nocha a seacht, i scríbhinn bhunaidh amhain sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san lodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis agus comhudaras ag na téacsanna i ngach ceann de na teangacha sin; déanfar an scríbhinn bhunaidh sin a thaisceadh i gcartlann Ardrunaíocht Chomhairle an Aontais Eorpaigh.

Fatto a Bruxelles, addi diciotto dicembre millenovecentonovantasette, in un unico esemplare, in lingua danese, finlandese, francese, greca, inglese, irlandese, italiana, portoghese, spagnola, svedese e tedesca, ciascun testo facente ugualmente fede, e depositato negli archivi del Segretariato generale del Consiglio dell'Unione europea.

Gedaan te Brussel, de achttiende december negentienhonderd zevenennegentig, in één exemplaar, in de Deense, de Duitse, de Engelse, de Finse, de Franse, de Griekse, de Ierse, de Italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde alle teksten gelijkelijk authentiek, dat wordt neergelegd in het archief van het Secretariaat-generaal van de Raad van de Europese Unie.

Feito em Bruxelas, em dezoito de Dezembro de mil novecentos e noventa e sete em exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana, neerlandesa, portuguesa e sueca, fazendo igualmente fé todos os textos, depositado nos arquivos do Secretariado-Geral do Conselho da Uniao Europeia.

Tehty Brysselissä kahdeksantenatoista päivänä joulukuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäseitsemän englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä yhtenä alkuperäiskappaleena, joka talletetaan Euroopan unionin neuvoston pääsihteeristön arkistoon ja jonka jokainen teksti on yhtä todistusvoimainen.

Som skedde i Bryssel den artonde december nittonhundranittiosju i ett enda exemplar på danska, engelska, finska, franska, grekiska, iriska, italienska, nederländska, portugisiska, spanska, svenska och tyska språken, vilka samtliga texter är lika giltiga, vilket skall deponeras i arkivet vid generalsekretariatet vid Europeiska unionens råd.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På Konungariket Sveriges vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

(1) OJ L 281, 23.11.1995, p. 31.

(2) OJ L 302, 19.10.1992, p. 2.

(3) OJ L 1, 1.1.1995, p. 181.

(4) OJ L 17, 21.1.1997, p. 2.

ANNEX

DECLARATIONS TO BE ANNEXED TO THE CONVENTION AND PUBLISHED IN THE OFFICIAL JOURNAL

1. Re Articles 1(1) and 28

With reference to the exceptions to the obligation to provide assistance under Article 28 of the Convention, Italy declares that the execution of mutual assistance requests, on the basis of the Convention, concerning infringements which under Italian law are not infringements of national or community customs provisions, may - for reasons relating to the subdivision of competence among domestic authorities in prevention and prosecution of crimes - harm the public policy or other national essential interests.

2. Re Articles 1(2) and 3(2)

Denmark and Finland declare that they interpret the term 'judicial authorities` or 'judicial authority` in Articles 1(2) and 3(2) of the Convention in the sense of their declarations made pursuant to Article 24 of the European Convention on mutual assistance in criminal matters, signed in Strasbourg on 20 April 1959.

3. Re Article 4(3) second indent

Denmark declares, as far as it is concerned, that Article 4(3), second indent, covers only actions by which a person participates in the commission by a group of people, acting toward a common goal, of one or more of the infringements concerned, including situations where the person concerned does not take part in the actual commission of the offence or offences in question; such participation must be based on knowledge of the purpose and general criminal activities of the group, or on knowledge of the group's intention to commit the offence(s) in question.

4. Re Article 4(3), third indent

Denmark declares, as far as it is concerned, that Article 4(3), third indent, applies only to the predicate offences in respect of which at any time receiving stolen goods is punishable under Danish law, including Section 191a of the Danish criminal Code on receiving stolen drugs and Section 284 of the Criminal Code on receiving goods in connection with smuggling of a particularly aggravated nature.

5. Re Article 6(4)

Denmark, Finland and Sweden declare that the liaison officers referred to in Article 6(4) may also represent the interests of Norway and Iceland or vice versa. The five Nordic countries have since 1982 had an arrangement whereby the stationed liaison officers from one of the countries involved also represent the other Nordic countries. This arrangement was made in order to strengthen the fight against drug trafficking and to limit the economic burden imposed on individual countries by the stationing of the liaison officers. Denmark, Finland and Sweden attach great importance to the continuation of this arrangement, which operates well.

6. Re Article 20(8)

Denmark declares that it accepts the provisions of Article 20, subject to the following conditions:

In case of a hot pursuit exercised by the customs authorities of another Member State at sea or through the air, such pursuit may be extended to Danish territory, including Danish territorial waters and the airspace above Danish territory and territorial waters, only if the competent Danish authorities have received prior notice thereof.

7. Re Article 21(5)

Denmark declares that it accepts the provisions of Article 21, subject to the following conditions:

Cross-border surveillance without prior authorisation may be carried out only in accordance with Article 21(2) and (3) if there are serious grounds for believing that the persons under observation are involved in one of the infringements referred to in Article 19(2) which could give rise to extradition.

8. Re Article 25(2)(i)

Member States undertake to keep each other informed in the Council on measures taken to ensure that the commitments referred to in point (i) are observed.

9. Declaration made pursuant to Article 26(4)

At the time of the signing of this Convention, the following declared that they accepted the jurisdiction

of the Court of Justice in accordance with the procedures laid down in Article 26(5):

- Ireland in accordance with the procedures laid down in Article 26(5)(a),
- the Federal Republic of Germany, the Hellenic Republic, the Italian Republic and the Republic of Austria in accordance with the procedures laid down in Article 26(5)(b).

DECLARATION

The Federal Republic of Germany, the Italian Republic and the Republic of Austria, reserve the right to make provision in their national law to the effect that, where a question relating to the interpretation of the Convention on mutual assistance and cooperation between customs administrations is raised in a case pending before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice of the European Communities.

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International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences

(Nairobi, 9 June 1977)

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INTERNATIONAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE FOR THE PREVENTION, INVESTIGATION AND REPRESSION OF CUSTOMS OFFENCES

Preamble

THE CONTRACTING PARTIES to the present Convention, established under the auspices of the Customs Co-operation Council,

CONSIDERING that offences against Customs law are prejudicial to the economic, social and fiscal interests of States and to the legitimate interests of trade,

CONSIDERING that action against Customs offences can be rendered more effective by co-operation between Customs administrations, and that such co-operation is one of the aims of the Convention establishing a Customs Co-operation Council,

HAVE AGREED as follows:

CHAPTER I

DEFINITIONS

Article 1

For the purposes of this Convention:

(a) the term "Customs law" means all the statutory or regulatory provisions enforced or administered by the Customs administrations concerning the importation, exportation or transit of goods;

(b) the term "Customs offence" means any breach, or attempted breach, of Customs law;

(c) the term "Customs fraud" means a Customs offence by which a person deceives the Customs and thus evades, wholly or partly, the payment of import or export duties and taxes or the application of prohibitions or restrictions laid down by Customs law or obtains any advantage contrary to Customs law;

(d) the term "smuggling" means Customs fraud consisting in the movement of goods across a Customs frontier in any clandestine manner;

(e) the term "import or export duties and taxes" means Customs duties and all other duties, taxes, fees or other charges which are collected on or in connexion with the importation or exportation of goods but not including fees and charges which are limited in amount to the approximate cost of services rendered;

(f) the term "person" means both natural and legal persons, unless the context otherwise requires;

(g) the term "the Council" means the organization set up by the Convention establishing a Customs Co-operation Council, done at Brussels on 15 December 1950;

(h) the term "Permanent Technical Committee" means the Permanent Technical Committee of the Council;

(ij) the term "ratification" means ratification, acceptance or approval.

CHAPTER II

SCOPE OF THE CONVENTION

Article 2

1. The Contracting Parties bound by one or more Annexes to this Convention agree that their Customs administrations shall afford each other mutual assistance with a view to preventing, investigating and repressing Customs offences, in accordance

with the provisions of this Convention.

2. The Customs administration of a Contracting Party may request mutual assistance as provided for in paragraph 1 of this Article in the course of any investigation or in connexion with any judicial or administrative proceedings being undertaken by that Contracting Party. If the Customs administration is not itself conducting the proceedings, it may request mutual assistance only within the limits of its competence in these proceedings. Similarly, if proceedings are undertaken in the country of the requested administration, the latter provides the assistance requested within the limits of its competence in these proceedings.

3. Mutual assistance as provided for in paragraph 1 of this Article shall not extend to requests for the arrest of persons or for the recovery of duties, taxes, charges, fines or any other monies on behalf of another Contracting Party.

Article 3

If a Contracting Party considers that the assistance sought would infringe upon its sovereignty, security or other substantial national interests or prejudice the legitimate commercial interests of any enterprise, public or private, it may decline to provide that assistance or give it subject to certain conditions or requirements.

Article 4

If the Customs administration of a Contracting Party requests assistance which it itself would be unable to give if requested to do so by the other Contracting Party, it shall draw attention to that fact in its request. Compliance with such a request shall be within the discretion of the requested Contracting Party.

CHAPTER III

GENERAL ASSISTANCE PROCEDURES

Article 5

1. Any intelligence, documents or other information communicated or obtained under this Convention:

(a) shall be used only for the purposes specified in this Convention, including use in judicial or administrative proceedings, and subject to such restrictions as may be laid down by the Customs administration which furnished them; and

(b) shall be afforded in the receiving country the same protection in respect of confidentiality and official secrecy as applies in that country to the same kind of intelligence, documents and other information obtained in its own territory.

2. Such intelligence, documents or other information may be used for other purposes only with the written consent of the Customs administration which furnished them and subject to any restrictions laid down by that administration and

to the provisions of paragraph 1(b) of this Article.

Article 6

1. The communications between Contracting Parties provided for by this Convention shall pass directly between Customs administrations. The Customs administrations of the Contracting Parties shall designate the services or officials responsible for such communications and shall advise the Secretary General of the Council of the names and addresses of those services or officials. The Secretary General shall communicate this information to the other Contracting Parties.

2. The Customs administration of the requested Contracting Party shall, subject to the laws and regulations in force in its territory, take all necessary measures to comply with a request for assistance.

3. The Customs administration of the requested Contracting Party shall reply to a request for assistance as soon as possible.

Article 7

1. Requests for assistance under this Convention shall normally be made in writing; they shall contain the requisite information and be accompanied by such documents as may be deemed useful.

2. Requests in writing shall be in a language acceptable to the Contracting Parties concerned. Any documents accompanying such requests shall be translated into a mutually acceptable language, if necessary.

3. Contracting Parties shall in all cases accept requests for assistance and accompanying documents in English or French or accompanied by a translation into English or French.

4. When, for reasons of urgency in particular, requests for assistance have not been made in writing, the requested Contracting Party may require written confirmation.

Article 8

Any expenses incurred under this Convention in respect of experts or witnesses shall be borne by the requesting Contracting Party. The Contracting Parties shall waive all claims for reimbursement of any other costs incurred in the execution of this Convention.

CHAPTER IV

MISCELLANEOUS PROVISIONS

Article 9

The Council and the Customs administrations of the Contracting Parties shall arrange for the services responsible for the prevention, investigation and repression of Customs offences to maintain personal and direct relations with a view to furthering the general aims of this Convention.

Article 10

For the purposes of this Convention any Annex or Annexes to which a Contracting Party is bound shall be construed to be an integral part of the Convention, and in relation to that Contracting Party any reference to the Convention shall be deemed to include a reference to such Annex or Annexes.

Article 11

The provisions of this Convention shall not preclude the application of any more extensive mutual assistance which certain Contracting Parties grant or may grant in future.

CHAPTER V

ROLE OF THE COUNCIL AND OF THE PERMANENT TECHNICAL COMMITTEE

Article 12

1. The Council shall, in accordance with the provisions of this Convention, be responsible for the administration and development of this Convention.

2. To these ends the Permanent Technical Committee shall, under the authority of the Council and in accordance with any directions given by the Council, have the following functions:

(a) to submit to the Council proposals for such amendments to this Convention as it may consider necessary;

(b) to furnish opinions on the interpretation of provisions of the Convention;

(c) to maintain relations with the other international organizations concerned and, in particular, with the competent bodies of the United Nations with UNESCO and with the International Criminal Police Organization /Interpol, as regards action against illicit traffic in narcotic drugs and psychotropic substances, and action against illicit traffic in works of art, antiques and other cultural property;

(d) to take any action likely to further the general aims of the Convention and in particular to study new methods and procedures to facilitate the prevention, investigation and repression of Customs offences, to convene meetings, etc.;

(e) to perform such tasks as the Council may direct in relation to the provisions of the Convention.

Article 13

For the purposes of voting in the Council and in the Permanent Technical Committee each Annex shall be taken to be a separate Convention.

CHAPTER VI

FINAL PROVISIONS

Article 14

Any dispute between two or more Contracting Parties concerning the interpretation or application of this Convention shall be settled by negotiation between them.

Article 15

1. Any State Member of the Council may become a Contracting Party to this Convention:

(a) by signing it without reservation of ratification;

(b) by depositing an instrument of ratification after signing it subject to ratification; or

(c) by acceding to it.[1]

2. This Convention shall be open until 30 June 1978 for signature at the Headquarters of the Council in Brussels by the States referred to in paragraph 1 of this Article. Thereafter, it shall be open for their accession.

3. Each State referred to in paragraph 1 of this Article shall at the time of signing, ratifying or acceding to this Convention specify the Annex or Annexes it accepts, it being necessary to accept at least one Annex. It may subsequently notify the Secretary General of the Council that it accepts one or more further Annexes.

4. The instruments of ratification or accession shall be deposited with the Secretary General of the Council.

5. Customs or economic unions may, together with all their Member States or at any time after all their Member States have become Contracting Parties to this Convention, also become Contracting Parties to this Convention in accordance with the provisions of paragraphs 1, 2 and 3 of this Article. However, such unions shall not have the right to vote.

Article 16

1. This Convention shall enter into force three months after five of the States referred to in paragraph 1 of Article 15 thereof have signed the Convention without reservation of ratification or have deposited their instruments of ratification or

accession.[2]

2. For any Contracting Party signing without reservation of ratification, ratifying or acceding to this Convention after five States have signed it without reservation of ratification or have deposited their instruments of ratification or accession, this Convention shall enter into force three months after the said Contracting Party has signed without reservation of ratification or deposited its instrument of ratification or accession.[3]

3. Any Annex to this Convention shall enter into force three months after two States have accepted that Annex. For any Contracting Party which subsequently accepts an Annex after two States have accepted it, that Annex shall enter into force three months after the said Contracting Party has notified its acceptance. No Annex shall however enter into force for a Contracting Party before the Convention has entered into force for that Contracting Party.

Article 17

1. Any State may, at the time of signing this Convention without reservation of ratification or of depositing its instrument of ratification or accession, or any time thereafter, declare by notification given to the Secretary General of the Council that this Convention shall extend to all or any of the territories for whose international relations it is responsible. Such notification shall take effect three months after the date of the receipt thereof by the Secretary General of the Council. However, the Convention shall not apply to the territories named in the notification before the Convention has entered into force for the State concerned.

2. Any State which has made a notification under paragraph 1 of this Article extending this Convention to any territory for whose international relations it is responsible may notify the Secretary General of the Council, under the procedure of Article 19 of this Convention, that the territory in question will no longer apply the Convention.

Article 18

No reservations to this Convention shall be permitted.

Article 19

1. This Convention is of unlimited duration but any Contracting Party may denounce it at any time after the date of its entry into force under Article 16 thereof.

2. The denunciation shall be notified by an instrument in writing, deposited with the Secretary General of the Council.

3. The denunciation shall take effect six months after the receipt of the instrument of denunciation by the Secretary General of the Council.

4. The provisions of paragraphs 2 and 3 of this Article shall also apply in respect of

the Annexes to this Convention, any Contracting Party being entitled, at any time after the date of their entry into force under Article 16 of the Convention, to withdraw its acceptance of one or more Annexes. Any Contracting Party which withdraws its acceptance of all the Annexes shall be deemed to have denounced the Convention.

5. Any Contracting Party which denounces the Convention or withdraws its acceptance of one or more Annexes shall remain bound by the provisions of Article 5 of this Convention for as long as it retains in its possession any intelligence, documents or other information obtained under the Convention.

Article 20

1. The Council may recommend amendments to this Convention.

2. The text of any amendment so recommended shall be communicated by the Secretary General of the Council to all Contracting Parties to this Convention, to the other signatory States and to those States Members of the Council that are not Contracting Parties to this Convention.

3. Any proposed amendment communicated in accordance with the preceding paragraph shall come into force with respect to all Contracting Parties three months after the expiry of a period of two years following the date of communication of the proposed amendment during which period no objection to the proposed amendment has been communicated to the Secretary General of the Council by a State which is a Contracting Party.

4. If an objection to the proposed amendment has been communicated to the Secretary General of the Council by a State which is a Contracting Party before the expiry of the period of two years specified in paragraph 3 of this Article, the amendment shall be deemed not to have been accepted and shall have no effect whatsoever.

Article 21

1. Any Contracting Party ratifying or acceding to this Convention shall be deemed to have accepted any amendments thereto which have entered into force at the date of deposit of its instrument of ratification or accession.

2. Any Contracting Party which accepts an Annex shall be deemed to have accepted any amendments to that Annex which have entered into force at the date on which it notifies its acceptance to the Secretary General of the Council.

Article 22

The Secretary General of the Council shall notify the Contracting Parties to this Convention, the other signatory States, those States Members of the Council that are not Contracting Parties to this Convention, and the Secretary General of the United Nations of:

(a) signatures ratifications, accessions and notifications under Article 15 of this Convention;

(b) the date of entry into force of this Convention and of each of the Annexes in accordance with Article 16;

(c) notification received in accordance with Article 17;

(d) denunciations under Article 19;

(e) any amendment deemed to have been accepted in accordance with Article 20 and the date of its entry into force.

Article 23

Upon its entry into force this Convention shall be registered with the Secretariat of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Nairobi, this ninth day of June nineteen hundred and seventy-seven, in the English and French languages, both texts being equally authentic, in a single original which shall be deposited with the Secretary General of the Council who shall transmit certified copies to all the States referred to in paragraph 1 of Article 15 of this Convention.

[Signatures not reproduced here.]

ANNEX I

ASSISTANCE BY A CUSTOMS ADMINISTRATION ON ITS OWN INITIATIVE

1. The Customs administration of a Contracting Party shall, on its own initiative, communicate to the Customs administration of the Contracting Party concerned, any information of a substantial nature which has come to light in the course of its normal activities and which gives good reason to believe that a serious Customs offence will be committed in the territory of the other Contracting Party. The information to be communicated shall concern, in particular, the movements of persons, goods and means of transport.

2. The Customs administration of a Contracting Party shall, where deemed appropriate, communicate on its own initiative to the Customs administration of another Contracting Party documents, reports, records of evidence or certified copies thereof in support of the information furnished under paragraph 1.

3. The Customs administration of a Contracting Party shall, on its own initiative, communicate to the Customs administration of another Contracting Party that is directly concerned, any information likely to be of material assistance to it in connexion with Customs offences and, particularly, in connexion with new means or methods of committing such offences.

ANNEX III

ASSISTANCE, ON REQUEST, RELATING TO CONTROLS

At the request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall communicate to that Customs administration information concerning the following matters:

(a) the authenticity of official documents produced in support of a Goods declaration made to the Customs authorities of the requesting Contracting Party;

(b) whether goods imported into the territory of the requesting Contracting Party have been lawfully exported from the territory of the other Contracting Party;

(c) whether goods exported from the territory of the requesting Contracting Party have been lawfully imported into the territory of the requested Contracting Party.

[1] Instrument of accession deposited for Australia 3 November 1986, with acceptance of Annexes I and III.

[2] The Convention entered into force generally 22 May 1980.

[3] The Convention entered into force for Australia 3 February 1987.

Act concerning the conditions of accession of the Czech Republic the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 5 on the transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation

Protocol No 5

on the transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation

THE HIGH CONTRACTING PARTIES,

CONSIDERING the particular situation of the region of Kaliningrad of the Russian Federation in the context of the Union's enlargement,

RECOGNISING the obligations and commitments of Lithuania with regard to the acquis establishing an area of freedom, security and justice,

NOTING, in particular, that Lithuania shall fully apply and implement the EC acquis regarding the list of countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as well the EC acquis regarding the uniform format for a visa as from accession at the latest,

RECOGNISING that the transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation through EU territory is a matter concerning the Union as a whole and should be treated as such and must not entail any unfavourable consequence for Lithuania,

CONSIDERING the decision to be taken by the Council to remove controls at internal borders after it has verified that the necessary conditions to that effect have been met,

DETERMINED to assist Lithuania in fulfilling the conditions for full participation in the Schengen area without internal frontiers as soon as possible,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1

The Community rules and arrangements on transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation, and in particular Council Regulation establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual shall not in themselves delay or prevent the full participation of Lithuania in the Schengen acquis, including the removal of internal border controls.

Article 2

The Community shall assist Lithuania in implementing the rules and arrangements for the transit of persons between the region of Kaliningrad and the other parts of the Russian Federation with a view to Lithuania's full participation in the Schengen area as soon as possible.

The Community shall assist Lithuania in managing the transit of persons between the region of

Kaliningrad and the other parts of the Russian Federation and shall, notably, bear any additional costs incurred by implementing the specific provisions of the acquis provided for such transit.

Article 3

Without prejudice to the sovereign rights of Lithuania, any further decision concerning the transit of persons between the region of Kaliningrad and other parts of the Russian Federation will be only adopted after the accession of Lithuania by the Council acting unanimously on a proposal from the Commission.

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AUTHOR	The 15 Member States ; Czech Republic ; Estonia ; Cyprus ; Latvia ; Lithuania ; Hungary ; Malta ; Poland ; Slovenia ; Slovak Republic
FORM	Treaty
TREATY	European Community ; European Union
TYPDOC	1 ; Treaty ; 2003 SEC_1_TYP_T
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2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings

Council Framework Decision

of 19 July 2002

on combating trafficking in human beings

(2002/629/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal of the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(3), the Tampere European Council on 15 and 16 October 1999, the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the Scoreboard, and the European Parliament in its Resolution of 19 May 2000 on the communication from the Commission "for further actions in the fight against trafficking in women" indicate or call for legislative action against trafficking in human beings, including common definitions, incriminations and sanctions.

(2) Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children(4) needs to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of an efficient judicial and law enforcement cooperation against trafficking in human beings.

(3) Trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion.

(4) The UN protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention against transnational organised crimes, represents a decisive step towards international cooperation in this field.

(5) Children are more vulnerable and are therefore at greater risk of falling victim to trafficking.

(6) The important work performed by international organisations, in particular the UN, must be complemented by that of the European Union.

(7) It is necessary that the serious criminal offence of trafficking in human beings be addressed not only through individual action by each Member State but by a comprehensive approach in which the definition of constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, forms an integral part. In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.

(8) It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking

in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime(5) and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union(6).

(9) This Framework Decision should contribute to the fight against and prevention of trafficking in human beings by complementing the instruments adopted in this area such as Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP)(7), Council Joint Action 96/748/JHA of 16 December 1996 extending the mandate given to the Europol Drugs Unit(8), Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women(9), Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network(10), Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union(11) and Council Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters(12).

(10) Council Joint Action 97/154/JHA should accordingly cease to apply in so far as it concerns trafficking in human beings,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation

1. Each Member State shall take the necessary measures to ensure that the following acts are punishable:

the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

(a) use is made of coercion, force or threat, including abduction, or

(b) use is made of deceit or fraud, or

(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or

(d) payments or benefits are given or received to achieve the consent of a person having control over another person

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

2. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used.

3. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used.

4. For the purpose of this Framework Decision, "child" shall mean any person below 18 years of age.

Article 2

Instigation, aiding, abetting and attempt

Each Member State shall take the necessary measures to ensure that the instigation of, aiding, abetting or attempt to commit an offence referred to in Article 1 is punishable.

Article 3

Penalties

1. Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.

2. Each Member State shall take the necessary measures to ensure that an offence referred to in Article 1 is punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances:

(a) the offence has deliberately or by gross negligence endangered the life of the victim;

(b) the offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;

(c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim;

(d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.

Article 4

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 1 and 2, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

(a) a power of representation of the legal person, or

(b) an authority to take decisions on behalf of the legal person, or

(c) an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in an offence referred to in Articles 1 and 2.

4. For the purpose of this Framework Decision, legal person shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 5

Sanctions on legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

(a) exclusion from entitlement to public benefits or aid, or

(b) temporary or permanent disqualification from the practice of commercial activities, or

(c) placing under judicial supervision, or

(d) a judicial winding-up order, or

(e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 6

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in Articles 1 and 2 where:

(a) the offence is committed in whole or in part within its territory, or

(b) the offender is one of its nationals, or

(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

2. A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 1 and 2 when it is committed by its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 7

Protection of and assistance to victims

1. Member States shall establish that investigations into or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 6(1)(a) applies.

2. Children who are victims of an offence referred to in Article 1 should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings(13).

3. Where the victim is a child, each Member State shall take the measures possible to ensure appropriate assistance for his or her family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family referred to.

Article 8

Territorial scope

This Framework Decision shall apply to Gibraltar.

Article 9

Application of Joint Action 97/154/JHA

Joint Action 97/154/JHA shall cease to apply in so far as it concerns trafficking in human beings.

Article 10

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision before 1 August 2004.

2. By the date referred to in paragraph 1, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. The Council will, by 1 August 2005 at the latest, on the basis of a report established on the basis of this information and a written report transmitted by the Commission, assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 11

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Brussels, 19 July 2002.

For the Council

The President

T. Pedersen

(1) OJ C 62 E, 27.2.2001, p. 324.

(2) OJ C 35 E, 28.2.2002, p. 114.

(3) OJ C 19, 23.1.1999, p. 1.

(4) OJ L 63, 4.3.1997, p. 2.

(5) OJ L 333, 9.12.1998, p. 1. Joint Action as last amended by Framework Decision 2001/500/JHA (OJ L 182, 5.7.2001, p. 1).

(6) OJ L 351, 29.12.1998, p. 1.

(7) OJ L 322, 12.12.1996, p. 7.

(8) OJ L 342, 31.12.1996, p. 4.

(9) OJ L 34, 9.2.2000, p. 1.

(10) OJ L 191, 7.7.1998, p. 4.

(11) OJ L 105, 27.4.1996, p. 1.

(12) OJ L 191, 7.7.1998, p. 1.

(13) OJ L 82, 22.3.2001, p. 1.

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2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

Council framework Decision

of 28 November 2002

on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

(2002/946/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the initiative of the French Republic(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) One of the objectives of the European Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters.

(2) In this framework, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.

(3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence(3) and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of this framework Decision.

(4) It is likewise essential not to confine possible actions to natural persons only but to provide for measures relating to the liability of legal persons.

(5) This framework Decision supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

(6) As regards Iceland and Norway, this framework Decision constitutes a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis(4), which fall within the area referred to in Article 1(E) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement(5).

(7) The United Kingdom is taking part in this framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis(6).

(8) Ireland is taking part in this framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis(7),

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Penalties

1. Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

2. Where appropriate, the criminal penalties covered in paragraph 1 may be accompanied by the following measures:

- confiscation of the means of transport used to commit the offence,

- a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed,

- deportation.

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA(8),

- the offence was committed while endangering the lives of the persons who are the subject of the offence.

4. If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

Article 2

Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the infringements referred to in Article 1(1) and which are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person,

- an authority to take decisions on behalf of the legal person, or

- an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the infringements referred to in Article 1(1) for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators or instigators of or accessories in the offences referred to in paragraph 1.

Article 3

Sanctions for legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 4

Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction with regard to the infringements referred to in Article 1(1) and committed

(a) in whole or in part within its territory;

(b) by one of its nationals, or

(c) for the benefit of a legal person established in the territory of that Member State.

2. Subject to the provisions of Article 5, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b),

- paragraph 1(c).

3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies.

Article 5

Extradition and prosecution

1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the infringements referred to in Article 1(1) when such infringements are committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the infringements referred to in Article 1(1) and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution, if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition, where appropriate as amended by any declarations made with respect to the Convention relating to extradition between the Member States of the European Union(9).

Article 6

International law on refugees

This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.

Article 7

Communication of information between the Member States

1. If a Member State is informed of infringements referred to in Article 1(1) which are in breach of the law on the entry and residence of aliens of another Member State, it shall inform the latter accordingly.

2. Any Member State which requests another Member State to prosecute, on the grounds of a breach of its own laws on the entry and residence of aliens, infringements referred to in Article 1(1) must specify, by means of an official report or a certificate from the competent authorities, the provisions of its law which have been breached.

Article 8

Territorial application

This framework Decision shall apply to Gibraltar.

Article 9

Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this framework Decision before 5 December 2004.

2. By the same date, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them by this framework Decision. On the basis of a report established using this information by the Commission, the Council shall, before 5 June 2005, assess the extent to which Member States have complied with the provisions of this framework Decision.

Article 10

Repeal

The provisions of Article 27(2) and (3) of the 1990 Schengen Convention shall be repealed as from 5 December 2004. Where a Member State implements this framework Decision pursuant to Article 9(1) in advance of that date, the said provisions shall cease to apply to that Member State from the date of implementation.

Article 11

Entry into force

This framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Brussels, 28 November 2002.

For the Council

The President

B. Haarder

(1) OJ C 253, 4.9.2000, p. 6.

(2) OJ C 276, 1.10.2001, p. 244.

(3) See page 17 of this Official Journal.

(4) OJ L 176, 10.7.1999, p. 36.

(5) OJ L 176, 10.7.1999, p. 31.

(6) OJ L 131, 1.6.2000, p. 43.

(7) OJ L 64, 7.3.2002, p. 20.

(8) OJ L 351, 29.12.1998, p. 1.

(9) OJ C 313, 23.10.1996, p. 12.

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Sirene Manual

Sirene Manual(1)

(2003/C 38/01)

CONTENTS

SIRENE

SUPPLEMENTARY INFORMATION REQUEST AT THE NATIONAL ENTRIES

TITLE I

GENERAL

Introduction

On 14 June 1985, five countries (the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) signed an agreement at Schengen, a small town in Luxembourg, with a view to enabling "(...) all nationals of the Member States to cross internal borders freely (...) and to enable the free circulation of goods and services".

One of the conditions for applying this agreement was that abolishing internal borders should not jeopardise State security. This means that all of the territories of the Contracting Parties have to be protected.

Several specialised groups were empowered to study practical measures so as to avoid security shortcomings once the agreement was brought into force.

The practical outcome of this work can be found in two documents, one technical (the feasibility study), and the other legal (the Convention).

The feasibility study, put to the Ministers and Secretaries of State of the five signatory countries of the Agreement in November 1988, lays down the broad technical principles for setting up the Schengen Information System.

The study not only sets out the structure of the information system, but also gives the essential specifications on the way it is to be organised to ensure it functions properly. This structure has been given the name "Sirene", which is an acronym of the definition of the structure in English: Supplementary Information REquest at the National Entries.

This is in fact a summary description of a procedure for transmitting the supplementary information required by an end-user for further action when the SIS has been consulted and a hit established.

The five founder countries signed the Convention implementing the Schengen Agreement on 19 June 1990, and were later joined by Italy on 27 November 1990, Spain and Portugal on 25 June 1991, Greece on 6 November 1992, Austria on 28 April 1995 and by Denmark, Sweden and Finland on 19 December 1996. The Convention lays down all of the legal rules binding on all of the Contracting Parties. Norway and Iceland also concluded a Cooperation Agreement with the Contracting Parties on 19 December 1996.

The common procedures and rules for cooperation between the partners are also detailed. Title IV focuses exclusively on the Schengen Information System.

The Schengen Information System (SIS) should provide the authorities responsible for:

(a) border controls;

(b) carrying out and coordinating the other police and customs checks within the country;

(c) issuing visas, residence permits and for administrative matters relating to aliens;

access to alerts on persons, vehicles and objects, by means of an automated consultation procedure.

The SIS is made up of two separate components: one is the central system, and the other is the national systems (one for each country). The SIS operates on the principle that the national systems cannot exchange computerised data directly between themselves, but instead only via the central system (C.SIS).

However, it should nevertheless be possible for the Contracting Parties to exchange the supplementary information required for implementing certain provisions foreseen under the Convention, and for the SIS to function properly, either on a bilateral or multilateral basis.

If each National Schengen Information System (N-SIS) is to meet the operating constraints set out in the feasibility study and the Convention, they must therefore have this supplementary information which is indispensable for using the Sirene computer system.

This is the technical operational service that will be used for transmitting all supplementary information requests at the national entries.

The following principle has been adopted:

A "national Sirene Bureau" shall be set up by each of the Contracting Parties to serve as a single contact point for the other partners, available around the clock.

The legal foundations, the cases when action ought to be taken, the procedures to be followed and the general principles for organising the Sirene Bureaux are defined by all of the Contracting Parties so as to have common rules.

The arrangements agreed at international level to this end are recorded in this "Sirene Manual".

Should the Contracting Parties deem necessary, they may decide to amend or update the manual.

1. The legal foundations

Article 108(1) to (4), constitutes the legal basis for the very existence of the Sirene Bureaux and for any action taken by them.

The Sirene Bureaux should therefore exchange information at least regarding the SIS. Depending on decisions taken at national level, inter alia based on Articles 39 and 46 of the Convention, the Sirene Bureaux may also exchange any other information with the competent bodies that the other Contracting Parties have appointed for this type of information.

This exchange of information is governed by the provisions of Title VI of the Convention (Articles 126 to 130).

The Bureaux shall not transmit information on applications for asylum, for instance.

This general framework for the objectives of the Sirene Bureaux tasks should be completed by listing the articles of the Convention which in any way have an impact on their activities.

- Article 5:

"1. For visits not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:

(d) the aliens shall not be persons for whom an alert has been issued for the purposes of refusing

entry."

- Article 25:

"1. Where a Contracting Party considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry it shall first consult the Contracting Party issuing the alert and shall take account of its interests: the residence permit shall be issued only for serious reasons, in particular of a humanitarian nature or reasons arising from international obligations.

If a residence permit is issued, the Contracting Party issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

2. Where it emerges that an alien who holds a valid residence permit, issued by one of the Contracting Parties, has been issued an alert for the purposes of refusing entry, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient grounds for withdrawing the said residence permit. If the residence permit is not withdrawn the Contracting Party issuing the alert shall withdraw the alert but may put the alien in question on its national list of alerts."

- Article 39:

"1. The Contracting Parties undertake to ensure that their police authorities, in compliance with national legislation and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences, insofar as national law does not stipulate that the request has to be made via the judicial authorities and provided that the request or the implementation thereof does not involve the application of measures of constraint by the requested Contracting Party. Where the requested police authorities do not have the power to deal with a request, they shall forward it to the competent authorities."

- Article 46:

"1. In certain cases, each Contracting Party may, in compliance with its national legislation and without being asked, send the Contracting Party concerned any information which may be of interest to it in helping prevent future crime and offences against or threats to public policy and security.

2. Information shall be exchanged, without prejudice to the arrangements for cooperation in border areas referred to in Article 39(4), via a central body to be designated. In particularly urgent cases, the exchange of information within the meaning of this Article may take place directly between the police authorities concerned, unless national provisions stipulate otherwise. The central body shall be informed of this as soon as possible."

- Article 94:

"1. The Contracting Party entering an alert shall determine whether the case is important enough to warrant the inclusion of the alert in the Schengen Information System.

4. Where a Contracting Party considers that an alert, in accordance with Articles 95, 97 or 99 is incompatible with its national law, its international obligations or essential national interests, it may subsequently add to the alert contained in the data file of the national section of the Schengen Information System a note to the effect that the action referred to in connection with the alert will not be taken in its territory. Consultation must be held in this connection with the other Contracting Parties (...)."

- Article 95:

"2. Prior to issuing an alert, the Contracting Party shall check whether the arrest is authorised under the national law of the requested Contracting Parties. If the Contracting Party issuing the alert has any doubts, it must consult the other Contracting Parties concerned.

The Contracting Party issuing the alert shall send, by the quickest means possible, to the requested Contracting Parties both the alert and essential information (...) on the case.

3. A requested Contracting Party may add to the alert in the file of the national section of the Schengen Information System a note prohibiting arrest in connection with the alert (...). The note shall be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. (...) the above time limit may be extended to one week. (...)

4. If, for particularly urgent reasons, a Contracting Party requests an immediate search, the requested Contracting Party shall examine whether it is able to withdraw its note. The requested Contracting Party shall take the necessary steps to ensure that the action to be taken can be carried out immediately, once the alert is validated."

- Article 96:

"1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions made in accordance with the rules of procedure laid down by national legislation, the administrative authorities or courts responsible."

- Article 97:

"Information on missing persons or persons who, in the interest of protection or in order to prevent threats, need to be temporarily placed under police protection at the request of the competent authority or the competent judicial authority of the Party issuing the alert, shall be included so that the police authorities may communicate their whereabouts to the Party issuing the alert or may move the persons to a safe place in order to prevent them from continuing their journey, if so authorised by national legislation. This shall apply in particular to minors and persons who must be interned following a decision by a competent authority. Communication of the information shall be subject to the consent of the missing person, if this person is of age."

- Article 98:

"1. Information on witnesses, persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for offences for which they are being prosecuted, or persons who are to be notified of a criminal judgment or of a summons to appear in order to serve a custodial sentence, shall be included, at the request of the competent judicial authorities, for the purposes of communicating their place of residence or domicile.

2. Information requested shall be communicated to the requesting Party in accordance with national legislation and the conventions on mutual assistance in criminal matters in force."

- Article 99:

"3. (...) an alert may be issued (...) at the request of the authorities responsible for State security. (...) The Contracting Party issuing the alert shall be required to consult the other Contracting Parties beforehand.

6. A requested Contracting Party may add to the alert in the file of the national section of the Schengen Information System a note prohibiting (...) performance of the action to be taken (...) The note must be deleted no later than 24 hours after the alert has been entered unless the Contracting Party refuses to take the action requested on legal grounds or for special reasons of expediency

(...)."

- Article 100:

"2. If a search brings to light the existence of an alert on an item which has been found, the authority which matched the two shall contact the authority which issued the alert in order to agree on the requisite measures to be taken (...)".

- Article 101:

"1. Access to data contained in the Schengen Information System and the right to search such data directly shall be reserved exclusively to the authorities responsible for:

(a) border checks;

(b) other police and customs checks carried out within the country, and the coordination of such checks.

2. In addition, access to data entered in accordance with Article 96 and the right to search such data directly may be exercised by the authorities responsible for issuing visas, the central authorities responsible for examining visa applications and the authorities responsible for issuing residence permits and the administration of aliens within the framework of the application of the provisions of this Convention on the movement of persons. Access to data shall be governed by the national law of each Contracting Party.

3. Users may only search data which they require in order to fulfil their tasks.

4. Each of the Contracting Parties shall send the Executive Committee a list of the competent authorities which are authorised to directly search the data contained in the Schengen Information System. This list shall provide each authority with information on which data it may search and for what purposes."

- Article 102:

"3. As regards the alerts laid down in Articles 95 to 100 of this Convention, any derogation (...) to change from one type of alert to another must be justified (...). Prior authorisation from the Contracting Party issuing the alert must be obtained for this purpose."

- Article 104:

"3. Insofar as this Convention does not lay down specific provisions on the enforcement of the action requested in the alert, the national legislation of the requested Contracting Party carrying out the action shall apply. Insofar as this Convention lays down specific provisions on carrying out the action requested in the alert, responsibility for the action to be taken shall be governed by the national law of the requested Contracting Party. If the requested action cannot be carried out, the requested Contracting Party shall immediately inform the Contracting Party issuing the alert."

- Article 105:

"The Contracting Party issuing the alert shall be responsible for ensuring that the data entered into the Schengen Information System is accurate, up-to-date and lawful."

- Article 106:

"2. If one of the Contracting Parties which has not issued the alert has good reason to believe that a piece of information is legally or factually incorrect, it shall advise the Contracting Party issuing the alert thereof as soon as possible: the latter shall be obliged to check the information and, if necessary, correct or delete the item in question without delay.

3. If the Contracting Parties are unable to reach agreement, the Contracting Party which did not issue the alert shall submit the case to the joint supervisory authority (...) for its opinion."

- Article 107:

"Where a person has already been the subject of an alert in the Schengen Information System, a Contracting Party which enters a further alert shall reach agreement on the entry of the alert with the Contracting Party which entered the first alert. The Contracting Party may also lay down general provisions to this end."

- Article 108:

"1. Each of the Contracting Parties shall designate an authority which shall have central responsibility for the national section of the Schengen Information System.

2. Each of the Contracting Parties shall enter its alerts via that authority.

3. The said authority shall be responsible for the correct operation of the national section of the Schengen Information System and shall take the requisite measures to ensure compliance with the provisions of this Convention.

4. The Contracting Parties shall inform one another, via the depositary, of the authority referred to in paragraph 1."

- Article 109:

"1. The right of persons to have access to data contained in the Schengen Information System which relates to them shall be exercised in accordance with the law of the Contracting Party before which they invoke that right. If national legislation so provides, the national supervisory authority provided for in Article 114(1) shall decide whether information shall be communicated and by what procedures. A Contracting Party which has not issued the alert may communicate information concerning such data only if it has previously given the Contracting Party issuing the alert an opportunity to state its position.

2. Communication of information to the person concerned shall be refused if there is a danger of it undermining the fulfilment of the legal task specified in the alert, or in order to protect the rights and freedoms of others. In any event, it shall be refused throughout the period of validity of the alert so that discreet surveillance may be carried out."

- Article 110:

"Anyone who finds that data relating to their person is factually or legally inaccurate may have this information corrected or deleted."

Analysing these articles of the Implementing Convention has made it possible to determine the main cases where Sirene intervention is called for. These principal cases have been completed according to the technical imperatives of the information systems and the degree of operational efficiency as defined jointly.

2. How the Sirene Bureaux are organised

The national Sirene Bureaux are the only contact points between the Contracting Parties in matters relating to the Schengen Information System.

In most cases, though, they are only intermediaries that forward the information to the competent national authorities. As such they merely carry out technical and formal controls. For other cases, the jurisdiction of the Sirene Bureaux must be defined at national level.

The officers responsible for the national files and users' services must vouch that the alerts

entered in the SIS and the information transmitted by Sirene are accurate, up-to-date and legal. This constraint is the outcome of the combined impact of Articles 105 and 108 of the Convention.

The Sirene Bureaux are merely operators acting on behalf of their country in the course of international contact, as a legal and/or functional entity, in accordance with the rules established by each State.

Each Contracting Party decides how its Sirene is to be organised and what the national procedures are to be, whilst respecting the rules set out in this manual.

However, these national structures should be well-known to all of the Contracting Parties, and must comprise certain technical resources and service constraints common to all of the Contracting Parties.

The officers in charge of the Sirene Bureaux shall meet at least twice a year to assess how their services are cooperating, to take the technical measures required in the event of any disfunctioning and adjust procedures.

2.1. The technical resources

For the main, the technical resources are the modes of communicating information between the Sirene Bureaux. It should be borne in mind that messages may be transmitted orally, in writing and by image.

Each Sirene Bureau shall use the national part of the communication system defined by all of the Contracting Parties.

Common provisions, as given in Annex 1 to this manual, shall summarise the cases when a communication shall be in writing and the cases when it need only be verbal.

2.1.1. The provisions for supplying information

The following measures have been adopted:

(a) the most appropriate means of communication must be determined on a case-by-case basis, according to technical possibilities and the requirements that the communication has to meet. Should circumstances dictate, the communications shall not be sent in unscrambled form;

(b) the messages will be conveyed mainly by telephone. So as to keep written messages to a minimum, telephone conversations will not automatically be confirmed in writing. The criteria for transmitting messages are detailed in annex 1;

(c) written messages shall be divided into two categories: free texts and standard forms that have to respect the instructions under Annex 5. If need be, the Sirene operators shall follow the transliteration rules set out for the SIS (see Annex 2). Preference should be given to using a language common to the Sirene operators who are in direct contact with one another when processing a case, so as to make it easier and quicker to use the information;

(d) The heads of the Sirene must have an e-mail address independent of the operating system. These specific addresses in the communication system shall enable direct mail exchange between the various Sirene heads.

2.1.2. The means of communication

The following measures have been adopted:

(a) the texts and images should preferably be sent via the specific mail channels defined by all of the Contracting Parties, rather than via telex, teletext, fax.

2.1.3. Archiving the information

The following measures have been adopted:

(a) each Contracting Party shall determine the provisions for storing information.

The Sirene Bureau of the Contracting Party issuing the alert is obliged to keep all of the information on its own alerts available to the other Contracting Parties.

The archives of each Sirene Bureau should be organised in such a way as to enable swift access to the relevant information in order to be able to meet very short deadlines for transmitting information;

(b) the files and other messages sent by the other Contracting Parties shall be stored according to procedures provided for under national law on data protection and on personal data as applicable in the receiving country. The provisions of Title VI of the Convention shall also apply. As far as is possible, these additional pieces of information should not be kept by the Sirene's once the corresponding alert has been erased.

2.2. Service constraints

Schengen Information System users may at any moment require further information so as to be able to implement a course of conduct. Operating constraints common to all Sirene Bureaux are therefore required.

2.2.1. Deadlines for processing files

The following measures have been adopted:

(a) the Sirene must answer requests for information made by the other contracting parties as soon as possible. The response must be given within 12 hours.

2.2.2. Availability of the Sirene Bureaux

The following measures have been adopted:

(a) the Sirene Bureaux must operate 24 hours a day, every day of the year;

(b) the international means of communication must be kept open permanently.

TITLE II

ACTION

3. Areas of intervention

Sirene action is to enable:

- the transmission of information on alerts in the Schengen Information System,

- adherence to the relevant provisions in the Convention,

- liaison between the national services and the international bodies responsible for public security assignments within the scope granted to them by each of the States.

These three general criteria for action have been summarised in the list of cases requiring intervention given below.

3.1. The main areas of intervention

3.1.1. The exchange of information prior to an alert (the second sentence of Article 95(2) and Article 99(3))

Two categories of alert come under this procedure: those under Article 95(2) (2nd sentence) on provisional arrest pending extradition and those under Article 99(3) on discreet surveillance or specific checks for State security purposes.

So as to guarantee that the procedure foreseen under Article 99(3) is followed, each Contracting Party shall take adequate technical or organisational measures to prevent an alert in this category from being entered into the Schengen Information System without the Sirene Bureau of that Contracting Party having been informed.

3.1.2. Information exchanged whilst entering an alert (Article 95(2))

This information is stipulated under the second part of the procedure foreseen by Article 95(2). A file should be sent containing information to supplement that already in the SIS. It should be forwarded to the other Contracting Parties and the information should be sent on a standard form.

See comments at point 4.1.1.

3.1.3. The exchange of information for multiple alerts (Article 107)

The existence of several alerts that have been issued by different countries for one and the same individual may cause confusion.

It is essential that the local police, who are the end-users of the Schengen Information System, are not faced with several types of procedure to follow that are contradictory. It is important that the police at local level know exactly what measures need to be taken.

A procedure should be established for detecting multiple alerts and there should be rules on setting priorities for entering them into the SIS.

This calls for:

- checks before entering an alert, to determine whether the individual is already in the SIS,

- consultation with the other Contracting Parties, if need be, if there are multiple alerts that are incompatible.

3.1.4. The exchange of information when adding a flag (Articles 94, 95, and 99)

Articles 94(4), 95(3) and 99(6) enable a requested Contracting Party to refuse to execute the prescribed procedure on its territory, and do so either temporarily or definitively. This option may be taken for alerts issued by virtue of Articles 95, 97 or 99.

Should this possibility be taken up, the alerts should be studied thoroughly immediately and a swift response should be given on the steps to be taken.

3.1.5. The exchange of information after a hit (Articles 95, 96, 97, 98, 99 and 100)

When an end-user consults the SIS on an alert and confirms that it matches the person, vehicle or object concerned, this positive response is termed as a hit.

The end-user might require supplementary information so as to be able to implement the procedures foreseen in the SIS tables 4, 10 or 16 under the best possible conditions (see Annex 4).

Unless stated otherwise, the issuing Contracting Party must be informed of the outcome of this hit.

This is primarily an operational matter, although it also has technical implications, as the alert then has to be processed. It might need to be erased, meaning another alert previously omitted from the system can be entered.

These alert "management" activities are absolutely essential for the smooth functioning of the SIS.

3.1.6. The exchange of information for aliens not to be granted entry (Articles 5, 25 and 96)

The information on aliens on whom an alert has been issued, with a view to refusing entry in accordance with Article 96, covers two types of action:

- firstly to refuse these aliens access to Schengen territory, and to this end to take the necessary steps to ensure that the consular services of the Contracting Parties do not issue them a visa, if one is required, and that the external border control services refuse them entry into the territories of the Parties,

- secondly, if these aliens are already on Contracting Party territory, action is to be taken to prevent the services responsible from issuing them residence permits and to initiate proceedings for their expulsion.

To this end and to gain a better understanding of the origins and validity of the non-admission measure on the basis of which an alert was entered pursuant to Article 96, the Contracting Party in whose territory the third country national subject to the alert is intercepted asks the Contracting Party issuing the alert for the following information under heading 089 of form G:

1. Type of decision

2. Authority issuing the decision

3. Date of decision

4. Date of service

5. Date of enforcement

6. Date of expiry of decision or length of validity.

See also point 4(6)2.

The notification foreseen under Article 5(2) and the consultation foreseen under Article 25 fall within the jurisdiction of the authorities responsible for issuing residence permits or visas.

The Sirene Bureaux should not be involved in the procedures foreseen under these two articles except for transmitting supplementary information directly relating to the alerts (notification of a hit, clarification on identity, for instance) or in erasing alerts.

In addition, the Sirene Bureaux may be involved in transmitting supplementary information necessary for expulsion or for refusing an alien entry, or in transmitting information generated by these operations.

The Sirene Bureaux are used as central authorities for transmitting and receiving additional information during the consultation procedure provided for in Article 25(1) and (2).

For this purpose, the Sirene Bureaux exchange N and O forms (Article 25(1) and Article 25(2)) at the request of the authorities responsible for issuing residence permits or visas with a view to retaining or deleting the alert.

If the State which granted the residence permit discovers that the holder of the said permit is the subject of an alert issued by another State pursuant to Article 96 of the Schengen Convention, it shall inform the latter's Sirene Bureau (by fax, M form, etc.). The Sirene Bureau of the State which issued the alert shall then instigate the consultation procedure pursuant to Article 25(2) of the Convention using the form provided for this purpose.

If a third State (i.e. a State which neither granted the residence permit nor issued the alert for the holder of the permit) discovers that there are grounds for consultation, it shall notify

both the State which issued the alert and the State which granted the residence permit.

3.1.7. The exchange of information when the procedures following a hit on an alert cannot be followed (Article 104(3))

Article 104(3) foresees procedure if a Contracting Party is unable, either by law or de facto, to follow procedure required by an alert.

3.1.8. The exchange of information if the original objective is changed (Article 102(3))

Article 102(3) allows for the purpose of the initial alert not to be respected after a hit in terms of how the data are to be used.

This procedure may only be used on grounds of the need to prevent an imminent serious threat to public order and safety, for serious reasons of State security or for the purposes of preventing a serious criminal offence.

The objective of the alert may only be altered subject to prior authorisation having been obtained from the issuing Contracting Party.

3.1.9. The exchange of information if data are found to be legally or factually flawed (Article 106)

The principle of data ownership laid down in Article 106 should not prevent a legal or factual error from being rectified. Paragraphs 2 and 3 of this Article covers this eventuality.

3.1.10. The exchange of information on the right to access and rectify data (Articles 109 and 110)

Any individual is entitled to have access to data on him/herself and, if need be, request that errors (whether de facto or legal) be corrected.

This possibility may be taken up in compliance with national legislation applicable in the country in which it is brought to bear.

A contracting Party may not authorise access to an alert issued by another Contracting Party unless the former has given the latter the opportunity to express its position.

3.2. Areas for supplementary intervention

3.2.1. The exchange of information on police cooperation (Articles 39 and 46)

Cooperation between the Contracting Parties and policing methods shall not be limited to using the information in the Schengen Information System alone.

Matching an alert may lead to the discovery of an offence or of a serious threat to public policy or to public security and there may also be a need to identify a person or object accurately.

The exchange of information, for instance, by means of photographs or finger prints may turn out to be indispensable. Articles 39 and 46 authorise these procedures for action.

This information shall be exchanged in such a way that complies with the provisions of Title VI of the Convention.

The following are recommended:

(a) the Sirene Bureaux of the Contracting Parties can exchange any useful information whilst respecting national measures taken to implement Articles 39 and 46;

(b) the Sirene Bureaux shall keep the other bureaux informed of measures taken at national level by each Contracting Party, as well as of any amendments made thereafter.

3.2.2. The specific powers in policing and security matters (Title III)

Title III of the Convention implementing the Schengen Agreement contains a number of innovative provisions in police and judicial cooperation. The Sirene Bureaux offer a way of organising matters in an operational fashion that may prove to be extremely useful in some cases, as for some Contracting Parties this curbs the proliferation of structures.

The following are recommended:

(a) each Contracting Party may give its Sirene Bureau specific policing and security powers, in line with Title III of the Convention;

(b) the Contracting Parties shall inform one another of the measures taken at national level for their respective Sirene Bureaux, as well as of any amendments that are made thereafter.

3.2.3. Overlapping roles of Sirene and Interpol

The role of the Schengen Information System is neither to replace nor to copy Interpol. Although there is a certain degree of overlap between tasks, the principles for action and for cooperation between the Contracting Parties differ substantially from those governing the International Criminal Police Organisation.

Consequently, it is necessary to establish the rules for cooperation between the Sirene Bureaux and the NCBs (National Central Bureaux).

The following procedures have been agreed:

(a) Priority of SIS alerts over Interpol alerts

SIS alerts and the exchange of information on these alerts should always have priority over alerts and information exchanged via Interpol. This priority should apply, in particular, if a SIS alert conflicts with an Interpol alert.

(b) Choice of communication channel

Within the territory of the Contracting Parties, alerts in the Schengen Information System take priority over Interpol alerts. Interpol alerts must be restricted to exceptional cases (alerts not provided for in the Convention (for instance, it is not possible to enter alerts for works of art into the SIS) or if not all the necessary information is available for a SIS alert). Parallel alerts in the SIS and via Interpol within the Schengen area are inadmissible. Alerts which are distributed via Interpol channels and which also cover the Schengen area or parts thereof (Interpol diffusion zone 2) should bear the following indication: "Zone 2 except for the Schengen States".

(c) Sending information to Third States

The Sirene Bureau of the Contracting Party which issued the alert always decides whether or not to pass information on to third States (authorisation, diffusion means and channel).

In so doing the Sirene Bureau observes the personal data-protection provisions laid down in the Schengen Convention. Use of the Interpol channel will depend on national provisions or procedures.

(d) Targeted search/restricted alerts

A targeted search is a search carried out in a restricted geographical area where there is concrete evidence of the whereabouts of the wanted person or object.

This evidence gives grounds to assume that the request from the judicial authority may be executed immediately on receipt.

Targeted searches in the Schengen area must take place using the A or M form.

An alert for the person or object should be entered in the SIS at the same time as the A or M

form is sent, if this has not been done already, so as to make a request for provisional arrest immediately enforceable (Article 64 of the Schengen Convention).

The alert not only complies with the provisions of Article 93 of the Convention but also increases the chances of success should the person or object move unexpectedly from one place to another within the Schengen area.

If a successful result can be achieved by means of a targeted and geographically restricted search, bilateral search requests for provisional arrest in line with the procedure laid down in extradition law may be made without entering an alert in the SIS.

(e) Hit and deletion of an Alert

The Schengen States ensure at national level that the Sirene Bureaux and the NCB inform one another of hits.

The deletion of an alert is undertaken by the authority which issued the alert.

(f) Improvement of cooperation between the Sirene Bureaux and the Interpol NCBs

Each Contracting Party shall take adequate measures to exchange information at national level between the Sirene bureaux and the NCBs.

4. The procedures to be followed

The smooth functioning of the Schengen Information System rests on coordinated action between the various national systems. As a prerequisite for this, common procedures must be defined that are to be followed by all of the Contracting Parties.

Each case requiring intervention has therefore been drawn up and codified to give an accurate description of the tasks to be carried out by the Sirene Bureaux.

4.1. The exchange of information prior to an alert

4.1.1. Checking whether the national law of the Contracting Parties authorises provisional arrest with a view to extradition (Article 95(2))

The Contracting Party issuing an alert shall check whether the provisional arrest that is to be requested is authorised by the national law of the other Contracting Parties.

The following procedure has been adopted:

(a) check that all Member States are able to follow up the alert foreseen;

(b) if there is any doubt, consult the Sirene Bureau concerned and transmit or exchange the information necessary for the check;

(c) the file provided for by Article 95(2), in the second part of the paragraph, shall be prepared before the alert is entered into the system. It should be checked that all of the information required is contained within the file and that it is presented correctly. The following information is to be transmitted, whereby the details for prosecution or the enforcement of criminal sentences must be given, in principle, as an alternative:

006: Surname: the surname used for the main data in the SIS alert is entered under heading 006.

007: Given name

009: Date of birth

010: Place of birth

011: Alias: the first alias name is written out in full and the total number of aliases found is

indicated. An M Form may be used to send the complete list of alias names.

012: Sex

013: Nationality: heading 013 "Nationality" must be filled in as completely as possible on the basis of the available information. If there are any doubts as to the information, code "1W", the word "supposed" should be added to the word "nationality".

030: Authority issuing the arrest warrant or decision (name and position of the magistrate or public prosecutor or name of the court)

031: Reference No of arrest warrant or decision (037)

See also comments below

032: Date of arrest warrant or decision (036)

Requests for criminal prosecution and enforcement can be summarised in an accompanying document.

033: Name of requesting authority

034: Maximum penalty/maximum penalty foreseen

035: Magistrate or court issuing the decision

036: Date of decision

037: Decision reference number

038: Sentence given

039: Indication of sentence remaining to be served

040: Legal texts applicable

041: Legal description of the deeds

042: Date/period the offence was committed

044: Description of the facts of the case (including their consequences)

045: Degree of involvement (principal, accessory, aider, abetter).

Each country may use its own legal terminology to describe the degree of participation (see point 2 of document SCH/OR.SIS-SIRENE (97) 12).

The information given must be in sufficient detail for the other Sirene Bureaux to verify the alert. Nevertheless, only a moderate amount of information should be given in order to avoid unnecessarily overloading the message system.

If the Sirene Bureaux are unable to receive the message because the number of spaces fixed for the relevant form for technical reasons is insufficient, an M form can be sent with supplementary information. The end of the transmission is indicated by the phrase "End of message" in the last form (heading 044 of Form A or heading 083 of form M).

The Sirene Bureau of the issuing Contracting Party may also provide further information, after consultation and/or at the request of another Contracting Party, if deemed necessary for clarifying an individual's identity. This information shall cover the following in particular:

- the origin of the passport or identity document in the possession of the person sought;

- the passport or identity document's reference number, issuing date, place and authority as well as the expiry date;

- description of the person sought;

- surname and given name of the wanted person's mother and father;

- whether there are records of the person's photo and/or finger prints;

- last known address.

As far as is possible, this information together with photographs and finger prints shall be available in the Sirene Bureaux, or immediately accessible to them permanently, so that they can transmit these identification elements as soon as possible.

In this highly sensitive area, the common objective should be to minimise the risk of detaining the wrong individual of similar identity to the person on whom an alert has been issued;

(d) where the alert is admissible by all of the Contracting Parties: the preparations shall be made for it to be entered into the SIS;

(e) where the alert is not admissible by all of the Contracting Parties:

- either the issuing Contracting Party abandons the idea of entering the alert,

- or it persists and asks the Contracting Party (-ies) concerned to submit a request immediately for a flag to be added.

In the event of a flag's being added, the alternative procedure must be implemented by the Contracting Party (-ies) concerned.

4.1.2. Consulting the Contracting Parties for alerts on grounds of State security (Article 99(3))

A Contracting Party issuing an alert for the purposes of discreet surveillance or of a specific check on the grounds of State security is obliged to consult the other Contracting Parties beforehand.

This highly sensitive area requires a specific procedure to safeguard the confidentiality of certain information. To this end, any contact between the services responsible for State security should be kept quite separate from the contact between the Sirene Bureaux.

In this specific case in question, the Sirene Bureaux shall ensure that the consultation procedure functions smoothly and record the results. The information is actually exchanged directly between the specialised services concerned.

The following procedure has been adopted:

(a) before entering an alert, the security department concerned contacts its Schengen counterparts directly;

(b) the specialised departments exchange the information they have, after which the security department entering the alert informs its national Sirene Bureau and forwards the results to it. The purpose is mainly to raise any objections that there might be to the planned alert;

(c) the Sirene Bureau contacted by the security department that is intending to enter an alert shall inform the other Sirene Bureaux. This enables the other bureaux to consult their respective security departments and exercise their rights;

(d) once the Sirene Bureau of the Contracting Party issuing the alert has established that the formal consultation has been held correctly it then approves the alert's being entered;

(e) should difficulties arise, the Sirene Bureau concerned shall inform the Contracting Party issuing the alert;

(f) if the Contracting Party issuing the alert upholds its alert, the requested Contracting Party

may request a flag be entered to grant 24 hours to study the matter;

(g) after this period for further study, at the request of a Contracting Party, a permanent flag may be entered for the alert that suspends the course of action that should otherwise be followed on the grounds of the alert.

4.2. Exchange of information when entering an alert

4.2.1. Sending a dossier for provisional arrest with a view to extradition (Article 95(2))

This file contains obligatory information as foreseen by the Convention. Furthermore, optional information to assist in processing the matter may also be sent if needed for ascertaining identity.

See comments at point 4.1.1.

A sample form, which is uniform for all of the Contracting Parties, can be found in Annex 5 to this manual.

The following procedure has been adopted:

(a) by the swiftest means available, the Contracting Party issuing the alert shall send the requested Contracting Parties the obligatory information on the case at the same time as entering the alert into the SIS.

If the individual is wanted on the grounds of more than one arrest warrant or verdict, which may serve as a basis for a request for provisional arrest for the purposes of extradition, information on one arrest warrant or one verdict only should initially be sent to the other Sirene Bureaux when entering the alert. The arrest warrant or verdict carrying the highest penalty or the arrest warrant or verdict which takes priority in view of the limitation period should be used.

Information on the other arrest warrants or verdicts should be kept by the Sirene Bureau of the State issuing the alert. In the event of a hit, it should be sent to the Sirene Bureau of the requested State immediately.

If one of the Sirene Bureaux thinks it necessary to add a flag on the basis of the information sent in form A, information on a second arrest warrant or verdict can be sent to all Sirene Bureaux so that the alert can be distributed and enforced as widely as possible;

(b) Any further information required for identification purposes is sent after consultation and/or at the request of another Contracting Party.

4.3. The exchange of information for multiple alerts

Pursuant to Article 107, the following general provisions have been adopted:

(a) only one alert per Contracting Party may be entered into the Schengen Information System for any one individual;

(b) several Contracting Parties may enter an alert on the same person in the Schengen Information System if the alerts are compatible or if there is no interference between the alerts;

(c) alerts issued pursuant to Article 95 are compatible with alerts issued pursuant to Articles 97 and 98. Moreover, they may also be considered as compatible with alerts issued pursuant to Article 96. In such cases, the procedures to be followed as set by Article 95 have priority over those set by Article 96;

(d) alerts issued pursuant to Articles 96 and 99 are not compatible with one another nor with alerts issued pursuant to Articles 95, 97 or 98, without prejudice to Articles 95 and 96 being compatible.

Within the category of alerts issued pursuant to Article 99, "discreet surveillance" procedures

are incompatible with "specific checks" procedures;

(e) the order of priority for grounds for alerts is as follows:

- provisional arrest with a view to extradition (Article 95),
- non-admission into Schengen States (Article 96),
- placing under protection (Article 97),
- discreet surveillance (Article 99),
- specific checks (Article 99),
- communicating whereabouts (Articles 97 and 98).

An exception may be made to this order of priority after consultation between the Contracting Parties if essential national interests are at stake;

(f) the Sirene Bureau of the Contracting Party issuing the alert shall keep a record of the requests to enter a new alert rejected after consultation by virtue of the provisions given above, and do so until the alert is deleted.

TABLE OF ALERTS

>TABLE POSITION>

The specific case of alerts pursuant to Article 96

The provisions of Article 101(2) enable the authorities responsible for issuing visas, for processing visa applications and issuing residence permits to have access to the data pursuant to Article 96.

All alerts pursuant to Article 96 need to be made available to all of the Schengen partners. The objective is not to issue an undesirable alien a residence permit or visa.

This imperative has to be to reconciled with the principles listed above.

The following general provisions have been adopted:

(a) a Contracting Party should always be able to enter an alert as pursuant to Article 96 so that the competent services do not issue residence permits or visas;

(b) if there is clash of interests with an alert pursuant to Article 95, each Contracting Party may maintain its alert. The rules on compatibility apply for all the other alerts;

(c) the procedures to be followed for the alerts shall be applied in the order of priority adopted, in other words, provisional arrest is made first;

(d) the Contracting Parties shall take the measures necessary at national level to inform their users of this procedure.

The specific case of alerts on vehicles

The following general recommendations have been adopted:

(a) only one alert per Contracting Party may be entered into the Schengen Information System for any one vehicle;

(b) several Contracting Parties may enter an alert on the same vehicle in the Schengen Information System if the alerts are compatible;

(c) alerts on vehicles issued pursuant to Article 99 with "discreet surveillance" procedures to

be followed are incompatible with alerts with "specific checks" procedures to be followed;

(d) alerts on vehicles pursuant to Article 99 are incompatible with alerts on vehicles pursuant to Article 100;

(e) the Sirene Bureau of the Contracting Party issuing the alert shall keep a record of the requests for entering a new alert rejected after consultation by virtue of the provisions given above, and do so until the alert is deleted.

TABLE OF COMPATIBLE ALERTS

>TABLE POSITION>

Under exceptional circumstances derogation may be made to the order of priorities indicated above, after consultation between the Contracting Parties, if essential national interests so require.

4.3.1. Checking for multiple alerts on an individual

Multiple alerts will occur only rarely. The main difficulty encountered will be in distinguishing accurately between individuals who have similar characteristics.

To solve this problem, even in cases where alerts are incompatible, cooperation between the Schengen States and policing methods advocate using the procedure for consultation between the Sirene Bureaux.

Each Contracting Party shall set up adequate technical resources to detect possible cases of individuals with identical characteristics before an alert is entered into the SIS.

The identity description elements for concluding that two identities might be identical are detailed in Annex 6 of this manual.

The following procedure has been adopted:

(a) if processing a request for entering a new alert reveals that there is already an individual in the SIS with the same mandatory identity description elements (surname, given name, date of birth) a check must be run before the new alert is approved;

(b) the Sirene Bureau shall contact the requesting department to clarify whether the alert is on the same person or not;

(c) if the cross-check reveals that the person in question is indeed one and the same, the Sirene Bureau shall apply the procedure for entering multiple alerts as defined in paragraph 4.3.3. If the outcome of the check is that there are in fact two different people, the Sirene Bureau approves the request for entering another alert.

4.3.2. Checking for multiple alerts on a vehicle

The mandatory identity description elements for alerts on a vehicle are:

- either the number plate;

- or the serial number.

However, both numbers may figure in the SIS.

Multiple alerts are checked for by comparing numbers. If two numbers are found to be identical it is assumed that there are multiple alerts on the same vehicle.

Technical difficulties arise with this method of verification in that comparison is not always possible as this depends on the obligatory description elements used.

SIS alerts on vehicles contain the serial number and/or the registration plate number. When entering a new alert, if it is discovered that the same serial number and/or registration plate number already

exists in the SIS, it is assumed that there are multiple alerts on the same vehicle.

The Sirene Bureau shall draw the national users' attention to the, certainly limited, number of cases that might cause problems where only one of the numbers has been compared: a positive response, or a "hit", is taken to mean that there are multiple alerts on one and the same vehicle, but a negative response does not mean that there is no alert on this vehicle. There may be an alert on the vehicle under the number that was not used on the comparative check.

The identity description elements used for concluding that two vehicles are identical are detailed in Annex 6 of this manual.

The procedure to be adopted by the Sirene Bureaux for vehicles is the same as for persons.

4.3.3. Negotiating entering a new alert if it is incompatible with a previous alert

If a request for an alert vies with an alert issued by the same Contracting Party, the national Sirene Bureau should ensure that only one alert is left in the SIS. Each individual State is free to choose the exact procedure to be applied.

If the alert requested is incompatible with an alert that has already been issued by one or several other Contracting Parties, their agreement is required.

The following procedure has been adopted:

(a) if the alerts are compatible, the Sirene Bureaux do not need to consult; if the alerts do not interfere with one another, the Contracting Party that wishes to enter a new alert shall decide whether consultation ought to be held;

(b) if the alerts are not compatible, or if there is any doubt, the Sirene Bureaux have to consult so that ultimately only one alert, or one group of alerts that are compatible with one another, is entered into the Schengen Information System;

(c) if an alert that is incompatible with existing alerts in the SIS is given priority status as the outcome of consultation, the Contracting Parties that entered the other alerts have to withdraw them when the new alert is entered into the SIS;

(d) any disputes shall be settled by negotiations between the Sirene Bureaux. If agreement cannot be reached on the basis of the list of priorities established, the oldest alert is left in the SIS.

4.4. The exchange of information when adding a flag

The Sirene Bureaux must exchange information so that the Contracting Parties can assess the need for a flag to be added, and thereafter implement this option.

There are three scenarios for adding a flag:

(a) a "permanent" flag may be added (or deleted) at any moment under the terms of Article 94(4) on alerts pursuant to Articles 95, 97 and 99.

An alternative procedure is foreseen for flags that apply to an alert issued pursuant to Article 95. No alternative procedure is foreseen for alerts pursuant to the other two articles, and the alert does not appear on the screen when the end-user consults the system;

(b) a flag for 24 hours "study" time, which may be extended to up to a maximum of seven days, under the provisions of Article 95(3) may be added to alerts pursuant to Article 95. This flag may be converted into a permanent flag. Alternative procedures, as foreseen by Article 95(5), must be followed;

(c) under the provisions of Article 99(6), a flag for a maximum of 24 hours "study" may be added to alerts issued pursuant to Article 99. This flag may be converted into a permanent flag. No alternative procedure is foreseen.

The Contracting Parties must take the following remarks into account:

- the procedure of adding a flag must be used exceptionally;

- it may take some time between an alert's being entered into the Schengen Information System and a flag's being added. During this time-lapse normal procedures should be followed. This period of time should therefore preferably be kept as short a possible;

- each Contracting Party shall detect the alerts likely to require a flag as swiftly as possible.

4.4.1. Consulting the Contracting Parties with a view to adding a flag

The following procedure has been adopted:

(a) the requested Contracting Party that intends to add a flag to an alert shall inform the Contracting Party that issued the alert.

No consultation is foreseen for a flag added to an alert issued pursuant to Articles 95(3) and 99(6) for the purposes of further study. All Contracting Parties shall be consulted obligatorily for a permanent flag as foreseen under Article 94(4);

(b) once information has been exchanged so as to meet the requirements of each of the Contracting Parties, they may need to amend or even delete either the alert, which is done by the requesting Party, or the request, which is done by the requested Party.

4.4.2. A request for a flag to be added

The following procedure has been adopted:

(a) the requested Contracting Party asks the Contracting Party that issued the alert to add a flag to an alert issued pursuant to Articles 95, 97 or 99.

This request must be made in writing. If the request is made by telephone written confirmation must be given;

(b) the Contracting Party that issued the alert is obliged to add a flag as soon as possible;

(c) the same procedure applies for extending a flag added so as to enable further study of an alert issued pursuant to Article 95(3), as well as for withdrawing a temporary or permanent flag;

(d) in urgent cases, a Contracting Party that issued an alert may ask the requested Contracting Parties to refrain from adding flags for the purposes of further study for alerts issued pursuant to Article 95.

4.4.3. Systematic request for a flag to be added for the State's nationals

The following procedure has been adopted:

(a) a Contracting Party may ask the Sirene Bureaux of the other Contracting Parties to add a flag as a matter of course to alerts issued on its nationals pursuant to Article 95 if the wanted person is one of its nationals;

(b) any Contracting Party wishing to take advantage of this option should forward its decision in writing to the Contracting Parties which it would like to cooperate;

(c) any Contracting Party(ies) to whom this request is addressed shall add a flag for the Contracting Party that has requested one and do so immediately after the alert is issued;

(d) this procedure shall continue to be binding until another written request is made for it to be cancelled.

4.5. The exchange of information after a hit

4.5.1. Informing the Schengen partners if an alert is matched

The following procedure has been adopted:

(a) a hit after a check has been carried out on an individual, a vehicle or an object on which an alert has been issued should always be communicated to the Sirene Bureau of the Contracting Party that issued the alert.

On the basis of this information, if deemed necessary the Sirene Bureau of the Contracting Party that issued the alert shall forward any relevant, specific information and the particular measures that should be taken to the Sirene Bureau of the Contracting Party that matched the alert.

When notifying the State which issued the alert of a hit, the Article of the Schengen Convention which applies to the hit should be indicated in heading 090 of form G.

If the hit concerns a person who is registered in the SIS pursuant to Article 95 of the Schengen Convention, the Sirene Bureau of the State in which the hit is obtained should inform the Sirene Bureau of the State issuing the alert by telephone before sending a G form;

(b) The Sirene Bureaux of Contracting Parties that issued alerts pursuant to Article 96 shall not be informed of any hits as a matter of course. Under exceptional circumstances, the bureaux can be informed by the requested Contracting Party that discovered the alert;

(c) for each Contracting Party to be able to exercise its rights, the Contracting Parties that had previously indicated that they wanted to issue an alert on the same person or object should preferably be informed of any hits. The Contracting Party that actually issued an alert is responsible for informing these other Contracting Parties;

(d) through the C.SIS's automatically communicating that an alert has been deleted, it is possible to study whether another alert, which was previously incompatible and which as such was not entered, can in fact now be entered.

4.5.2. Communicating further information

The following procedure has been adopted:

(a) the Sirene Bureaux may transmit further information on alerts issued pursuant to Articles 95, 97, 98 and 100; in so doing they may act on behalf of judicial authorities if this information falls within the scope of mutual judicial assistance.

The Sirene Bureaux have no powers or particular duties in areas of extradition(2). If an alert issued pursuant to Article 95 is matched, their role simply consists of transmitting further information that the Contracting Parties might require for determining whether extradition procedures should indeed be implemented.

It is not the Sirene Bureaux but the appropriate departments within each Contracting Party that are responsible for transmitting extradition files and other judicial data through the diplomatic channel or other channels;

(b) as far as is possible, the Sirene Bureaux shall communicate medical details on the individuals on whom an alert has been issued pursuant to Article 97 if measures have to be taken for their protection.

The information transmitted is kept only as long as is strictly necessary and is used exclusively

for the purposes of medical treatment given to the person concerned;

(c) if operations after an alert is matched so require (such as if an offence is discovered or if there is a threat to law and order, if an object, vehicle or individual needs to be more clearly identified, etc.), the information transmitted as a complement to that stipulated under Title IV of the Schengen Convention, in particular regarding Articles 99 and 100, shall be transmitted by virtue of Articles 39 and 46 of the abovementioned Convention.

The Sirene Bureaux shall send "further information" as quickly as possible in a P form, in response to a G form when a hit is made on an alert issued on a vehicle pursuant to Article 100 of the Schengen Convention.

NB:

(Given that the request is urgent and that it will therefore not be possible to collate all the information immediately, it is agreed that certain headings will be optional rather than obligatory, and that efforts will be made to collate the information relating to the main headings, for example: 041, 042, 043, 162, 164, 165, 166 and 167).

4.6. The exchange of information on aliens not to be granted admission

If an alien who falls under the scenario foreseen in Articles 5 or 25 of the Convention applies for a residence permit or visa the authority issuing the paper must apply specific rules.

Under exceptional circumstances the Schengen partners might need to be informed of the fact that the alert has been matched. Since there are many addressees of alerts issued pursuant to Article 96 in the consular posts and embassies, and given the distances between them, they need not be informed as a matter of course.

4.6.1. Issuing residence permits or visas

The following procedure has been adopted:

(a) a requested Contracting Party may inform the Contracting Party that issued an alert pursuant to Article 96 of its having been matched. This latter may then inform the other Contracting Parties if it thinks so fit;

(b) if so requested, whilst respecting national legislation the Sirene Bureaux of the Contracting Parties concerned may assist in transmitting the necessary information to the specialised services responsible for issuing residence permits and visas;

(c) if the procedure foreseen under Article 25 of the Convention entails deleting an alert issued pursuant to Article 96 the Sirene Bureaux shall, whilst respecting their national legislation, offer their support if so requested.

4.6.2. Refusing admission or expulsion from Schengen territory

The following procedure has been adopted:

(a) a Contracting Party may ask to be informed of any alerts it issued pursuant to Article 96 that have been matched.

Any Contracting Party that wishes to take up this option shall ask the other Contracting Parties in writing;

(b) a requested Contracting Party may take the initiative and inform the Contracting Party issuing an alert pursuant to Article 96 that the alert has been matched, the alien has not been granted admission or has been expelled from Schengen territory.

(c) if, on its territory, a Contracting Party intercepts a person for whom an alert has been issued, the Contracting Party issuing the alert may forward the information required to expel (return/deport) a third-country national. Depending on the needs of the requesting Contracting Party and if available to the requested Contracting Party, this information should include the following:

- the type of decision,

- the authority issuing the decision,

- the date of the decision,

- the date of service,

- the date of enforcement,

- the date on which the decision expires or the length of validity.

See point 3(1)(6).

- If a person on whom an alert has been issued is intercepted at the border the procedures set by the issuing Contracting Party have to be followed,

- for the exceptions set out for Articles 5 or 25 of the Convention the requisite consultation must be held between the Contracting Parties concerned via the Sirene Bureaux,

- there might also be an urgent need for complementary information to be exchanged via the Sirene Bureaux in specific cases to identify an individual with certainty.

4.7. The exchange of information when the procedure following a hit cannot be executed

4.7.1. Informing the alerting Contracting Party that the procedures cannot be followed

The following procedure has been adopted:

(a) the requested Contracting Party shall inform the Contracting Party that issued the alert straight away, and do so via its Sirene Bureau, of the fact that it is not able to follow procedures, and give the reasons;

(b) the Contracting Parties concerned may then agree on what procedure to follow in keeping with their own national legislation and with the provisions of the Convention.

4.8. The exchange of information if the objective of the alert is changed

The consent of the Contracting Party that issued the alert is required for this procedure that is used only under exceptional circumstances.

The issuing Contracting Party should be able to appraise the importance and relevance of the request.

The ends for which the data are to be used must come under one of the alert categories foreseen in Articles 95 to 100 of the Convention.

On no account should this data be used for other ends than those foreseen by the Convention.

4.8.1. Informing the alerting Contracting Party that the objective has been changed

The following procedure has been adopted:

(a) through its Sirene Bureau, the requested Contracting Party shall explain to the Contracting Party that issued the alert the grounds for its asking for the original objective to be changed;

(b) as soon as possible, the issuing Contracting Party shall study whether this wish can be met and advise the requested Contracting Party through its Sirene Bureau of its decision.

If need be, the Contracting Party that issued the alert can grant authorisation subject to certain conditions on how the data are to be used.

4.8.2. Procedures for changing the original objective

The following procedure has been adopted:

(a) once the Contracting Party that issued the alert has agreed, the requested Contracting Party shall use the data for the ends it sought and obtained authorisation. It shall take account of any conditions set.

4.9. The exchange of information in the case of inaccurate or inadmissible data

4.9.1. Informing the alerting Contracting Party that data is inaccurate or inadmissible

The following procedure has been adopted:

(a) the Contracting Party that establishes that data contain an error shall advise the issuing Contracting Party thereof via its Sirene Bureau;

(b) information shall be exchanged so as to reach an agreement on how this data should be corrected or deleted;

(c) form J may be used when inaccurate or inadmissible data is detected as well as to transmit the reply from the Sirene Bureaux issuing the alert;

(d) the additional information required to establish identity should be sent on agreement with and/or at the request of another Contracting Party.

4.9.2. Rectification procedures

The following procedure has been adopted:

(a) if the Contracting Parties are in agreement, the issuing Contracting Party shall follow its national procedures for correcting the error;

(b) if there is no agreement, the Sirene Bureau of the Contracting Party that established the error shall advise the authority responsible within its own country to referral of the matter to the Joint Supervisory Authority.

4.10. The exchange of information regarding the right to access or rectify data

4.10.1. Informing the national authorities of a request to access or rectify data

The following procedure has been adopted:

(a) each Sirene Bureau must apply its national legislation on the right to access to the data. Depending on the circumstances of the case, the Sirene Bureaux shall either forward the national authorities responsible any requests they receive for access or for rectifying data, or they shall adjudicate upon these requests within the limits of their remit;

(b) If the national authorities responsible so ask, the Sirene Bureaux of the Contracting Parties concerned shall forward information on exercising this right to access.

4.10.2. Information on requests for access for alerts issued by other Contracting Parties

As far as is possible, information on alerts entered into the SIS by another Contracting Party shall be exchanged via the national Sirene Bureaux.

The following procedure has been adopted:

(a) the request for access shall be forwarded to the Contracting Party that issued the alert as

soon as possible, so that it can take a position on the question;

(b) the issuing Contracting Party shall inform the Contracting Party that received the request of its position. It shall take account of any legal deadlines set for processing the request;

(c) if the Contracting Party that issued the alert sends its position to the Sirene Bureau of the Contracting Party that received the request for access, the Sirene Bureau shall ensure that the position is forwarded to the authority responsible for adjudication on the request as soon as possible.

4.10.3. Information on access and rectification procedures

The following procedure has been adopted:

(a) the Sirene Bureaux shall keep one another informed of any national legislation adopted on access and rectification procedures for personal data, as well as of any amendments made thereafter.

5. The tasks to be performed per alert category

Several problems have to be addressed by the Sirene Bureaux when an alert is entered into the SIS. They must ensure that that the provisions set out in the Schengen Convention are respected and guarantee the technical status of the data.

The sequence of tasks to be performed for each category of alerts must be followed scrupulously so as to guarantee that the information distributed through the SIS is reliable.

The moment a hit is made, the main duty is to notify straight away that the alert has been matched. Should circumstances so require, any further information that might be needed for action to be taken shall be exchanged between the Contracting Parties concerned.

5.1. Creating an alert

5.1.1. The tasks common to all categories

The following tasks must be carried out before any action is taken which relates specifically to one category of alerts:

(a) check for multiple alerts:

- at national level there may only be one alert in the SIS per country on any one individual (or vehicle). In the event of their being more than one, national procedures must be followed to ensure that only one alert is left in the SIS,

- within Schengen, there may be several compatible alerts on any one individual (or vehicle);

(b) if there is more than one alert on any one individual (or vehicle) check that they are compatible:

- if they are not compatible, negotiate entering only one alert (on any one individual or vehicle). In the event of failure to come to an agreement: the procedure is terminated here,

- if the multiple alerts are compatible, or if it is agreed that the new alert should be given priority, continue with the procedure.

Please note:

The contracting Party issuing the alert should keep a copy of requests for entering an alert that are rejected so that it can communicate all the hits of which it has been informed.

The Contracting Party that was not able to enter its alert shall take the necessary technical measures to review its request if it is notified automatically that the alert previously blocking

its request has been deleted.

5.1.2. Measures to be taken for each individual category of alert

5.1.2.1. Alerts pursuant to Article 95

(a) Check that the national legislation of the Contracting Parties authorises provisional arrest for the purpose of extradition.

(b) Check whether there is a file on obligatory complementary information.

(c) Enter the alert into the SIS and at the same time send the file to the other Sirene Bureaux.

(d) At the request of another Contracting Party add a flag.

5.1.2.2. Alerts pursuant to Article 96

(a) Enter the alert into the SIS.

5.1.2.3. Alerts pursuant to Article 97

(a) Enter the alert into the SIS.

(b) At the request of a Contracting Party add a flag.

5.1.2.4. Alerts pursuant to Article 98

(a) Enter the alert into the SIS.

5.1.2.5. Alerts pursuant to Article 99(2)

(a) Enter the alert into the SIS.

(b) At the request of another Contracting Party add a flag.

5.1.2.6. Alerts pursuant to Article 99(3)

(a) Check with the national security services that the security services in the other Contracting Parties have been informed.

(b) Inform the Sirene Bureaux in the other Contracting Parties of the new alert and ensure that cooperation and consultation take place correctly.

(c) Enter the alert into the SIS.

(d) At the request of a Contracting Party add a flag.

5.1.2.7. Alerts pursuant to Article 100

(a) For vehicles only: check for multiple alerts, and if there is more than one alert, check that the alerts are compatible.

(b) Enter the alert into the SIS.

(c) An alert for a vehicle should be issued by the State in which the first report was made.

5.2. Amending an alert

5.2.1. Entering an alias

(a) Check that the alias that is due to be entered is not a multiple alert. If there is any doubt or if there is a multiple alert, follow procedures foreseen for this.

The party that entered the original alert is responsible for adding any aliases. If a third country discovers the alias it should pass the matter on to the party that originally entered the alert,

unless the third country itself issues an alert on the alias.

(b) Inform the other Contracting Parties of aliases regarding an alert issued pursuant to Articles 95 or 99(3). Whenever needed, the Sirene Bureaux shall transmit this information to their national authorities responsible for each category of alert.

(c) Enter the alert into the SIS.

5.2.2. Changing the grounds or procedures for an alert

This procedure shall be applied regardless of a hit.

(a) Delete the alert that is to be placed in another category

(b) Recommence the entire procedure for entering an alert in the new category.

5.3. Deleting an alert

5.3.1. Deleting after a hit

(a) Inform the Contracting Parties who had been unable to enter their alert that a hit has been made and that the alert has been deleted.

5.3.2. Deleting when the conditions for maintaining the alert cease to be met

Excluding the cases after a hit, an alert may be deleted either directly by the C.SIS (once the expiry date is passed) or indirectly by the service that entered the alert in the SIS (once the conditions for the alert's being maintained no longer apply).

In both instances the C.SIS delete message should be processed automatically by the N.SIS so that an alert kept pending can be entered in its place.

(a) The Sirene Bureau is notified automatically by a message from its N.SIS that an alert put on hold can be entered.

(b) The Sirene Bureau shall apply the entire procedure for entering an alert in the appropriate alert category.

(1) Council Decision 2003/19/EC of 14 October 2002 on declassifying certain parts of the Sirene Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 8, 14.1.2003, p. 34).

(2) Except for Sirene Austria.

Sirene Manual(1)

(2003/C 38/01)

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SIRENE

SUPPLEMENTARY INFORMATION REQUEST AT THE NATIONAL ENTRIES

TITLE I

GENERAL

Introduction

On 14 June 1985, five countries (the Kingdom of Belgium, the Federal Republic of Germany, the

French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) signed an agreement at Schengen, a small town in Luxembourg, with a view to enabling "(...) all nationals of the Member States to cross internal borders freely (...) and to enable the free circulation of goods and services".

One of the conditions for applying this agreement was that abolishing internal borders should not jeopardise State security. This means that all of the territories of the Contracting Parties have to be protected.

Several specialised groups were empowered to study practical measures so as to avoid security shortcomings once the agreement was brought into force.

The practical outcome of this work can be found in two documents, one technical (the feasibility study), and the other legal (the Convention).

The feasibility study, put to the Ministers and Secretaries of State of the five signatory countries of the Agreement in November 1988, lays down the broad technical principles for setting up the Schengen Information System.

The study not only sets out the structure of the information system, but also gives the essential specifications on the way it is to be organised to ensure it functions properly. This structure has been given the name "Sirene", which is an acronym of the definition of the structure in English: Supplementary Information REquest at the National Entries.

This is in fact a summary description of a procedure for transmitting the supplementary information required by an end-user for further action when the SIS has been consulted and a hit established.

The five founder countries signed the Convention implementing the Schengen Agreement on 19 June 1990, and were later joined by Italy on 27 November 1990, Spain and Portugal on 25 June 1991, Greece on 6 November 1992, Austria on 28 April 1995 and by Denmark, Sweden and Finland on 19 December 1996. The Convention lays down all of the legal rules binding on all of the Contracting Parties. Norway and Iceland also concluded a Cooperation Agreement with the Contracting Parties on 19 December 1996.

The common procedures and rules for cooperation between the partners are also detailed. Title IV focuses exclusively on the Schengen Information System.

The Schengen Information System (SIS) should provide the authorities responsible for:

(a) border controls;

(b) carrying out and coordinating the other police and customs checks within the country;

(c) issuing visas, residence permits and for administrative matters relating to aliens;

access to alerts on persons, vehicles and objects, by means of an automated consultation procedure.

The SIS is made up of two separate components: one is the central system, and the other is the national systems (one for each country). The SIS operates on the principle that the national systems cannot exchange computerised data directly between themselves, but instead only via the central system (C.SIS).

However, it should nevertheless be possible for the Contracting Parties to exchange the supplementary information required for implementing certain provisions foreseen under the Convention, and for the SIS to function properly, either on a bilateral or multilateral basis.

If each National Schengen Information System (N-SIS) is to meet the operating constraints set out in the feasibility study and the Convention, they must therefore have this supplementary information which is indispensable for using the Sirene computer system.

This is the technical operational service that will be used for transmitting all supplementary information requests at the national entries.

The following principle has been adopted:

A "national Sirene Bureau" shall be set up by each of the Contracting Parties to serve as a single contact point for the other partners, available around the clock.

The legal foundations, the cases when action ought to be taken, the procedures to be followed and the general principles for organising the Sirene Bureaux are defined by all of the Contracting Parties so as to have common rules.

The arrangements agreed at international level to this end are recorded in this "Sirene Manual".

Should the Contracting Parties deem necessary, they may decide to amend or update the manual.

1. The legal foundations

Article 108(1) to (4), constitutes the legal basis for the very existence of the Sirene Bureaux and for any action taken by them.

The Sirene Bureaux should therefore exchange information at least regarding the SIS. Depending on decisions taken at national level, inter alia based on Articles 39 and 46 of the Convention, the Sirene Bureaux may also exchange any other information with the competent bodies that the other Contracting Parties have appointed for this type of information.

This exchange of information is governed by the provisions of Title VI of the Convention (Articles 126 to 130).

The Bureaux shall not transmit information on applications for asylum, for instance.

This general framework for the objectives of the Sirene Bureaux tasks should be completed by listing the articles of the Convention which in any way have an impact on their activities.

- Article 5:

"1. For visits not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:

(d) the aliens shall not be persons for whom an alert has been issued for the purposes of refusing entry."

- Article 25:

"1. Where a Contracting Party considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry it shall first consult the Contracting Party issuing the alert and shall take account of its interests: the residence permit shall be issued only for serious reasons, in particular of a humanitarian nature or reasons arising from international obligations.

If a residence permit is issued, the Contracting Party issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

2. Where it emerges that an alien who holds a valid residence permit, issued by one of the Contracting Parties, has been issued an alert for the purposes of refusing entry, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient grounds for withdrawing the said residence permit. If the residence permit is not withdrawn the Contracting Party issuing the alert shall withdraw the alert but may put the alien in question on its national list of alerts."

- Article 39:

"1. The Contracting Parties undertake to ensure that their police authorities, in compliance with national legislation and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences, insofar as national law does not stipulate that the request has to be made via the judicial authorities and provided that the request or the implementation thereof does not involve the application of measures of constraint by the requested Contracting Party. Where the requested police authorities do not have the power to deal with a request, they shall forward it to the competent authorities."

- Article 46:

"1. In certain cases, each Contracting Party may, in compliance with its national legislation and without being asked, send the Contracting Party concerned any information which may be of interest to it in helping prevent future crime and offences against or threats to public policy and security.

2. Information shall be exchanged, without prejudice to the arrangements for cooperation in border areas referred to in Article 39(4), via a central body to be designated. In particularly urgent cases, the exchange of information within the meaning of this Article may take place directly between the police authorities concerned, unless national provisions stipulate otherwise. The central body shall be informed of this as soon as possible."

- Article 94:

"1. The Contracting Party entering an alert shall determine whether the case is important enough to warrant the inclusion of the alert in the Schengen Information System.

4. Where a Contracting Party considers that an alert, in accordance with Articles 95, 97 or 99 is incompatible with its national law, its international obligations or essential national interests, it may subsequently add to the alert contained in the data file of the national section of the Schengen Information System a note to the effect that the action referred to in connection with the alert will not be taken in its territory. Consultation must be held in this connection with the other Contracting Parties (...)."

- Article 95:

"2. Prior to issuing an alert, the Contracting Party shall check whether the arrest is authorised under the national law of the requested Contracting Parties. If the Contracting Party issuing the alert has any doubts, it must consult the other Contracting Parties concerned.

The Contracting Party issuing the alert shall send, by the quickest means possible, to the requested Contracting Parties both the alert and essential information (...) on the case.

3. A requested Contracting Party may add to the alert in the file of the national section of the Schengen Information System a note prohibiting arrest in connection with the alert (...). The note shall be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. (...) the above time limit may be extended to one week. (...)

4. If, for particularly urgent reasons, a Contracting Party requests an immediate search, the requested Contracting Party shall examine whether it is able to withdraw its note. The requested Contracting Party shall take the necessary steps to ensure that the action to be taken can be carried out immediately, once the alert is validated."

- Article 96:

"1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions made in accordance with the rules of procedure laid down by national legislation, the administrative authorities or courts responsible."

- Article 97:

"Information on missing persons or persons who, in the interest of protection or in order to prevent threats, need to be temporarily placed under police protection at the request of the competent authority or the competent judicial authority of the Party issuing the alert, shall be included so that the police authorities may communicate their whereabouts to the Party issuing the alert or may move the persons to a safe place in order to prevent them from continuing their journey, if so authorised by national legislation. This shall apply in particular to minors and persons who must be interned following a decision by a competent authority. Communication of the information shall be subject to the consent of the missing person, if this person is of age."

- Article 98:

"1. Information on witnesses, persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for offences for which they are being prosecuted, or persons who are to be notified of a criminal judgment or of a summons to appear in order to serve a custodial sentence, shall be included, at the request of the competent judicial authorities, for the purposes of communicating their place of residence or domicile.

2. Information requested shall be communicated to the requesting Party in accordance with national legislation and the conventions on mutual assistance in criminal matters in force."

- Article 99:

"3. (...) an alert may be issued (...) at the request of the authorities responsible for State security. (...) The Contracting Party issuing the alert shall be required to consult the other Contracting Parties beforehand.

6. A requested Contracting Party may add to the alert in the file of the national section of the Schengen Information System a note prohibiting (...) performance of the action to be taken (...) The note must be deleted no later than 24 hours after the alert has been entered unless the Contracting Party refuses to take the action requested on legal grounds or for special reasons of expediency (...)."

- Article 100:

"2. If a search brings to light the existence of an alert on an item which has been found, the authority which matched the two shall contact the authority which issued the alert in order to agree on the requisite measures to be taken (...)".

- Article 101:

"1. Access to data contained in the Schengen Information System and the right to search such data directly shall be reserved exclusively to the authorities responsible for:

(a) border checks;

(b) other police and customs checks carried out within the country, and the coordination of such checks.

2. In addition, access to data entered in accordance with Article 96 and the right to search such data directly may be exercised by the authorities responsible for issuing visas, the central authorities responsible for examining visa applications and the authorities responsible for issuing residence permits and the administration of aliens within the framework of the application of the provisions

of this Convention on the movement of persons. Access to data shall be governed by the national law of each Contracting Party.

3. Users may only search data which they require in order to fulfil their tasks.

4. Each of the Contracting Parties shall send the Executive Committee a list of the competent authorities which are authorised to directly search the data contained in the Schengen Information System. This list shall provide each authority with information on which data it may search and for what purposes."

- Article 102:

"3. As regards the alerts laid down in Articles 95 to 100 of this Convention, any derogation (...) to change from one type of alert to another must be justified (...). Prior authorisation from the Contracting Party issuing the alert must be obtained for this purpose."

- Article 104:

"3. Insofar as this Convention does not lay down specific provisions on the enforcement of the action requested in the alert, the national legislation of the requested Contracting Party carrying out the action shall apply. Insofar as this Convention lays down specific provisions on carrying out the action requested in the alert, responsibility for the action to be taken shall be governed by the national law of the requested Contracting Party. If the requested action cannot be carried out, the requested Contracting Party shall immediately inform the Contracting Party issuing the alert."

- Article 105:

"The Contracting Party issuing the alert shall be responsible for ensuring that the data entered into the Schengen Information System is accurate, up-to-date and lawful."

- Article 106:

"2. If one of the Contracting Parties which has not issued the alert has good reason to believe that a piece of information is legally or factually incorrect, it shall advise the Contracting Party issuing the alert thereof as soon as possible: the latter shall be obliged to check the information and, if necessary, correct or delete the item in question without delay.

3. If the Contracting Parties are unable to reach agreement, the Contracting Party which did not issue the alert shall submit the case to the joint supervisory authority (...) for its opinion."

- Article 107:

"Where a person has already been the subject of an alert in the Schengen Information System, a Contracting Party which enters a further alert shall reach agreement on the entry of the alert with the Contracting Party which entered the first alert. The Contracting Party may also lay down general provisions to this end."

- Article 108:

"1. Each of the Contracting Parties shall designate an authority which shall have central responsibility for the national section of the Schengen Information System.

2. Each of the Contracting Parties shall enter its alerts via that authority.

3. The said authority shall be responsible for the correct operation of the national section of the Schengen Information System and shall take the requisite measures to ensure compliance with the provisions of this Convention.

4. The Contracting Parties shall inform one another, via the depositary, of the authority referred to in paragraph 1."

- Article 109:

"1. The right of persons to have access to data contained in the Schengen Information System which relates to them shall be exercised in accordance with the law of the Contracting Party before which they invoke that right. If national legislation so provides, the national supervisory authority provided for in Article 114(1) shall decide whether information shall be communicated and by what procedures. A Contracting Party which has not issued the alert may communicate information concerning such data only if it has previously given the Contracting Party issuing the alert an opportunity to state its position.

2. Communication of information to the person concerned shall be refused if there is a danger of it undermining the fulfilment of the legal task specified in the alert, or in order to protect the rights and freedoms of others. In any event, it shall be refused throughout the period of validity of the alert so that discreet surveillance may be carried out."

- Article 110:

"Anyone who finds that data relating to their person is factually or legally inaccurate may have this information corrected or deleted."

Analysing these articles of the Implementing Convention has made it possible to determine the main cases where Sirene intervention is called for. These principal cases have been completed according to the technical imperatives of the information systems and the degree of operational efficiency as defined jointly.

2. How the Sirene Bureaux are organised

The national Sirene Bureaux are the only contact points between the Contracting Parties in matters relating to the Schengen Information System.

In most cases, though, they are only intermediaries that forward the information to the competent national authorities. As such they merely carry out technical and formal controls. For other cases, the jurisdiction of the Sirene Bureaux must be defined at national level.

The officers responsible for the national files and users' services must vouch that the alerts entered in the SIS and the information transmitted by Sirene are accurate, up-to-date and legal. This constraint is the outcome of the combined impact of Articles 105 and 108 of the Convention.

The Sirene Bureaux are merely operators acting on behalf of their country in the course of international contact, as a legal and/or functional entity, in accordance with the rules established by each State.

Each Contracting Party decides how its Sirene is to be organised and what the national procedures are to be, whilst respecting the rules set out in this manual.

However, these national structures should be well-known to all of the Contracting Parties, and must comprise certain technical resources and service constraints common to all of the Contracting Parties.

The officers in charge of the Sirene Bureaux shall meet at least twice a year to assess how their services are cooperating, to take the technical measures required in the event of any disfunctioning and adjust procedures.

2.1. The technical resources

For the main, the technical resources are the modes of communicating information between the Sirene

Bureaux. It should be borne in mind that messages may be transmitted orally, in writing and by image.

Each Sirene Bureau shall use the national part of the communication system defined by all of the Contracting Parties.

Common provisions, as given in Annex 1 to this manual, shall summarise the cases when a communication shall be in writing and the cases when it need only be verbal.

2.1.1. The provisions for supplying information

The following measures have been adopted:

(a) the most appropriate means of communication must be determined on a case-by-case basis, according to technical possibilities and the requirements that the communication has to meet. Should circumstances dictate, the communications shall not be sent in unscrambled form;

(b) the messages will be conveyed mainly by telephone. So as to keep written messages to a minimum, telephone conversations will not automatically be confirmed in writing. The criteria for transmitting messages are detailed in annex 1;

(c) written messages shall be divided into two categories: free texts and standard forms that have to respect the instructions under Annex 5. If need be, the Sirene operators shall follow the transliteration rules set out for the SIS (see Annex 2). Preference should be given to using a language common to the Sirene operators who are in direct contact with one another when processing a case, so as to make it easier and quicker to use the information;

(d) The heads of the Sirene must have an e-mail address independent of the operating system. These specific addresses in the communication system shall enable direct mail exchange between the various Sirene heads.

2.1.2. The means of communication

The following measures have been adopted:

(a) the texts and images should preferably be sent via the specific mail channels defined by all of the Contracting Parties, rather than via telex, teletext, fax.

2.1.3. Archiving the information

The following measures have been adopted:

(a) each Contracting Party shall determine the provisions for storing information.

The Sirene Bureau of the Contracting Party issuing the alert is obliged to keep all of the information on its own alerts available to the other Contracting Parties.

The archives of each Sirene Bureau should be organised in such a way as to enable swift access to the relevant information in order to be able to meet very short deadlines for transmitting information;

(b) the files and other messages sent by the other Contracting Parties shall be stored according to procedures provided for under national law on data protection and on personal data as applicable in the receiving country. The provisions of Title VI of the Convention shall also apply. As far as is possible, these additional pieces of information should not be kept by the Sirene's once the corresponding alert has been erased.

2.2. Service constraints

Schengen Information System users may at any moment require further information so as to be able to implement a course of conduct. Operating constraints common to all Sirene Bureaux are therefore required.

2.2.1. Deadlines for processing files

The following measures have been adopted:

(a) the Sirene must answer requests for information made by the other contracting parties as soon as possible. The response must be given within 12 hours.

2.2.2. Availability of the Sirene Bureaux

The following measures have been adopted:

(a) the Sirene Bureaux must operate 24 hours a day, every day of the year;

(b) the international means of communication must be kept open permanently.

TITLE II

ACTION

3. Areas of intervention

Sirene action is to enable:

- the transmission of information on alerts in the Schengen Information System,

- adherence to the relevant provisions in the Convention,

- liaison between the national services and the international bodies responsible for public security assignments within the scope granted to them by each of the States.

These three general criteria for action have been summarised in the list of cases requiring intervention given below.

3.1. The main areas of intervention

3.1.1. The exchange of information prior to an alert (the second sentence of Article 95(2) and Article 99(3))

Two categories of alert come under this procedure: those under Article 95(2) (2nd sentence) on provisional arrest pending extradition and those under Article 99(3) on discreet surveillance or specific checks for State security purposes.

So as to guarantee that the procedure foreseen under Article 99(3) is followed, each Contracting Party shall take adequate technical or organisational measures to prevent an alert in this category from being entered into the Schengen Information System without the Sirene Bureau of that Contracting Party having been informed.

3.1.2. Information exchanged whilst entering an alert (Article 95(2))

This information is stipulated under the second part of the procedure foreseen by Article 95(2). A file should be sent containing information to supplement that already in the SIS. It should be forwarded to the other Contracting Parties and the information should be sent on a standard form.

See comments at point 4.1.1.

3.1.3. The exchange of information for multiple alerts (Article 107)

The existence of several alerts that have been issued by different countries for one and the same individual may cause confusion.

It is essential that the local police, who are the end-users of the Schengen Information System, are not faced with several types of procedure to follow that are contradictory. It is important

that the police at local level know exactly what measures need to be taken.

A procedure should be established for detecting multiple alerts and there should be rules on setting priorities for entering them into the SIS.

This calls for:

- checks before entering an alert, to determine whether the individual is already in the SIS,

- consultation with the other Contracting Parties, if need be, if there are multiple alerts that are incompatible.

3.1.4. The exchange of information when adding a flag (Articles 94, 95, and 99)

Articles 94(4), 95(3) and 99(6) enable a requested Contracting Party to refuse to execute the prescribed procedure on its territory, and do so either temporarily or definitively. This option may be taken for alerts issued by virtue of Articles 95, 97 or 99.

Should this possibility be taken up, the alerts should be studied thoroughly immediately and a swift response should be given on the steps to be taken.

3.1.5. The exchange of information after a hit (Articles 95, 96, 97, 98, 99 and 100)

When an end-user consults the SIS on an alert and confirms that it matches the person, vehicle or object concerned, this positive response is termed as a hit.

The end-user might require supplementary information so as to be able to implement the procedures foreseen in the SIS tables 4, 10 or 16 under the best possible conditions (see Annex 4).

Unless stated otherwise, the issuing Contracting Party must be informed of the outcome of this hit.

This is primarily an operational matter, although it also has technical implications, as the alert then has to be processed. It might need to be erased, meaning another alert previously omitted from the system can be entered.

These alert "management" activities are absolutely essential for the smooth functioning of the SIS.

3.1.6. The exchange of information for aliens not to be granted entry (Articles 5, 25 and 96)

The information on aliens on whom an alert has been issued, with a view to refusing entry in accordance with Article 96, covers two types of action:

- firstly to refuse these aliens access to Schengen territory, and to this end to take the necessary steps to ensure that the consular services of the Contracting Parties do not issue them a visa, if one is required, and that the external border control services refuse them entry into the territories of the Parties,

- secondly, if these aliens are already on Contracting Party territory, action is to be taken to prevent the services responsible from issuing them residence permits and to initiate proceedings for their expulsion.

To this end and to gain a better understanding of the origins and validity of the non-admission measure on the basis of which an alert was entered pursuant to Article 96, the Contracting Party in whose territory the third country national subject to the alert is intercepted asks the Contracting Party issuing the alert for the following information under heading 089 of form G:

1. Type of decision

2. Authority issuing the decision

3. Date of decision

4. Date of service

5. Date of enforcement

6. Date of expiry of decision or length of validity.

See also point 4(6)2.

The notification foreseen under Article 5(2) and the consultation foreseen under Article 25 fall within the jurisdiction of the authorities responsible for issuing residence permits or visas.

The Sirene Bureaux should not be involved in the procedures foreseen under these two articles except for transmitting supplementary information directly relating to the alerts (notification of a hit, clarification on identity, for instance) or in erasing alerts.

In addition, the Sirene Bureaux may be involved in transmitting supplementary information necessary for expulsion or for refusing an alien entry, or in transmitting information generated by these operations.

The Sirene Bureaux are used as central authorities for transmitting and receiving additional information during the consultation procedure provided for in Article 25(1) and (2).

For this purpose, the Sirene Bureaux exchange N and O forms (Article 25(1) and Article 25(2)) at the request of the authorities responsible for issuing residence permits or visas with a view to retaining or deleting the alert.

If the State which granted the residence permit discovers that the holder of the said permit is the subject of an alert issued by another State pursuant to Article 96 of the Schengen Convention, it shall inform the latter's Sirene Bureau (by fax, M form, etc.). The Sirene Bureau of the State which issued the alert shall then instigate the consultation procedure pursuant to Article 25(2) of the Convention using the form provided for this purpose.

If a third State (i.e. a State which neither granted the residence permit nor issued the alert for the holder of the permit) discovers that there are grounds for consultation, it shall notify both the State which issued the alert and the State which granted the residence permit.

3.1.7. The exchange of information when the procedures following a hit on an alert cannot be followed (Article 104(3))

Article 104(3) foresees procedure if a Contracting Party is unable, either by law or de facto, to follow procedure required by an alert.

3.1.8. The exchange of information if the original objective is changed (Article 102(3))

Article 102(3) allows for the purpose of the initial alert not to be respected after a hit in terms of how the data are to be used.

This procedure may only be used on grounds of the need to prevent an imminent serious threat to public order and safety, for serious reasons of State security or for the purposes of preventing a serious criminal offence.

The objective of the alert may only be altered subject to prior authorisation having been obtained from the issuing Contracting Party.

3.1.9. The exchange of information if data are found to be legally or factually flawed (Article 106)

The principle of data ownership laid down in Article 106 should not prevent a legal or factual error from being rectified. Paragraphs 2 and 3 of this Article covers this eventuality.

3.1.10. The exchange of information on the right to access and rectify data (Articles 109 and 110)

Any individual is entitled to have access to data on him/herself and, if need be, request that errors (whether de facto or legal) be corrected.

This possibility may be taken up in compliance with national legislation applicable in the country in which it is brought to bear.

A contracting Party may not authorise access to an alert issued by another Contracting Party unless the former has given the latter the opportunity to express its position.

3.2. Areas for supplementary intervention

3.2.1. The exchange of information on police cooperation (Articles 39 and 46)

Cooperation between the Contracting Parties and policing methods shall not be limited to using the information in the Schengen Information System alone.

Matching an alert may lead to the discovery of an offence or of a serious threat to public policy or to public security and there may also be a need to identify a person or object accurately.

The exchange of information, for instance, by means of photographs or finger prints may turn out to be indispensable. Articles 39 and 46 authorise these procedures for action.

This information shall be exchanged in such a way that complies with the provisions of Title VI of the Convention.

The following are recommended:

(a) the Sirene Bureaux of the Contracting Parties can exchange any useful information whilst respecting national measures taken to implement Articles 39 and 46;

(b) the Sirene Bureaux shall keep the other bureaux informed of measures taken at national level by each Contracting Party, as well as of any amendments made thereafter.

3.2.2. The specific powers in policing and security matters (Title III)

Title III of the Convention implementing the Schengen Agreement contains a number of innovative provisions in police and judicial cooperation. The Sirene Bureaux offer a way of organising matters in an operational fashion that may prove to be extremely useful in some cases, as for some Contracting Parties this curbs the proliferation of structures.

The following are recommended:

(a) each Contracting Party may give its Sirene Bureau specific policing and security powers, in line with Title III of the Convention;

(b) the Contracting Parties shall inform one another of the measures taken at national level for their respective Sirene Bureaux, as well as of any amendments that are made thereafter.

3.2.3. Overlapping roles of Sirene and Interpol

The role of the Schengen Information System is neither to replace nor to copy Interpol. Although there is a certain degree of overlap between tasks, the principles for action and for cooperation between the Contracting Parties differ substantially from those governing the International Criminal Police Organisation.

Consequently, it is necessary to establish the rules for cooperation between the Sirene Bureaux

and the NCBs (National Central Bureaux).

The following procedures have been agreed:

(a) Priority of SIS alerts over Interpol alerts

SIS alerts and the exchange of information on these alerts should always have priority over alerts and information exchanged via Interpol. This priority should apply, in particular, if a SIS alert conflicts with an Interpol alert.

(b) Choice of communication channel

Within the territory of the Contracting Parties, alerts in the Schengen Information System take priority over Interpol alerts. Interpol alerts must be restricted to exceptional cases (alerts not provided for in the Convention (for instance, it is not possible to enter alerts for works of art into the SIS) or if not all the necessary information is available for a SIS alert). Parallel alerts in the SIS and via Interpol within the Schengen area are inadmissible. Alerts which are distributed via Interpol channels and which also cover the Schengen area or parts thereof (Interpol diffusion zone 2) should bear the following indication: "Zone 2 except for the Schengen States".

(c) Sending information to Third States

The Sirene Bureau of the Contracting Party which issued the alert always decides whether or not to pass information on to third States (authorisation, diffusion means and channel).

In so doing the Sirene Bureau observes the personal data-protection provisions laid down in the Schengen Convention. Use of the Interpol channel will depend on national provisions or procedures.

(d) Targeted search/restricted alerts

A targeted search is a search carried out in a restricted geographical area where there is concrete evidence of the whereabouts of the wanted person or object.

This evidence gives grounds to assume that the request from the judicial authority may be executed immediately on receipt.

Targeted searches in the Schengen area must take place using the A or M form.

An alert for the person or object should be entered in the SIS at the same time as the A or M form is sent, if this has not been done already, so as to make a request for provisional arrest immediately enforceable (Article 64 of the Schengen Convention).

The alert not only complies with the provisions of Article 93 of the Convention but also increases the chances of success should the person or object move unexpectedly from one place to another within the Schengen area.

If a successful result can be achieved by means of a targeted and geographically restricted search, bilateral search requests for provisional arrest in line with the procedure laid down in extradition law may be made without entering an alert in the SIS.

(e) Hit and deletion of an Alert

The Schengen States ensure at national level that the Sirene Bureaux and the NCB inform one another of hits.

The deletion of an alert is undertaken by the authority which issued the alert.

(f) Improvement of cooperation between the Sirene Bureaux and the Interpol NCBs

Each Contracting Party shall take adequate measures to exchange information at national level

between the Sirene bureaux and the NCBs.

4. The procedures to be followed

The smooth functioning of the Schengen Information System rests on coordinated action between the various national systems. As a prerequisite for this, common procedures must be defined that are to be followed by all of the Contracting Parties.

Each case requiring intervention has therefore been drawn up and codified to give an accurate description of the tasks to be carried out by the Sirene Bureaux.

4.1. The exchange of information prior to an alert

4.1.1. Checking whether the national law of the Contracting Parties authorises provisional arrest with a view to extradition (Article 95(2))

The Contracting Party issuing an alert shall check whether the provisional arrest that is to be requested is authorised by the national law of the other Contracting Parties.

The following procedure has been adopted:

(a) check that all Member States are able to follow up the alert foreseen;

(b) if there is any doubt, consult the Sirene Bureau concerned and transmit or exchange the information necessary for the check;

(c) the file provided for by Article 95(2), in the second part of the paragraph, shall be prepared before the alert is entered into the system. It should be checked that all of the information required is contained within the file and that it is presented correctly. The following information is to be transmitted, whereby the details for prosecution or the enforcement of criminal sentences must be given, in principle, as an alternative:

006: Surname: the surname used for the main data in the SIS alert is entered under heading 006.

007: Given name

009: Date of birth

010: Place of birth

011: Alias: the first alias name is written out in full and the total number of aliases found is indicated. An M Form may be used to send the complete list of alias names.

012: Sex

013: Nationality: heading 013 "Nationality" must be filled in as completely as possible on the basis of the available information. If there are any doubts as to the information, code "1W", the word "supposed" should be added to the word "nationality".

030: Authority issuing the arrest warrant or decision (name and position of the magistrate or public prosecutor or name of the court)

031: Reference No of arrest warrant or decision (037)

See also comments below

032: Date of arrest warrant or decision (036)

Requests for criminal prosecution and enforcement can be summarised in an accompanying document.

033: Name of requesting authority

034: Maximum penalty/maximum penalty foreseen

035: Magistrate or court issuing the decision

036: Date of decision

037: Decision reference number

038: Sentence given

039: Indication of sentence remaining to be served

040: Legal texts applicable

041: Legal description of the deeds

042: Date/period the offence was committed

044: Description of the facts of the case (including their consequences)

045: Degree of involvement (principal, accessory, aider, abetter).

Each country may use its own legal terminology to describe the degree of participation (see point 2 of document SCH/OR.SIS-SIRENE (97) 12).

The information given must be in sufficient detail for the other Sirene Bureaux to verify the alert. Nevertheless, only a moderate amount of information should be given in order to avoid unnecessarily overloading the message system.

If the Sirene Bureaux are unable to receive the message because the number of spaces fixed for the relevant form for technical reasons is insufficient, an M form can be sent with supplementary information. The end of the transmission is indicated by the phrase "End of message" in the last form (heading 044 of Form A or heading 083 of form M).

The Sirene Bureau of the issuing Contracting Party may also provide further information, after consultation and/or at the request of another Contracting Party, if deemed necessary for clarifying an individual's identity. This information shall cover the following in particular:

- the origin of the passport or identity document in the possession of the person sought;

- the passport or identity document's reference number, issuing date, place and authority as well as the expiry date;

- description of the person sought;

- surname and given name of the wanted person's mother and father;

- whether there are records of the person's photo and/or finger prints;

- last known address.

As far as is possible, this information together with photographs and finger prints shall be available in the Sirene Bureaux, or immediately accessible to them permanently, so that they can transmit these identification elements as soon as possible.

In this highly sensitive area, the common objective should be to minimise the risk of detaining the wrong individual of similar identity to the person on whom an alert has been issued;

(d) where the alert is admissible by all of the Contracting Parties: the preparations shall be made for it to be entered into the SIS;

(e) where the alert is not admissible by all of the Contracting Parties:

- either the issuing Contracting Party abandons the idea of entering the alert,

- or it persists and asks the Contracting Party (-ies) concerned to submit a request immediately for a flag to be added.

In the event of a flag's being added, the alternative procedure must be implemented by the Contracting Party (-ies) concerned.

4.1.2. Consulting the Contracting Parties for alerts on grounds of State security (Article 99(3))

A Contracting Party issuing an alert for the purposes of discreet surveillance or of a specific check on the grounds of State security is obliged to consult the other Contracting Parties beforehand.

This highly sensitive area requires a specific procedure to safeguard the confidentiality of certain information. To this end, any contact between the services responsible for State security should be kept quite separate from the contact between the Sirene Bureaux.

In this specific case in question, the Sirene Bureaux shall ensure that the consultation procedure functions smoothly and record the results. The information is actually exchanged directly between the specialised services concerned.

The following procedure has been adopted:

(a) before entering an alert, the security department concerned contacts its Schengen counterparts directly;

(b) the specialised departments exchange the information they have, after which the security department entering the alert informs its national Sirene Bureau and forwards the results to it. The purpose is mainly to raise any objections that there might be to the planned alert;

(c) the Sirene Bureau contacted by the security department that is intending to enter an alert shall inform the other Sirene Bureaux. This enables the other bureaux to consult their respective security departments and exercise their rights;

(d) once the Sirene Bureau of the Contracting Party issuing the alert has established that the formal consultation has been held correctly it then approves the alert's being entered;

(e) should difficulties arise, the Sirene Bureau concerned shall inform the Contracting Party issuing the alert;

(f) if the Contracting Party issuing the alert upholds its alert, the requested Contracting Party may request a flag be entered to grant 24 hours to study the matter;

(g) after this period for further study, at the request of a Contracting Party, a permanent flag may be entered for the alert that suspends the course of action that should otherwise be followed on the grounds of the alert.

4.2. Exchange of information when entering an alert

4.2.1. Sending a dossier for provisional arrest with a view to extradition (Article 95(2))

This file contains obligatory information as foreseen by the Convention. Furthermore, optional information to assist in processing the matter may also be sent if needed for ascertaining identity.

See comments at point 4.1.1.

A sample form, which is uniform for all of the Contracting Parties, can be found in Annex 5 to this manual.

The following procedure has been adopted:

(a) by the swiftest means available, the Contracting Party issuing the alert shall send the requested

Contracting Parties the obligatory information on the case at the same time as entering the alert into the SIS.

If the individual is wanted on the grounds of more than one arrest warrant or verdict, which may serve as a basis for a request for provisional arrest for the purposes of extradition, information on one arrest warrant or one verdict only should initially be sent to the other Sirene Bureaux when entering the alert. The arrest warrant or verdict carrying the highest penalty or the arrest warrant or verdict which takes priority in view of the limitation period should be used.

Information on the other arrest warrants or verdicts should be kept by the Sirene Bureau of the State issuing the alert. In the event of a hit, it should be sent to the Sirene Bureau of the requested State immediately.

If one of the Sirene Bureaux thinks it necessary to add a flag on the basis of the information sent in form A, information on a second arrest warrant or verdict can be sent to all Sirene Bureaux so that the alert can be distributed and enforced as widely as possible;

(b) Any further information required for identification purposes is sent after consultation and/or at the request of another Contracting Party.

4.3. The exchange of information for multiple alerts

Pursuant to Article 107, the following general provisions have been adopted:

(a) only one alert per Contracting Party may be entered into the Schengen Information System for any one individual;

(b) several Contracting Parties may enter an alert on the same person in the Schengen Information System if the alerts are compatible or if there is no interference between the alerts;

(c) alerts issued pursuant to Article 95 are compatible with alerts issued pursuant to Articles 97 and 98. Moreover, they may also be considered as compatible with alerts issued pursuant to Article 96. In such cases, the procedures to be followed as set by Article 95 have priority over those set by Article 96;

(d) alerts issued pursuant to Articles 96 and 99 are not compatible with one another nor with alerts issued pursuant to Articles 95, 97 or 98, without prejudice to Articles 95 and 96 being compatible.

Within the category of alerts issued pursuant to Article 99, "discreet surveillance" procedures are incompatible with "specific checks" procedures;

(e) the order of priority for grounds for alerts is as follows:

- provisional arrest with a view to extradition (Article 95),
- non-admission into Schengen States (Article 96),
- placing under protection (Article 97),
- discreet surveillance (Article 99),
- specific checks (Article 99),
- communicating whereabouts (Articles 97 and 98).

An exception may be made to this order of priority after consultation between the Contracting Parties if essential national interests are at stake;

(f) the Sirene Bureau of the Contracting Party issuing the alert shall keep a record of the requests to enter a new alert rejected after consultation by virtue of the provisions given above, and

do so until the alert is deleted.

TABLE OF ALERTS

>TABLE POSITION>

The specific case of alerts pursuant to Article 96

The provisions of Article 101(2) enable the authorities responsible for issuing visas, for processing visa applications and issuing residence permits to have access to the data pursuant to Article 96.

All alerts pursuant to Article 96 need to be made available to all of the Schengen partners. The objective is not to issue an undesirable alien a residence permit or visa.

This imperative has to be to reconciled with the principles listed above.

The following general provisions have been adopted:

(a) a Contracting Party should always be able to enter an alert as pursuant to Article 96 so that the competent services do not issue residence permits or visas;

(b) if there is clash of interests with an alert pursuant to Article 95, each Contracting Party may maintain its alert. The rules on compatibility apply for all the other alerts;

(c) the procedures to be followed for the alerts shall be applied in the order of priority adopted, in other words, provisional arrest is made first;

(d) the Contracting Parties shall take the measures necessary at national level to inform their users of this procedure.

The specific case of alerts on vehicles

The following general recommendations have been adopted:

(a) only one alert per Contracting Party may be entered into the Schengen Information System for any one vehicle;

(b) several Contracting Parties may enter an alert on the same vehicle in the Schengen Information System if the alerts are compatible;

(c) alerts on vehicles issued pursuant to Article 99 with "discreet surveillance" procedures to be followed are incompatible with alerts with "specific checks" procedures to be followed;

(d) alerts on vehicles pursuant to Article 99 are incompatible with alerts on vehicles pursuant to Article 100;

(e) the Sirene Bureau of the Contracting Party issuing the alert shall keep a record of the requests for entering a new alert rejected after consultation by virtue of the provisions given above, and do so until the alert is deleted.

TABLE OF COMPATIBLE ALERTS

>TABLE POSITION>

Under exceptional circumstances derogation may be made to the order of priorities indicated above, after consultation between the Contracting Parties, if essential national interests so require.

4.3.1. Checking for multiple alerts on an individual

Multiple alerts will occur only rarely. The main difficulty encountered will be in distinguishing accurately between individuals who have similar characteristics.

To solve this problem, even in cases where alerts are incompatible, cooperation between the Schengen States and policing methods advocate using the procedure for consultation between the Sirene Bureaux.

Each Contracting Party shall set up adequate technical resources to detect possible cases of individuals with identical characteristics before an alert is entered into the SIS.

The identity description elements for concluding that two identities might be identical are detailed in Annex 6 of this manual.

The following procedure has been adopted:

(a) if processing a request for entering a new alert reveals that there is already an individual in the SIS with the same mandatory identity description elements (surname, given name, date of birth) a check must be run before the new alert is approved;

(b) the Sirene Bureau shall contact the requesting department to clarify whether the alert is on the same person or not;

(c) if the cross-check reveals that the person in question is indeed one and the same, the Sirene Bureau shall apply the procedure for entering multiple alerts as defined in paragraph 4.3.3. If the outcome of the check is that there are in fact two different people, the Sirene Bureau approves the request for entering another alert.

4.3.2. Checking for multiple alerts on a vehicle

The mandatory identity description elements for alerts on a vehicle are:

- either the number plate;

- or the serial number.

However, both numbers may figure in the SIS.

Multiple alerts are checked for by comparing numbers. If two numbers are found to be identical it is assumed that there are multiple alerts on the same vehicle.

Technical difficulties arise with this method of verification in that comparison is not always possible as this depends on the obligatory description elements used.

SIS alerts on vehicles contain the serial number and/or the registration plate number. When entering a new alert, if it is discovered that the same serial number and/or registration plate number already exists in the SIS, it is assumed that there are multiple alerts on the same vehicle.

The Sirene Bureau shall draw the national users' attention to the, certainly limited, number of cases that might cause problems where only one of the numbers has been compared: a positive response, or a "hit", is taken to mean that there are multiple alerts on one and the same vehicle, but a negative response does not mean that there is no alert on this vehicle. There may be an alert on the vehicle under the number that was not used on the comparative check.

The identity description elements used for concluding that two vehicles are identical are detailed in Annex 6 of this manual.

The procedure to be adopted by the Sirene Bureaux for vehicles is the same as for persons.

4.3.3. Negotiating entering a new alert if it is incompatible with a previous alert

If a request for an alert vies with an alert issued by the same Contracting Party, the national Sirene Bureau should ensure that only one alert is left in the SIS. Each individual State is free to choose the exact procedure to be applied.

If the alert requested is incompatible with an alert that has already been issued by one or several other Contracting Parties, their agreement is required.

The following procedure has been adopted:

(a) if the alerts are compatible, the Sirene Bureaux do not need to consult; if the alerts do not interfere with one another, the Contracting Party that wishes to enter a new alert shall decide whether consultation ought to be held;

(b) if the alerts are not compatible, or if there is any doubt, the Sirene Bureaux have to consult so that ultimately only one alert, or one group of alerts that are compatible with one another, is entered into the Schengen Information System;

(c) if an alert that is incompatible with existing alerts in the SIS is given priority status as the outcome of consultation, the Contracting Parties that entered the other alerts have to withdraw them when the new alert is entered into the SIS;

(d) any disputes shall be settled by negotiations between the Sirene Bureaux. If agreement cannot be reached on the basis of the list of priorities established, the oldest alert is left in the SIS.

4.4. The exchange of information when adding a flag

The Sirene Bureaux must exchange information so that the Contracting Parties can assess the need for a flag to be added, and thereafter implement this option.

There are three scenarios for adding a flag:

(a) a "permanent" flag may be added (or deleted) at any moment under the terms of Article 94(4) on alerts pursuant to Articles 95, 97 and 99.

An alternative procedure is foreseen for flags that apply to an alert issued pursuant to Article 95. No alternative procedure is foreseen for alerts pursuant to the other two articles, and the alert does not appear on the screen when the end-user consults the system;

(b) a flag for 24 hours "study" time, which may be extended to up to a maximum of seven days, under the provisions of Article 95(3) may be added to alerts pursuant to Article 95. This flag may be converted into a permanent flag. Alternative procedures, as foreseen by Article 95(5), must be followed;

(c) under the provisions of Article 99(6), a flag for a maximum of 24 hours "study" may be added to alerts issued pursuant to Article 99. This flag may be converted into a permanent flag. No alternative procedure is foreseen.

The Contracting Parties must take the following remarks into account:

- the procedure of adding a flag must be used exceptionally;

- it may take some time between an alert's being entered into the Schengen Information System and a flag's being added. During this time-lapse normal procedures should be followed. This period of time should therefore preferably be kept as short a possible;

- each Contracting Party shall detect the alerts likely to require a flag as swiftly as possible.

4.4.1. Consulting the Contracting Parties with a view to adding a flag

The following procedure has been adopted:

(a) the requested Contracting Party that intends to add a flag to an alert shall inform the Contracting Party that issued the alert.

No consultation is foreseen for a flag added to an alert issued pursuant to Articles 95(3) and 99(6) for the purposes of further study. All Contracting Parties shall be consulted obligatorily for a permanent flag as foreseen under Article 94(4);

(b) once information has been exchanged so as to meet the requirements of each of the Contracting Parties, they may need to amend or even delete either the alert, which is done by the requesting Party, or the request, which is done by the requested Party.

4.4.2. A request for a flag to be added

The following procedure has been adopted:

(a) the requested Contracting Party asks the Contracting Party that issued the alert to add a flag to an alert issued pursuant to Articles 95, 97 or 99.

This request must be made in writing. If the request is made by telephone written confirmation must be given;

(b) the Contracting Party that issued the alert is obliged to add a flag as soon as possible;

(c) the same procedure applies for extending a flag added so as to enable further study of an alert issued pursuant to Article 95(3), as well as for withdrawing a temporary or permanent flag;

(d) in urgent cases, a Contracting Party that issued an alert may ask the requested Contracting Parties to refrain from adding flags for the purposes of further study for alerts issued pursuant to Article 95.

4.4.3. Systematic request for a flag to be added for the State's nationals

The following procedure has been adopted:

(a) a Contracting Party may ask the Sirene Bureaux of the other Contracting Parties to add a flag as a matter of course to alerts issued on its nationals pursuant to Article 95 if the wanted person is one of its nationals;

(b) any Contracting Party wishing to take advantage of this option should forward its decision in writing to the Contracting Parties which it would like to cooperate;

(c) any Contracting Party(ies) to whom this request is addressed shall add a flag for the Contracting Party that has requested one and do so immediately after the alert is issued;

(d) this procedure shall continue to be binding until another written request is made for it to be cancelled.

4.5. The exchange of information after a hit

4.5.1. Informing the Schengen partners if an alert is matched

The following procedure has been adopted:

(a) a hit after a check has been carried out on an individual, a vehicle or an object on which an alert has been issued should always be communicated to the Sirene Bureau of the Contracting Party that issued the alert.

On the basis of this information, if deemed necessary the Sirene Bureau of the Contracting Party that issued the alert shall forward any relevant, specific information and the particular measures that should be taken to the Sirene Bureau of the Contracting Party that matched the alert.

When notifying the State which issued the alert of a hit, the Article of the Schengen Convention which applies to the hit should be indicated in heading 090 of form G.

If the hit concerns a person who is registered in the SIS pursuant to Article 95 of the Schengen Convention, the Sirene Bureau of the State in which the hit is obtained should inform the Sirene Bureau of the State issuing the alert by telephone before sending a G form;

(b) The Sirene Bureaux of Contracting Parties that issued alerts pursuant to Article 96 shall not be informed of any hits as a matter of course. Under exceptional circumstances, the bureaux can be informed by the requested Contracting Party that discovered the alert;

(c) for each Contracting Party to be able to exercise its rights, the Contracting Parties that had previously indicated that they wanted to issue an alert on the same person or object should preferably be informed of any hits. The Contracting Party that actually issued an alert is responsible for informing these other Contracting Parties;

(d) through the C.SIS's automatically communicating that an alert has been deleted, it is possible to study whether another alert, which was previously incompatible and which as such was not entered, can in fact now be entered.

4.5.2. Communicating further information

The following procedure has been adopted:

(a) the Sirene Bureaux may transmit further information on alerts issued pursuant to Articles 95, 97, 98 and 100; in so doing they may act on behalf of judicial authorities if this information falls within the scope of mutual judicial assistance.

The Sirene Bureaux have no powers or particular duties in areas of extradition(2). If an alert issued pursuant to Article 95 is matched, their role simply consists of transmitting further information that the Contracting Parties might require for determining whether extradition procedures should indeed be implemented.

It is not the Sirene Bureaux but the appropriate departments within each Contracting Party that are responsible for transmitting extradition files and other judicial data through the diplomatic channel or other channels;

(b) as far as is possible, the Sirene Bureaux shall communicate medical details on the individuals on whom an alert has been issued pursuant to Article 97 if measures have to be taken for their protection.

The information transmitted is kept only as long as is strictly necessary and is used exclusively for the purposes of medical treatment given to the person concerned;

(c) if operations after an alert is matched so require (such as if an offence is discovered or if there is a threat to law and order, if an object, vehicle or individual needs to be more clearly identified, etc.), the information transmitted as a complement to that stipulated under Title IV of the Schengen Convention, in particular regarding Articles 99 and 100, shall be transmitted by virtue of Articles 39 and 46 of the abovementioned Convention.

The Sirene Bureaux shall send "further information" as quickly as possible in a P form, in response to a G form when a hit is made on an alert issued on a vehicle pursuant to Article 100 of the Schengen Convention.

NB:

(Given that the request is urgent and that it will therefore not be possible to collate all the information immediately, it is agreed that certain headings will be optional rather than obligatory, and that efforts will be made to collate the information relating to the main headings, for example: 041, 042, 043, 162, 164, 165, 166 and 167).

4.6. The exchange of information on aliens not to be granted admission

If an alien who falls under the scenario foreseen in Articles 5 or 25 of the Convention applies for a residence permit or visa the authority issuing the paper must apply specific rules.

Under exceptional circumstances the Schengen partners might need to be informed of the fact that the alert has been matched. Since there are many addressees of alerts issued pursuant to Article 96 in the consular posts and embassies, and given the distances between them, they need not be informed as a matter of course.

4.6.1. Issuing residence permits or visas

The following procedure has been adopted:

(a) a requested Contracting Party may inform the Contracting Party that issued an alert pursuant to Article 96 of its having been matched. This latter may then inform the other Contracting Parties if it thinks so fit;

(b) if so requested, whilst respecting national legislation the Sirene Bureaux of the Contracting Parties concerned may assist in transmitting the necessary information to the specialised services responsible for issuing residence permits and visas;

(c) if the procedure foreseen under Article 25 of the Convention entails deleting an alert issued pursuant to Article 96 the Sirene Bureaux shall, whilst respecting their national legislation, offer their support if so requested.

4.6.2. Refusing admission or expulsion from Schengen territory

The following procedure has been adopted:

(a) a Contracting Party may ask to be informed of any alerts it issued pursuant to Article 96 that have been matched.

Any Contracting Party that wishes to take up this option shall ask the other Contracting Parties in writing;

(b) a requested Contracting Party may take the initiative and inform the Contracting Party issuing an alert pursuant to Article 96 that the alert has been matched, the alien has not been granted admission or has been expelled from Schengen territory.

(c) if, on its territory, a Contracting Party intercepts a person for whom an alert has been issued, the Contracting Party issuing the alert may forward the information required to expel (return/deport) a third-country national. Depending on the needs of the requesting Contracting Party and if available to the requested Contracting Party, this information should include the following:

- the type of decision,

- the authority issuing the decision,

- the date of the decision,

- the date of service,

- the date of enforcement,

- the date on which the decision expires or the length of validity.

See point 3(1)(6).

- If a person on whom an alert has been issued is intercepted at the border the procedures set by the issuing Contracting Party have to be followed,

- for the exceptions set out for Articles 5 or 25 of the Convention the requisite consultation must be held between the Contracting Parties concerned via the Sirene Bureaux,

- there might also be an urgent need for complementary information to be exchanged via the Sirene Bureaux in specific cases to identify an individual with certainty.

4.7. The exchange of information when the procedure following a hit cannot be executed

4.7.1. Informing the alerting Contracting Party that the procedures cannot be followed

The following procedure has been adopted:

(a) the requested Contracting Party shall inform the Contracting Party that issued the alert straight away, and do so via its Sirene Bureau, of the fact that it is not able to follow procedures, and give the reasons;

(b) the Contracting Parties concerned may then agree on what procedure to follow in keeping with their own national legislation and with the provisions of the Convention.

4.8. The exchange of information if the objective of the alert is changed

The consent of the Contracting Party that issued the alert is required for this procedure that is used only under exceptional circumstances.

The issuing Contracting Party should be able to appraise the importance and relevance of the request.

The ends for which the data are to be used must come under one of the alert categories foreseen in Articles 95 to 100 of the Convention.

On no account should this data be used for other ends than those foreseen by the Convention.

4.8.1. Informing the alerting Contracting Party that the objective has been changed

The following procedure has been adopted:

(a) through its Sirene Bureau, the requested Contracting Party shall explain to the Contracting Party that issued the alert the grounds for its asking for the original objective to be changed;

(b) as soon as possible, the issuing Contracting Party shall study whether this wish can be met and advise the requested Contracting Party through its Sirene Bureau of its decision.

If need be, the Contracting Party that issued the alert can grant authorisation subject to certain conditions on how the data are to be used.

4.8.2. Procedures for changing the original objective

The following procedure has been adopted:

(a) once the Contracting Party that issued the alert has agreed, the requested Contracting Party shall use the data for the ends it sought and obtained authorisation. It shall take account of any conditions set.

4.9. The exchange of information in the case of inaccurate or inadmissible data

4.9.1. Informing the alerting Contracting Party that data is inaccurate or inadmissible

The following procedure has been adopted:

(a) the Contracting Party that establishes that data contain an error shall advise the issuing Contracting Party thereof via its Sirene Bureau;

(b) information shall be exchanged so as to reach an agreement on how this data should be corrected or deleted;

(c) form J may be used when inaccurate or inadmissible data is detected as well as to transmit the reply from the Sirene Bureaux issuing the alert;

(d) the additional information required to establish identity should be sent on agreement with and/or at the request of another Contracting Party.

4.9.2. Rectification procedures

The following procedure has been adopted:

(a) if the Contracting Parties are in agreement, the issuing Contracting Party shall follow its national procedures for correcting the error;

(b) if there is no agreement, the Sirene Bureau of the Contracting Party that established the error shall advise the authority responsible within its own country to referral of the matter to the Joint Supervisory Authority.

4.10. The exchange of information regarding the right to access or rectify data

4.10.1. Informing the national authorities of a request to access or rectify data

The following procedure has been adopted:

(a) each Sirene Bureau must apply its national legislation on the right to access to the data. Depending on the circumstances of the case, the Sirene Bureaux shall either forward the national authorities responsible any requests they receive for access or for rectifying data, or they shall adjudicate upon these requests within the limits of their remit;

(b) If the national authorities responsible so ask, the Sirene Bureaux of the Contracting Parties concerned shall forward information on exercising this right to access.

4.10.2. Information on requests for access for alerts issued by other Contracting Parties

As far as is possible, information on alerts entered into the SIS by another Contracting Party shall be exchanged via the national Sirene Bureaux.

The following procedure has been adopted:

(a) the request for access shall be forwarded to the Contracting Party that issued the alert as soon as possible, so that it can take a position on the question;

(b) the issuing Contracting Party shall inform the Contracting Party that received the request of its position.

It shall take account of any legal deadlines set for processing the request;

(c) if the Contracting Party that issued the alert sends its position to the Sirene Bureau of the Contracting Party that received the request for access, the Sirene Bureau shall ensure that the position is forwarded to the authority responsible for adjudication on the request as soon as possible.

4.10.3. Information on access and rectification procedures

The following procedure has been adopted:

(a) the Sirene Bureaux shall keep one another informed of any national legislation adopted on access and rectification procedures for personal data, as well as of any amendments made thereafter.

5. The tasks to be performed per alert category

Several problems have to be addressed by the Sirene Bureaux when an alert is entered into the SIS. They must ensure that that the provisions set out in the Schengen Convention are respected

and guarantee the technical status of the data.

The sequence of tasks to be performed for each category of alerts must be followed scrupulously so as to guarantee that the information distributed through the SIS is reliable.

The moment a hit is made, the main duty is to notify straight away that the alert has been matched. Should circumstances so require, any further information that might be needed for action to be taken shall be exchanged between the Contracting Parties concerned.

5.1. Creating an alert

5.1.1. The tasks common to all categories

The following tasks must be carried out before any action is taken which relates specifically to one category of alerts:

(a) check for multiple alerts:

- at national level there may only be one alert in the SIS per country on any one individual (or vehicle). In the event of their being more than one, national procedures must be followed to ensure that only one alert is left in the SIS,

- within Schengen, there may be several compatible alerts on any one individual (or vehicle);

(b) if there is more than one alert on any one individual (or vehicle) check that they are compatible:

- if they are not compatible, negotiate entering only one alert (on any one individual or vehicle). In the event of failure to come to an agreement: the procedure is terminated here,

- if the multiple alerts are compatible, or if it is agreed that the new alert should be given priority, continue with the procedure.

Please note:

The contracting Party issuing the alert should keep a copy of requests for entering an alert that are rejected so that it can communicate all the hits of which it has been informed.

The Contracting Party that was not able to enter its alert shall take the necessary technical measures to review its request if it is notified automatically that the alert previously blocking its request has been deleted.

5.1.2. Measures to be taken for each individual category of alert

5.1.2.1. Alerts pursuant to Article 95

(a) Check that the national legislation of the Contracting Parties authorises provisional arrest for the purpose of extradition.

(b) Check whether there is a file on obligatory complementary information.

(c) Enter the alert into the SIS and at the same time send the file to the other Sirene Bureaux.

(d) At the request of another Contracting Party add a flag.

5.1.2.2. Alerts pursuant to Article 96

(a) Enter the alert into the SIS.

5.1.2.3. Alerts pursuant to Article 97

(a) Enter the alert into the SIS.

(b) At the request of a Contracting Party add a flag.

5.1.2.4. Alerts pursuant to Article 98

(a) Enter the alert into the SIS.

5.1.2.5. Alerts pursuant to Article 99(2)

(a) Enter the alert into the SIS.

(b) At the request of another Contracting Party add a flag.

5.1.2.6. Alerts pursuant to Article 99(3)

(a) Check with the national security services that the security services in the other Contracting Parties have been informed.

(b) Inform the Sirene Bureaux in the other Contracting Parties of the new alert and ensure that cooperation and consultation take place correctly.

(c) Enter the alert into the SIS.

(d) At the request of a Contracting Party add a flag.

5.1.2.7. Alerts pursuant to Article 100

(a) For vehicles only: check for multiple alerts, and if there is more than one alert, check that the alerts are compatible.

(b) Enter the alert into the SIS.

(c) An alert for a vehicle should be issued by the State in which the first report was made.

5.2. Amending an alert

5.2.1. Entering an alias

(a) Check that the alias that is due to be entered is not a multiple alert. If there is any doubt or if there is a multiple alert, follow procedures foreseen for this.

The party that entered the original alert is responsible for adding any aliases. If a third country discovers the alias it should pass the matter on to the party that originally entered the alert, unless the third country itself issues an alert on the alias.

(b) Inform the other Contracting Parties of aliases regarding an alert issued pursuant to Articles 95 or 99(3). Whenever needed, the Sirene Bureaux shall transmit this information to their national authorities responsible for each category of alert.

(c) Enter the alert into the SIS.

5.2.2. Changing the grounds or procedures for an alert

This procedure shall be applied regardless of a hit.

(a) Delete the alert that is to be placed in another category

(b) Recommence the entire procedure for entering an alert in the new category.

5.3. Deleting an alert

5.3.1. Deleting after a hit

(a) Inform the Contracting Parties who had been unable to enter their alert that a hit has been made and that the alert has been deleted.

5.3.2. Deleting when the conditions for maintaining the alert cease to be met

Excluding the cases after a hit, an alert may be deleted either directly by the C.SIS (once the expiry date is passed) or indirectly by the service that entered the alert in the SIS (once the conditions for the alert's being maintained no longer apply).

In both instances the C.SIS delete message should be processed automatically by the N.SIS so that an alert kept pending can be entered in its place.

(a) The Sirene Bureau is notified automatically by a message from its N.SIS that an alert put on hold can be entered.

(b) The Sirene Bureau shall apply the entire procedure for entering an alert in the appropriate alert category.

(1) Council Decision 2003/19/EC of 14 October 2002 on declassifying certain parts of the Sirene Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 8, 14.1.2003, p. 34).

(2) Except for Sirene Austria.

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Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

Commission Regulation (EC) No 1560/2003

of 2 September 2003

laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national(1), and in particular Article 15(5), Article 17(3), Article 18(3), Article 19(3) and (5), Article 20(1), (3) and (4) and Article 22(2) thereof,

Whereas:

(1) A number of specific arrangements must be established for the effective application of Regulation (EC) No 343/2003. Those arrangements must be clearly defined so as to facilitate cooperation between the authorities in the Member States competent for implementing that Regulation as regards the transmission and processing of requests for the purposes of taking charge and taking back, requests for information and the carrying out of transfers.

(2) To ensure the greatest possible continuity between the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities(2), signed in Dublin on 15 June 1990, and Regulation (EC) No 343/2003, which replaces that Convention, this Regulation should be based on the common principles, lists and forms adopted by the committee set up by Article 18 of that Convention, with the inclusion of amendments necessitated by the introduction of new criteria, the wording of certain provisions and of the lessons drawn from experience.

(3) The interaction between the procedures laid down in Regulation (EC) No 343/2003 and the application of Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention(3) must be taken into account.

(4) It is desirable, both for the Member States and the asylum seekers concerned, that there should be a mechanism for finding a solution in cases where Member States differ over the application of the humanitarian clause in Article 15 of Regulation (EC) No 343/2003.

(5) The establishment of an electronic transmission network to facilitate the implementation of Regulation (EC) No 343/2003 means that rules must be laid down relating to the technical standards applicable and the practical arrangements for using the network.

(6) 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(4) applies to processing carried out pursuant to the present Regulation in accordance with Article 21 of Regulation (EC) No 343/2003.

(7) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark, which is not bound by Regulation (EC) No 343/2003, is not bound by the present Regulation or subject to its application, until such time as an agreement allowing it to participate in Regulation (EC) No 343/2003 is reached.

(8) In accordance with Article 4 of the Agreement of 19 January 2001 between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining an application for asylum lodged in a Member State or in Iceland or Norway(5), this Regulation is to be applied by Iceland and Norway as it is applied by the Member States of the European Community. Consequently, for the purposes of this Regulation, Member States also include Iceland and Norway.

(9) It is necessary for the present Regulation to enter into force as quickly as possible to enable Regulation (EC) No 343/2003 to be applied.

(10) The measures set out in this Regulation are in accordance with the opinion of the Committee set up by Article 27 of Regulation (EC) No 343/2003,

HAS ADOPTED THIS REGULATION:

TITLE I PROCEDURES

CHAPTER I PREPARATION OF REQUESTS

Article 1

Preparation of requests for taking charge

1. Requests for taking charge shall be made on a standard form in accordance with the model in Annex I. The form shall include mandatory fields which must be duly filled in and other fields to be filled in if the information is available. Additional information may be entered in the field set aside for the purpose.

The request shall also include:

(a) a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for asylum, accompanied, where appropriate, by comments on the circumstances in which it was obtained and the probative value attached to it by the requesting Member State, with reference to the lists of proof and circumstantial evidence referred to in Article 18(3) of Regulation (EC) No 343/2003, which are set out in Annex II to the present Regulation;

(b) where necessary, a copy of any written declarations made by or statements taken from the applicant.

2. Where the request is based on a positive result (hit) transmitted by the Eurodac Central Unit in accordance with Article 4(5) of Regulation (EC) No 2725/2000 after comparison of the asylum seeker's fingerprints with fingerprint data previously taken and sent to the Central Unit in accordance with Article 8 of that Regulation and checked in accordance with Article 4(6) of that Regulation, it shall also include the data supplied by the Central Unit.

3. Where the requesting Member State asks for an urgent reply in accordance with Article 17(2) of Regulation (EC) No 343/2003, the request shall describe the circumstances of the application for asylum and shall state the reasons in law and in fact which warrant an urgent reply.

Article 2

Preparation of requests for taking back

Requests for taking back shall be made on a standard form in accordance with the model in Annex III, setting out the nature of the request, the reasons for it and the provisions of Regulation (EC) No 343/2003 on which it is based.

The request shall also include the positive result (hit) transmitted by the Eurodac Central Unit, in accordance with Article 4(5) of Regulation EC) No 2725/2000, after comparison of the applicant's fingerprints with fingerprint data previously taken and sent to the Central Unit in accordance with Article 4(1) and (2) of that Regulation and checked in accordance with Article 4(6) of that Regulation.

For requests relating to applications dating from before Eurodac became operational, a copy of the fingerprints shall be attached to the form.

CHAPTER II REACTION TO REQUESTS

Article 3

Processing requests for taking charge

1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.

2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility.

Article 4

Processing of requests for taking back

Where a request for taking back is based on data supplied by the Eurodac Central Unit and checked by the requesting Member State, in accordance with Article 4(6) of Regulation (EC) No 2725/2000, the requested Member State shall acknowledge its responsibility unless the checks carried out reveal that its obligations have ceased under the second subparagraph of Article 4(5) or under Article 16(2), (3) or (4) of Regulation (EC) No 343/2003. The fact that obligations have ceased on the basis of those provisions may be relied on only on the basis of material evidence or substantiated and verifiable statements by the asylum seeker.

Article 5

Negative reply

1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.

2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003.

Article 6

Positive reply

Where the Member State accepts responsibility, the reply shall say so, specifying the provision of Regulation (EC) No 343/2003 that is taken as a basis, and shall include practical details regarding the subsequent transfer, such as contact particulars of the department or person to be contacted.

CHAPTER III TRANSFERS

Article 7

Practical arrangements for transfers

1. Transfers to the Member State responsible may be carried out in one of the following ways:

(a) at the request of the asylum seeker, by a certain specified date;

(b) by supervised departure, with the asylum seeker being accompanied to the point of embarkation by an official of the requesting Member State, the responsible Member State being notified of the place, date and time of the asylum seeker's arrival within an agreed time limit;

(c) under escort, the asylum seeker being accompanied by an official of the requesting Member State or by a representative of an agency empowered by the requesting Member State to act in that capacity and handed over to the authorities in the responsible Member State.

2. In the cases referred to in paragraph 1(a) and (b), the applicant shall be supplied with the laissez-passer referred to in Article 19(3) and Article 20(1)(e) of Regulation (EC) No 343/2003, a model of which is set out in Annex IV to the present Regulation, to allow him to enter the Member State responsible and to identify himself on his arrival at the place and time indicated to him at the time of notification of the decision on taking charge or taking back by the Member State responsible.

In the case referred to in paragraph 1(c), a laissez-passer shall be issued if the asylum seeker is not in possession of identity documents. The time and place of transfer shall be agreed in advance by the Member States concerned in accordance with the procedure set out in Article 8.

3. The Member State making the transfer shall ensure that all the asylum seeker's documents are returned to him before his departure, given into the safe keeping of members of the escort to be

handed to the competent authorities of the Member State responsible, or sent by other appropriate means.

Article 8

Cooperation on transfers

1. It is the obligation of the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way. That Member State shall determine, where appropriate, the location on its territory to which the asylum seeker will be transferred or handed over to the competent authorities, taking account of geographical constraints and modes of transport available to the Member State making the transfer. In no case may a requirement be imposed that the escort accompany the asylum seeker beyond the point of arrival of the international means of transport used or that the Member State making the transfer meet the costs of transport beyond that point.

2. The Member State organising the transfer shall arrange the transport for the asylum seeker and his escort and decide, in consultation with the Member State responsible, on the time of arrival and, where necessary, on the details of the handover to the competent authorities. The Member State responsible may require that three working days' notice be given.

Article 9

Postponed and delayed transfers

1. The Member State responsible shall be informed without delay of any postponement due either to an appeal or review procedure with suspensive effect, or physical reasons such as ill health of the asylum seeker, non-availability of transport or the fact that the asylum seeker has withdrawn from the transfer procedure.

2. A Member State which, for one of the reasons set out in Article 19(4) and Article 20(2) of Regulation (EC) No 343/2003, cannot carry out the transfer within the normal time limit of six months provided for in Article 19(3) and Article 20(1)(d) of that Regulation, shall inform the Member State responsible before the end of that time limit. Otherwise, the responsibility for processing the application for asylum and the other obligations under Regulation (EC) No 343/2003 falls to the former Member State, in accordance with Article 19(4) and Article 20(2) of that Regulation.

3. When, for one of the reasons set out in Article 19(4) and Article 20(2) of Regulation (EC) No 343/2003, a Member State undertakes to carry out the transfer after the normal time limit of six months, it shall make the necessary arrangements in advance with the Member State responsible.

Article 10

Transfer following an acceptance by default

1. Where, pursuant to Article 18(7) or Article 20(1)(c) of Regulation (EC) No 343/2003 as appropriate, the requested Member State is deemed to have accepted a request to take charge or to take back, the requesting Member State shall initiate the consultations needed to organise the transfer.

2. If asked to do so by the requesting Member State, the Member State responsible must confirm in writing, without delay, that it acknowledges its responsibility as a result of its failure to reply within the time limit. The Member State responsible shall take the necessary steps to determine the asylum seeker's place of arrival as quickly as possible and, where applicable, agree with the requesting Member State the time of arrival and the practical details of the handover to the competent authorities.

CHAPTER IV HUMANITARIAN CLAUSE

Article 11

Situations of dependency

1. Article 15(2) of Regulation (EC) No 343/2003 shall apply whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker.

2. The situations of dependency referred to in Article 15(2) of Regulation (EC) No 343/2003 shall be assessed, as far as possible, on the basis of objective criteria such as medical certificates. Where such evidence is not available or cannot be supplied, humanitarian grounds shall be taken as proven only on the basis of convincing information supplied by the persons concerned.

3. The following points shall be taken into account in assessing the necessity and appropriateness of bringing together the persons concerned:

(a) the family situation which existed in the country of origin;

(b) the circumstances in which the persons concerned were separated;

(c) the status of the various asylum procedures or procedures under the legislation on aliens under way in the Member States.

4. The application of Article 15(2) of Regulation (EC) No 343/2003 shall, in any event, be subject to the assurance that the asylum seeker or relative will actually provide the assistance needed.

5. The Member State in which the relatives will be reunited and the date of the transfer shall be agreed by the Member States concerned, taking account of:

(a) the ability of the dependent person to travel;

(b) the situation of the persons concerned as regards residence, preference being given to the bringing the asylum seeker together with his relative where the latter already has a valid residence permit and resources in the Member State in which he resides.

Article 12

Unaccompanied minors

1. Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the

necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.

Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.

2. The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer.

Article 13

Procedures

1. The initiative of requesting another Member State to take charge of an asylum seeker on the basis of Article 15 of Regulation (EC) No 343/2003 shall be taken either by the Member State where the application for asylum was made and which is carrying out a procedure to determine the Member State responsible, or by the Member State responsible.

2. The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

3. The requested Member State shall carry out the necessary checks to establish, where applicable, humanitarian reasons, particularly of a family or cultural nature, the level of dependency of the person concerned or the ability and commitment of the other person concerned to provide the assistance desired.

4. In all events, the persons concerned must have given their consent.

Article 14

Conciliation

1. Where the Member States cannot resolve a dispute, either on the need to carry out a transfer or to bring relatives together on the basis of Article 15 of Regulation (EC) No 343/2003, or on the Member State in which the persons concerned should be reunited, they may have recourse to the conciliation procedure provided for in paragraph 2 of this Article.

2. The conciliation procedure shall be initiated by a request from one of the Member States in dispute to the Chairman of the Committee set up by Article 27 of Regulation (EC) No 343/2003. By agreeing to use the conciliation procedure, the Member States concerned undertake to take the utmost account of the solution proposed.

The Chairman of the Committee shall appoint three members of the Committee representing three Member States not connected with the matter. They shall receive the arguments of the parties either in writing or orally and, after deliberation, shall propose a solution within one month, where necessary after a vote.

The Chairman of the Committee, or his deputy, shall chair the discussion. He may put forward his point of view but he may not vote.

Whether it is adopted or rejected by the parties, the solution proposed shall be final and irrevocable.

CHAPTER V COMMON PROVISIONS

Article 15

Transmission of requests

1. Requests, replies and all written correspondence between Member States concerning the application of Regulation (EC) No 343/2003 shall where possible be sent through the "DubliNet" electronic communications network, set up under Title II of the present Regulation.

By way of derogation from the first subparagraph, correspondence between the departments responsible for carrying out transfers and competent departments in the requested Member State regarding the practical arrangements for transfers, time and place of arrival, particularly where the asylum seeker is under escort, may be transmitted by other means.

2. Any request, reply or correspondence emanating from a National Access Point, as referred to in Article 19, shall be deemed to be authentic.

3. The acknowledgement issued by the system shall be taken as proof of transmission and of the date and time of receipt of the request or reply.

Article 16

Language of communication

The language or languages of communication shall be chosen by agreement between the Member States concerned.

Article 17

Consent of the persons concerned

1. For the application of Articles 7 and 8, Article 15(1) and Article 21(3) of Regulation (EC) No 343/2003, which require the persons concerned to express a desire or give consent, their approval must be given in writing.

2. In the case of Article 21(3) of Regulation (EC) No 343/2003, the applicant must know for what information he is giving his approval.

TITLE II ESTABLISHMENT OF THE "DUBLINET" NETWORK

CHAPTER I TECHNICAL STANDARDS

Article 18

Establishment of "DubliNet"

1. The secure electronic means of transmission referred to in Article 22(2) of Regulation (EC) No 343/2003 shall be known as "DubliNet".

2. DubliNet is based on the use of the generic IDA services referred to in Article 4 of Decision No 1720/1999/EC(6).

Article 19

National Access Points

1. Each Member State shall have a single designated National Access Point.

2. The National Access Points shall be responsible for processing incoming data and transmitting outgoing data.

3. The National Access Points shall be responsible for issuing an acknowledgement of receipt for every incoming transmission.

4. The forms of which the models are set out in Annexes I and III and the form for the request of information set out in Annex V shall be sent between National Access Points in the format supplied by the Commission. The Commission shall inform the Member States of the technical standards required.

CHAPTER II RULES FOR USE

Article 20

Reference number

1. Each transmission shall have a reference number making it possible unambiguously to identify the case to which it relates and the Member State making the request. That number must also make it possible to determine whether the transmission relates to a request for taking charge (type 1), a request for taking back (type 2) or a request for information (type 3).

2. The reference number shall begin with the letters used to identify the Member State in Eurodac. This code shall be followed by the number indicating the type of request, according to the classification set out in paragraph 1.

If the request is based on data supplied by Eurodac, the Eurodac reference number shall be included.

Article 21

Continuous operation

1. The Member States shall take the necessary steps to ensure that their National Access Points operate without interruption.

2. If the operation of a National Access Point is interrupted for more than seven working hours the Member State shall notify the competent authorities designated pursuant to Article 22(1) of Regulation (EC) No 343/2003 and the Commission and shall take all the necessary steps to ensure that normal operation is resumed as soon as possible.

3. If a National Access Point has sent data to a National Access Point that has experienced an interruption in its operation, the acknowledgement of transmission generated by the IDA generic services shall be used as proof of the date and time of transmission. The deadlines set by Regulation (EC) No 343/2003 for sending a request or a reply shall not be suspended for the duration of the interruption of the operation of the National Access Point in question.

TITLE III TRANSITIONAL AND FINAL PROVISIONS

Article 22

Laissez-passer produced for the purposes of the Dublin Convention

Laissez-passer printed for the purposes of the Dublin Convention shall be accepted for the transfer of applicants for asylum under Regulation (EC) No 343/2003 for a period of no more than 18 months following the entry into force of the present Regulation.

Article 23

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 2 September 2003.

For the Commission

Antonio Vitorino

Member of the Commission

(1) OJ L 50, 25.2.2003, p. 1.

(2) OJ C 254, 19.8.1997, p. 1.

(3) OJ L 316, 15.12.2000, p. 1.

(4) OJ L 281, 23.11.1995, p. 31.

(5) OJ L 93, 3.4.2001, p. 40.

(6) OJ L 203, 3.8.1999, p. 9.

ANNEX I

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ANNEX II

(References are to Articles of Council Regulation (EC) No 343/2003)

LIST A MEANS OF PROOF

I. Process of determining the State responsible for examining an application for asylum

1. Presence of a family member (father, mother, guardian) of an asylum applicant who is an unaccompanied minor (Article 6)

Probative evidence

- written confirmation of the information by the other Member State,
- extracts from registers,
- residence permits issued to the family member,
- evidence that the persons are related, if available,
- failing this, and if necessary, a DNA or blood test.

2. Legal residence in a Member State of a family member recognised as having refugee status (Article 7)

Probative evidence

- written confirmation of the information by the other Member State,
- extracts from registers,
- residence permits issued to the individual with refugee status,
- evidence that the persons are related, if available,
- consent of the persons concerned.

3. Presence of a family member applying for asylum whose application has not yet been the subject of a first decision regarding the substance in a Member State (Article 8)

Probative evidence

- written confirmation of the information by the other Member State,
- extracts from registers,
- temporary residence authorisations issued to the individual while the asylum application is being examined,
- evidence that the persons are related, if available,
- failing this, if necessary, a DNA or blood test,
- consent of the persons concerned.

4. Valid residence documents (Article 9(1) and (3) or residence documents which expired less than two years previously (and date of entry into force) (Article 9(4))

Probative evidence

- residence document,

- extracts from the register of aliens or similar registers,

- reports/confirmation of the information by the Member State which issued the residence document.

5. Valid visas (Article 9(2) and(3)) and visas which expired less than six months previously (and date of entry into force) (Article 9(4))

Probative evidence

- visa issued (valid or expired, as appropriate),

- extracts from the register of aliens or similar registers,

- reports/confirmation of the information by the Member State which issued the visa.

6. Legal entry into the territory at an external frontier (Article 11)

Probative evidence

- entry stamp in a passport,

- exit stamp from a country bordering on a Member State, bearing in mind the route taken by the asylum-seeker and the date the frontier was crossed,

- tickets conclusively establishing entry at an external frontier,

- entry stamp or similar endorsement in passport.

7. Illegal entry at an external frontier (Article 10(1))

Probative evidence

- positive match by Eurodac from a comparison of the fingerprints of the applicant with fingerprints taken pursuant to Article 8 of the "Eurodac" Regulation,

- entry stamp in a forged or falsified passport,

- exit stamp from a country bordering on a Member State, bearing in mind the route taken by the asylum-seeker and the date the frontier was crossed,

- tickets conclusively establishing entry at an external frontier,

- entry stamp or similar endorsement in passport.

8. Residence in a Member State for at least five months (Article 10(2))

Probative evidence

- residence authorisations issued while the application for a residence permit is being examined,

- requests to leave the territory or expulsion order issued on dates at least five months apart or that have not been enforced,

- extracts from the records of hospitals, prisons, detention centres.

9. Departure from the territory of the Member States (Article 16(3))

Probative evidence

- exit stamp,

- extracts from third-country registers (substantiating residence),

- tickets conclusively establishing departure from or entry at an external frontier,

- report/confirmation by the Member State from which the asylum-seeker left the territory of the

Member States,

- stamp of third country bordering on a Member State, bearing in mind the route taken by the asylum-seeker and the date the frontier was crossed.

II. Obligation on the Member State responsible for examining the application for asylum to readmit or take back the asylum-seeker

1. Process of determining the Member State responsible is under way in the Member State where the asylum application was lodged (Article 4(5))

Probative evidence

- positive match by Eurodac from a comparison of the fingerprints of the applicant with fingerprints taken pursuant to Article 4 of the "Eurodac" Regulation,

- form submitted by the asylum-seeker,

- official report drawn up by the authorities,

- fingerprints taken in connection with an asylum application,

- extracts from relevant registers and files,

- written report by the authorities attesting that an application has been made.

2. Application for asylum is under examination or was lodged previously (Article 16(1)(c)(d) and (e))

Probative evidence

- positive match by Eurodac from a comparison of the fingerprints of the applicant with fingerprints taken pursuant to Article 4 of the "Eurodac" Regulation,

- form submitted by the asylum-seeker,

- official report drawn up by the authorities,

- fingerprints taken in connection with an asylum application,

- extracts from relevant registers and files,

- written report by the authorities attesting that an application has been made.

3. Departure from the territory of the Member States (Article 4(5), Article 16(3))

Probative evidence

- exit stamp,

- extracts from third-country registers (substantiating residence),

- exit stamp from a third country bordering on a Member State, bearing in mind the route taken by the asylum-seeker and the date on which the frontier was crossed,

- written proof from the authorities that the alien has actually been expelled.

4. Expulsion from the territory of the Member States (Article 16(4))

Probative evidence

- written proof from the authorities that the alien has actually been expelled,

- exit stamp,

- confirmation of the information regarding expulsion by the third country.

LIST B CIRCUMSTANTIAL EVIDENCE

I. Process of determining the State responsible for examining an application for asylum

1. Presence of a family member (father, mother, guardian) of an asylum applicant who is an unaccompanied minor (Article 6)

Indicative evidence(1)

- verifiable information from the asylum applicant,

- statements by the family members concerned,

- reports/confirmation of the information by an international organisation, such as UNHCR.

2. Legal residence in a Member State of a family member recognised as having refugee status (Article 7)

Indicative evidence

- verifiable information from the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR.

3. Presence of a family member applying for asylum whose application has not yet been the subject of a first decision regarding the substance in a Member State (Article 8)

Indicative evidence

- verifiable information from the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR.

4. Valid residence documents (Article 9(1) and (3)) or residence documents which expired less than two years previously (and date of entry into force) (Article 9(4))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by the Member State which did not issue the residence permit,

- reports/confirmation of the information by family members, travelling companions, etc.

5. Valid visas (Article 9(2) and (3)) and visas which expired less than six months previously (and date of entry into force) (Article 9(4))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by the Member State which did not issue the residence permit,

- reports/confirmation of the information by family members, travelling companions, etc.

6. Legal entry into the territory at an external frontier (Article 11)

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by another Member State or third country,

- reports/confirmation of the information by family members, travelling companions, etc.

- fingerprints, except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier. In such cases, they constitute probative evidence as defined in list A,

- tickets,

- hotel bills,

- entry cards for public or private institutions in the Member States,

- appointment cards for doctors, dentists, etc.,

- information showing that the asylum applicant has used the services of a travel agency,

- other circumstantial evidence of the same kind.

7. Illegal entry into the territory at an external frontier (Article 10(1))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by another Member State or third country,

- reports/confirmation of the information by family members, travelling companions, etc.,

- fingerprints, except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier. In such cases, they constitute probative evidence as defined in list A,

- tickets,

- hotel bills,

- entry cards for public or private institutions in the Member States,

- appointment cards for doctors, dentists, etc.,

- information showing that the asylum applicant has used the services of a courier or a travel agency,

- other circumstantial evidence of the same kind.

8. Residence in a Member State for at least five months (Article 10(2))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by a non-governmental organisation, such as an organisation providing accommodation for those in need,

- reports/confirmation of the information by family members, travelling companions, etc.,

- fingerprints,

- tickets,

- hotel bills,

- entry cards for public or private institutions in the Member States,

- appointment cards for doctors, dentists, etc.,

- information showing that the asylum applicant has used the services of a courier or a travel agency,

- other circumstantial evidence of the same kind.

9. Departure from the territory of the Member States (Article 16(3))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by another Member State,

- re Article 3(7) and Article 10(3): exit stamp where the asylum applicant concerned has left the territory of the Member States for a period of at least three months,

- reports/confirmation of the information by family members, travelling companions, etc.,

- fingerprints, except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier. In such cases, they constitute probative evidence as defined in list A,

- tickets,

- hotel bills,

- appointment cards for doctors, dentists, etc. in a third country,

- information showing that the asylum applicant has used the services of a courier or a travel agency,

- other circumstantial evidence of the same kind.

II. Obligation on the Member State responsible for examining the application for asylum to readmit or take back the asylum-seeker

1. Process of determining the Member State responsible is under way in the Member State where the asylum application was lodged (Article 4(5))

Indicative evidence

- verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by family members, travelling companions, etc.,

- reports/confirmation of the information by another Member State.

2. Application for asylum is under examination or was lodged previously (Article 16(1) (c)(d)(e))

Indicative evidence

- verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by another Member State.

3. Departure from the territory of the Member States (Article 4(5), Article 16(3))

Indicative evidence

- detailed and verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- reports/confirmation of the information by another Member State,

- exit stamp where the asylum applicant concerned has left the territory of the Member States for a period of at least three months,

- reports/confirmation of the information by family members, travelling companions, etc.,

- fingerprints, except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier. In such cases, they constitute probative evidence as defined in list A,

- tickets,

- hotel bills,

- appointment cards for doctors, dentists, etc. in a third country,

- information showing that the asylum applicant has used the services of a courier or a travel agency,

- other circumstantial evidence of the same kind.

4. Expulsion from the territory of the Member States (Article 16(4))

Indicative evidence

- verifiable statements by the asylum applicant,

- reports/confirmation of the information by an international organisation, such as UNHCR,

- exit stamp where the asylum applicant concerned has left the territory of the Member States for a period of at least three months,

- reports/confirmation of the information by family members, travelling companions, etc.,

- fingerprints, except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier. In such cases, they constitute probative evidence as defined in list A,

- tickets,

- hotel bills,

- appointment cards for doctors, dentists, etc.,

- information showing that the asylum applicant has used the services of a courier or a travel agency,

- other circumstantial evidence of the same kind.

(1) This indicative evidence must always be followed by an item of probative evidence as defined in list A.

ANNEX III

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>PIC FILE= "L_2003222EN.002101.TIF">

ANNEX IV

>PIC FILE= "L_2003222EN.002202.TIF">

ANNEX V

>PIC FILE= "L_2003222EN.002302.TIF">

DOCNUM	32003R1560
AUTHOR	European Commission
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2003 ; R
PUBREF	Official Journal L 222 , 05/09/2003 P. 0003 - 0023
DESCRIPT	right of asylum ; foreign national ; admission of aliens ; migration policy ; EU country
PUB	2003/09/05
DOC	2003/09/02
INFORCE	2003/09/06=EV
ENDVAL	9999/99/99
LEGBASE	32003R0343-A15P5..... 32003R0343-A17P3..... 32003R0343-A18P3..... 32003R0343-A19P3..... 32003R0343-A19P5..... 32003R0343-A20P1..... 32003R0343-A20P3..... 32003R0343-A20P4..... 32003R0343-A22P2.....

LEGCIT	31995L0046..... 11997D/PRO/05..... 41997A0819(01)..... 31999D1720..... 32000R2725..... 22001A0403(01).....
SUB	Justice and home affairs
REGISTER	19103000
PREPWORK	Opinion Committee
DATES	of document: 02/09/2003 of effect: 06/09/2003; Entry into force Date pub. + 1 See Art 23 end of validity: 99/99/9999

Act concerning the conditions of accession of the Czech Republic the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Annex I: List of provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on and applicable in the new Member States as from accession (referred to in Article 3 of the Act of Accession)

ANNEX I

List of provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on and applicable in the new Member States as from accession (referred to in Article 3 of the Act of Accession)

1. The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders dated 14 June 1985(1).

2. The following provisions of the Convention signed in Schengen on 19 June 1990(2) implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, its related Final Act and Joint Declarations, as amended by certain of the acts listed in paragraph 7 below:

Article 1 to the extent that it relates to the provisions of this paragraph; Articles 3 to 7, excluding Article 5(1)(d); Article 13; Articles 26 and 27; Article 39; Articles 44 to 59; Articles 61 to 63; Articles 65 to 69; Articles 71 to 73; Articles 75 and 76; Article 82; Article 91; Articles 126 to 130 to the extent that they relate to the provisions of this paragraph; and Article 136; Joint Declarations 1 and 3 of the Final Act.

3. The following provisions of the Agreements on Accession to the Convention signed in Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, their Final Acts and the related Declarations, as amended by certain of the acts listed in paragraph 7 below:

(a) the Agreement signed on 27 November 1990 on the Accession of the Italian Republic:

- Article 4,
- Joint Declaration 1 in Part II of the Final Act;

(b) the Agreement signed on 25 June 1991 on the Accession of the Kingdom of Spain:

- Article 4,
- Joint Declaration 1 in Part II of the Final Act,
- Declaration 2 in Part III of the Final Act;

(c) the Agreement signed on 25 June 1991 on the Accession of the Portuguese Republic:

- Articles 4, 5 and 6,
- Joint Declaration 1 in Part II of the Final Act;

(d) the Agreement signed on 6 November 1992 on the Accession of the Hellenic Republic:

- Articles 3, 4 and 5,

- Joint Declaration 1 in Part II of the Final Act,

- Declaration 2 in Part III of the Final Act;

(e) the Agreement signed on 28 April 1995 on the Accession of the Republic of Austria:

- Article 4,

- Joint Declaration 1 in Part II of the Final Act;

(f) the Agreement signed on 19 December 1996 on the Accession of the Kingdom of Denmark:

- Articles 4, 5(2) and 6,

- Joint Declarations 1 and 3 in Part II of the Final Act;

(g) the Agreement signed on 19 December 1996 on the Accession of the Republic of Finland:

- Articles 4 and 5,

- Joint Declarations 1 and 3 in Part II of the Final Act,

- Declaration by the Government of the Republic of Finland on the Åland islands in Part III of the Final Act;

(h) the Agreement signed on 19 December 1996 on the Accession of the Kingdom of Sweden:

- Articles 4 and 5,

- Joint Declarations 1 and 3 in Part II of the Final Act.

4. The provisions of the following Decisions of the Executive Committee established by the Convention signed in Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, as amended by certain of the acts listed in paragraph 7 below:

SCH/Com-ex (93) 10 Decision of the Executive Committee of 14 December 1993 concerning the declarations by the Ministers and State Secretaries

SCH/Com-ex (93) 14 Decision of the Executive Committee of 14 December 1993 on improving practical judicial cooperation for combating drug trafficking

SCH/Com-ex (93) 22 rev Decision of the Executive Committee of 14 December 1993 concerning the confidential nature of certain documents

SCH/Com-ex (94) 16 rev Decision of the Executive Committee of 21 November 1994 on the acquisition of common entry and exit stamps

SCH/Com-ex (94) 28 rev Decision of the Executive Committee of 22 December 1994 on the certificate provided for in Article 75 to carry narcotic drugs and psychotropic substances

SCH/Com-ex (94) 29 rev 2 Decision of the Executive Committee of 22 December 1994 on bringing into force the Convention implementing the Schengen Agreement of 19 June 1990

SCH/Com-ex (95) 21 Decision of the Executive Committee of 20 December 1995 on the swift exchange between the Schengen States of statistical and specific data on possible malfunctions at the external borders

SCH/Com-ex (98) 1 rev 2 Decision of the Executive Committee of 21 April 1998 on the activities of the Task Force, insofar as it relates to the provisions in paragraph 2 above

SCH/Com-ex (98) 17 Decision of the Executive Committee of 23 June 1998 concerning the confidential nature of certain documents

SCH/ Com-ex (98) 26 def Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen

SCH/Com-ex (98) 35 rev 2 Decision of the Executive Committee of 16 September 1998 on forwarding the Common Manual to EU applicant States

SCH/Com-ex (98) 37 def 2 Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration, insofar as it relates to the provisions in paragraph 2 above

SCH/Com-ex (98) 51 rev 3 Decision of the Executive Committee of 16 December 1998 on cross border police cooperation in the area of crime prevention and detection

SCH/Com-ex (98) 52 Decision of the Executive Committee of 16 December 1998 on the Handbook on cross-border police-cooperation, insofar as it relates to the provisions in paragraph 2 above

SCH/Com-ex (98) 57 Decision of the Executive Committee of 16 December 1998 on the introduction of a harmonised form providing proof of invitation, sponsorship and accommodation

SCH/Com-ex (98) 59 rev Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers

SCH/Com-ex (99) 1 rev 2 Decision of the Executive Committee of 28 April 1999 on the drugs situation

SCH/Com-ex (99) 6 Decision of the Executive Committee of 28 April 1999 on the Schengen acquis relating to telecommunications

SCH/Com-ex (99) 7 rev 2 Decision of the Executive Committee of 28 April 1999 on liaison officers

SCH/Com-ex (99) 8 rev 2 Decision of the Executive Committee of 28 April 1999 on general principles governing the payment of informers

SCH/Com-ex (99) 10 Decision of the Executive Committee of 28 April 1999 on the illegal trade in firearms

SCH/Com-ex (99) 13 Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions:

- Annexes 1-3, 7, 8 and 15 of the Common Consular Instructions

- The Common Manual, insofar as it relates to the provisions in paragraph 2 above, including Annexes 1, 5, 5A, 6, 10, 13

SCH/Com-ex (99) 18 Decision of the Executive Committee of 28 April 1999 on the improvement of police cooperation in preventing and detecting criminal offences.

5. The following Declarations of the Executive Committee established by the Convention signed in Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, to the extent that they relate to the provisions in paragraph 2 above:

SCH/Com-ex (96) decl 6 rev 2 Declaration of the Executive Committee of 26 June 1996 on extradition

SCH/Com-ex (97) decl 13 rev 2 Declaration of the Executive Committee of 9 February 1998 on the abduction of minors.

6. The following Decisions of the Central Group established by the Convention signed in Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, to the extent that they relate to the provisions in paragraph 2 above:

SCH/C (98) 117 Decision of the Central Group of 27 October 1998 on the adoption of measures to fight illegal immigration

SCH/C (99) 25 Decision of the Central Group of 22 March 1999 on general principles governing the payment of informers.

7. The following acts which build upon the Schengen acquis or otherwise relate to it:

Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, 14.7.1995, p. 1)

Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (OJ L 119, 7.5.1999, p. 49)

Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ L 176, 10.7.1999, p. 1)

Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ L 176, 10.7.1999, p. 17)

Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two states with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 31)

Council Decision 1999/848/EC of 13 December 1999 on the full application of the Schengen acquis in Greece (OJ L 327, 21.12.1999, p. 58)

Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43)

Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (OJ L 248, 3.10.2000, p. 1)

Council Decision 2000/751/EC of 30 November 2000 on declassifying certain parts of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 303, 2.12.2000, p. 29)

Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway (OJ L 309, 9.10.2000, p. 24)

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.03.2001, p. 1)

Council Regulation No 789/2001/EC of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ L 116, 26.4.2001, p. 2)

Council Regulation No 790/2001/EC of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks

and surveillance (OJ L 116, 26.4.2001, p. 5)

Council Decision 2001/329/EC of 24 April 2001 updating part VI and Annexes 3, 6 and 13 of the Common Consular Instructions and Annexes 5(a), 6(a) and 8 to the Common Manual (OJ L 116, 26.4.2001, p. 32), insofar as it relates to Annex 3 to the Common Consular Instructions and Annex 5(a) to the Common Manual

Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10.7.2001, p. 45)

Council Decision 2001/886/JHA of 6 December 2001 on the development of the second generation Schengen Information System (SIS II) (OJ L 328, 13.12.2001, p. 1)

Council Regulation (EC) No 2414/2001 of 7 December 2001 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement (OJ L 327, 12.12.2001, p. 1)

Council Regulation (EC) No 2424/2001 of 6 December 2001 on the development of the second generation Schengen Information System (SIS II) (OJ L 328, 13.12.2001, p. 4)

Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form (OJ L 53, 23.2.2002, p. 4)

Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas (OJ L 53, 23.2.2002, p. 7)

Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20)

Council Decision 2002/352/EC of 25 April 2002 on the revision of the Common Manual (OJ L 123, 9.5.2002, p. 47)

Council Decision 2002/353/EC of 25 April 2002 on declassifying Part II of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 123, 9.5.2002, p. 49)

Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ L 157, 15.6.2002, p. 1)

Council Decision 2002/587/EC of 12 July 2002 on the revision of the Common Manual (OJ L 187, 16.7.2002, p. 50)

Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1)

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17).

(1) OJ L 239, 22.9.2000, p. 13.

(2) OJ L 239, 22.9.2000, p. 19.

DOCNUM 12003TN01

AUTHOR	The 15 Member States ; Czech Republic ; Estonia ; Cyprus ; Latvia ; Lithuania ; Hungary ; Malta ; Poland ; Slovenia ; Slovak Republic
FORM	Treaty
TREATY	European Community ; European Union
TYPDOC	1 ; Treaty ; 2003 SEC_1_TYP_T
PUBREF	Official Journal L 236 , 23/09/2003 P. 0050 - 0052
PUB	2003/09/23
DOC	2003/04/16
INFORCE	2004/05/01=EV
ENDVAL	9999/99/99
SIGNED	2003/04/16=Athens
LEGCIT	41993D0010..... 41993D0014..... 41993D0022..... 41994D0016..... 41994D0028..... 41994D0029..... 31995R1683..... 41995D0021..... 41998D0001..... 41998D0017..... 41998D0026..... 41998D0035..... 41998D0037..... 41998D0051..... 41998D0052..... 41998D0052..... 41998D0057..... 41998D0057..... 41998D0059..... 41998D0059..... 41998D0117..... 31999D0307..... 31999D0435..... 31999D0436..... 31999D0437..... 31999D0848..... 41999D0001..... 41999D0001..... 41999D0006..... 41999D0006..... 41999D0007..... 41999D0007.....

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41999D0018.....
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41999D0025.....
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32000D0586.....
32000D0751.....
32000D0777.....
42000A0922(01).....
42000A0922(02).....
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42000A0922(06).....
42000A0922(07).....
42000A0922(08).....
42000A0922(09).....
42000A0922(10).....
42000X0922(02).....
42000X0922(03).....
32001D0329.....
32001D0886.....
32001L0051.....
32001R0539.....
32001R0789.....
32001R0790.....
32001R2414.....
32001R2424.....
32002D0192.....
32002D0352.....
32002D0353.....
32002D0587.....
32002D0946.....
32002L0090.....
32002R0333.....
32002R0334.....
32002R1030.....
12003T003.....

SUB Accession ; Principles, objectives and tasks of the Treaties

AUTLANG The official languages ; Estonian ; Hungarian ; Latvian ; Lithuanian ; MAL ; Polish ; Slovak ; Slovenian ; Czech

DATES

of document: 16/04/2003
of effect: 01/05/2004; Entry into force See 12003T/TTE/02
of signature: 16/04/2003; Athens
end of validity: 99/99/9999

32004F0106(01) Official Journal C 002 , 06/01/2004 P. 0001 - 0002 1

Council Act of 27 November 2003 drawing up, on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention - Declaration

Council Act

of 27 November 2003

drawing up, on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention

(2004/C 2/01)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Convention on the Establishment of a European Police Office (EuropolConvention)(1), and in particular Article 43(1) thereof,

Having regard to the initiative of the Kingdom of Denmark(2),

Having regard to the opinion of the European Parliament(3),

Having regard to the opinion of the Management Board of Europol(4),

Whereas:

(1) Pursuant to Article 30(2) of the Treaty on European Union, within a period of five years after the entry into force of the Treaty of Amsterdam on 1 May 1999, the Council is to promote cooperation in a number of different areas, inter alia, through Europol.

(2) The Tampere European Council in October 1999 stated that Europol has a key role with respect to cooperation between Member States' authorities in the field of cross-border crime investigation in supporting Union-wide crime prevention, analyses and investigation. The European Council called on the Council to provide Europol with the necessary support,

HAS DECIDED to draw up the attached Protocol amending the Convention on the Establishment of a European Police Office (Europol Convention), signed today by the representatives of the governments of the Member States, and

RECOMMENDS

that Member States adopt this Protocol in accordance with their respective constitutional requirements.

Done at Brussels, 27 November 2003.

For the Council

The President

R. Castelli

(1) OJ C 316, 27.11.1995, p. 2.

(2) OJ C 172, 18.7.2002, p. 15.

(3) Opinion delivered on 9 April 2003 (not yet published in the Official Journal).

(4) Opinion delivered on 31 October 2002; additional opinion delivered on 24 June 2003.

Declaration by the Council

The Council agrees that the instruction of Europol to deal with "fraud" as one of the forms of crime referred to in the Annex to the Europol Convention confers, as far as tax fraud and customs

fraud is concerned, competences to Europol only in the field of improvement of the effectiveness and cooperation of the competent authorities of the Member States responsible for the functioning of the criminal law enforcement system and not their authorities responsible for ensuring the levying of taxes and customs duties.

DOCNUM	32004F0106(01)
AUTHOR	Council
FORM	Various acts
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2004 SEC_3_TYP_F
PUBREF	Official Journal C 002 , 06/01/2004 P. 0001 - 0002
DESCRIPT	European convention ; Europol ; EU police cooperation ; information transfer ; information system ; data collection ; information processing
PUB	2004/01/06
DOC	2003/11/27
INFORCE	2003/11/27=EV
ENDVAL	9999/99/99
LEGBASE	41995A1127(01)-A43P1.....
LEGCIT	12002M030.....
EARLACTS	42004A0106(01).....Relation.....
SUB	Justice and home affairs
REGISTER	19301000
PREPWORK	initiative ;OJ C 172/2002 P 15 Opinion European Parliament;given on 09/04/2003 Opinion Management Board of Europol;given on 31/10/2004 ET 24/06/2003
DATES	of document: 27/11/2003 of effect: 27/11/2003; Entry into force Date of document end of validity: 99/99/9999

2002/630/JHA: Council Decision of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS)

Council Decision

of 22 July 2002

establishing a framework programme on police and judicial cooperation in criminal matters (AGIS)

(2002/630/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 30(1), Article 31 and Article 34(2)(c) thereof,

Having regard to the initiative from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) Article 29 of the Treaty on European Union states that the Union's objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters, and by preventing and combating racism and xenophobia.

(2) The conclusions of the Tampere European Council of October 1999 call for cooperation to be stepped up on preventing and fighting crime, including crime using new information and communication technologies, in order to achieve a genuine European area of justice. The importance of cooperation in this area has again been emphasised in the action plan entitled The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium(3).

(3) Article 12 of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings(4) calls for cooperation between Member States in order to facilitate more effective protection of victims' interests in criminal proceedings.

(4) It is appropriate to widen the European dimension of projects to three Member States or to two Member States and an applicant country in order to promote the formation of partnerships and the exchange of information and good national practice.

(5) The Grotius II - Criminal(5), Stop II(6), Oisin II(7), Hippokrates(8) and Falcone(9) programmes, established by the Council, have helped to strengthen cooperation between the police and judiciary in the Member States and to improve mutual understanding of their police, judicial, legal and administrative systems.

(6) Following approval by the Feira European Council in June 2000 of the European Union Action Plan on Drugs (2000 to 2004), actions to combat drug trafficking are also included in this framework programme.

(7) The establishment of a single framework programme, expressly called for by the European Parliament and the Council when the previous programmes were adopted, will further boost cooperation by way of a coordinated and multidisciplinary approach involving the various persons responsible for preventing and combating crime at European Union level. In doing so, it is necessary to maintain a balanced approach between various activities aiming at the creation of the area of freedom, security and justice.

(8) It is desirable to ensure the continuity of the activities supported by the framework programme,

by providing for their coordination within a single frame of reference that rationalises procedures and improves management and economies of scale. Moreover, it is necessary to make full use of the operational benefits of the programme, in particular for law enforcement authorities, and to encourage cooperation between the Member States' law enforcement authorities and to provide such authorities with a greater insight into the working methods of their counterparts in other Member States and constraints by which they may be bound.

(9) The expenditure of the framework programme should be compatible with the current ceiling under Heading 3 of the financial perspective.

(10) The annual appropriations of the framework programme should be decided upon by the budgetary authority during the budgetary procedure.

(11) The framework programme needs to be made accessible to the applicant countries, as partners and participants in the projects funded under that programme. Where appropriate, participation of other States in that programme could also be envisaged.

(12) The measures required to implement this Decision should be adopted according to the procedures laid down in it, with the assistance of a Committee.

(13) To increase the added value of the projects implemented under this Decision, it is necessary to ensure consistency and complementarity between these projects and other forms of Community intervention.

(14) Regular monitoring and evaluation of the framework programme need to be ensured so that the effectiveness of the projects carried out can be assessed in the light of the objectives and so that the priorities can be re-adjusted if necessary.

(15) A financial reference amount, within the meaning of point 34 of the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure(10), is included in this Decision for the entire duration of the framework programme, without thereby affecting the powers of the budgetary authority as they are defined by the Treaty establishing the European Community,

HAS DECIDED AS FOLLOWS:

Article 1

Establishment of the framework programme

1. This Decision establishes a framework programme for police and judicial cooperation in criminal matters in the context of the area of freedom, security and justice, hereafter referred to as the programme.

2. The programme is hereby established for the period from 1 January 2003 to 31 December 2007 and may be extended beyond the latter date.

Article 2

Programme objectives

1. The programme shall contribute to the general objective of providing European Union citizens

with a high level of protection in an area of freedom, security and justice. In this context, it aims, in particular, to:

(a) develop, implement and evaluate European policies in this field;

(b) promote and strengthen networking, mutual cooperation on general subjects of common interest to the Member States, the exchange and dissemination of information, experience and best practice, local and regional cooperation, and the improvement and adaptation of training and technical and scientific research;

(c) encourage Member States to step up cooperation with the applicant countries, other third countries and appropriate regional and international organisations.

2. The programme shall support projects in the following areas relating to Title VI of the Treaty on European Union:

(a) judicial cooperation in general and criminal matters, including training;

(b) cooperation between law enforcement authorities;

(c) cooperation between law enforcement authorities or other public or private organisations in the Member States involved in preventing and fighting crime, organised or otherwise;

(d) cooperation between Member States to achieve effective protection of the interests of victims in criminal proceedings.

Article 3

Access to the programme

1. The programme shall co-finance projects of a maximum duration of two years presented by public or private institutions and bodies, including professional organisations, non-governmental organisations, associations, organisations representing business, research and basic and further training institutes; the projects shall be directed at the target groups set out in paragraph 3.

2. To be eligible for co-financing, the projects must involve partners in at least three Member States, or two Member States and one applicant country, and have the objectives mentioned in Article 2. The applicant countries may participate in the projects in order to familiarise themselves with the acquis in this area and help them to prepare for the accession. Other third countries may also participate when this serves the aims of the projects.

3. The programme shall be directed at the following target groups:

(a) legal practitioners: judges, public prosecutors, lawyers, law officials, criminal investigation officers, bailiffs, experts, court interpreters and other professionals associated with the judiciary;

(b) law-enforcement officials and officers: public bodies in Member States which are responsible under national law for preventing, detecting and combating criminal offences;

(c) officials in other government departments and representatives of associations, professional organisations, research and business involved in fighting and preventing crime, organised or otherwise;

(d) representatives of victim assistance services, including public departments responsible for immigration and social services.

4. Within the framework of the objectives laid down in Article 2, the programme may also cofinance:

(a) specific projects presented in accordance with paragraph 1 that are of particular interest in terms of the programme's priorities or cooperation with the applicant countries;

(b) complementary measures such as seminars, meetings of experts or other activities to disseminate the results obtained under the programme.

5. Within the framework of the objectives laid down in Article 2, the programme may also give direct financial support to activities included in the annual activity programmes of non-governmental organisations which meet the following criteria:

(a) they must be non-profit-making organisations;

(b) they must be constituted in accordance with the law of one of the Member States;

(c) they must pursue activities with a European dimension and involve, as a general rule, at least half of the Member States;

(d) the aims of their activities must include one or more of the objectives laid down in Article 2.

Article 4

Activities of the programme

The programme shall comprise the following types of project:

(a) training;

(b) setting up and launching exchange and placement schemes;

(c) studies and research;

(d) dissemination of the results obtained under the programme;

(e) encouraging cooperation between the Member States' law enforcement, judicial authorities or other public or private organisations in the Member States involved in preventing and fighting crime, for instance by giving assistance for the establishment of networks;

(f) conferences and seminars.

Article 5

Financing the programme

1. The financial reference amount for the implementation of this programme for the period 2003 to 2007 shall be EUR 65 million.

The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspective.

2. The cofinancing of a project by the programme shall be exclusive of any other financing by another programme financed by the general budget of the European Union.

3. Financing decisions shall be followed by financing contracts between the Commission and the organisers. The financing decisions and contracts arising therefrom shall be subject to financial control by the Commission and to audits by the Court of Auditors.

4. The proportion of financial support from the general budget of the European Union shall not exceed 70 % of the total cost of the project.

5. However, the specific projects and complementary measures referred to in Article 3(4) and the activities referred to in Article 3(5) can be financed to 100 %, up to a ceiling of 10 % of the total financial package allocated annually to the programme for specific projects under Article 3(4)(a) and 5 % for complementary measures under Article 3(4)(b).

Article 6

Implementation of the programme

1. The Commission shall be responsible for the management and implementation of the programme, in cooperation with the Member States.

2. The programme shall be managed by the Commission in accordance with the Financial Regulation applicable to the general budget of the European Communities.

3. To implement the programme, the Commission shall:

(a) prepare an annual work programme comprising specific objectives, thematic priorities and, if necessary, a list of specific projects and complementary measures; the programme shall be balanced between the areas specified in Article 2(2), with at least 15 % of annual funding being devoted to each of the areas specified in subparagraphs (a), (b) and (c) of that paragraph;

(b) evaluate and select the projects submitted and ensure management of them.

4. Examination of the projects presented shall be carried out in accordance with the advisory procedure laid down in Article 8. Examination of the annual work programme, the specific projects and the complementary measures (referred to in Article 3(4) and the activities referred to in Article 3(5)) shall be carried out in accordance with the management procedure laid down in Article 9.

5. The Commission shall, on condition that they are compatible with the relevant policies, evaluate and select projects submitted by the organisers on the basis of the following criteria:

(a) conformity with the programme's objectives;

(b) European dimension of the project and scope for participation by the applicant countries;

(c) compatibility with the work undertaken or planned within the framework of the European Union's policy priorities on judicial cooperation in general and criminal matters;

(d) extent to which the project complements other past, present or future cooperation projects;

(e) ability of the organiser to implement the project;

(f) inherent quality of the project in terms of its conception, organisation, presentation and expected results;

(g) amount of the grant requested under the programme and proportionality with the expected results;

(h) the impact of the expected results on the programme's objectives.

Article 7

Committee

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission, hereafter referred to as the Committee.

2. The Committee shall adopt its rules of procedure on a proposal by the Chair, on the basis of standard rules of procedure which have been published in the Official Journal of the European Communities.

3. The Commission may invite representatives from the applicant countries to information meetings after the Committee's meetings.

Article 8

Advisory procedure

1. Where reference is made to this Article, the representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft, within a time limit which the Chair may lay down according to the urgency of the matter, if necessary by taking a vote.

2. The opinion shall be recorded in the minutes; each Member State may request that its position be recorded in the minutes.

3. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which the opinion has been taken into account.

Article 9

Management procedure

1. Where reference is made to this Article, the representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft, within a time limit which the Chair may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty establishing the European Community, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The Chair shall not vote.

2. The Commission shall adopt measures which shall apply immediately. However, if the measures are not in accordance with the opinion of the Committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period of three months from the date of such communication.

3. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 2.

Article 10

Consistency and complementarity

The Commission, in cooperation with the Member States, shall ensure that projects complement and are consistent with other Community policies.

Article 11

Monitoring and evaluation

The Commission shall regularly monitor the programme. It shall inform the European Parliament of the work programme adopted and the list of projects co-financed and shall present to the European Parliament and the Council:

(a) an annual report on the implementation of the programme. The first report shall be submitted by 30 June 2004;

(b) an interim evaluation of the implementation of the programme by 30 June 2005;

(c) a communication on the continuation of the programme, if necessary accompanied by an appropriate proposal, by 30 September 2006;

(d) a final evaluation of the entire programme by 30 June 2008.

Article 12

Entry into force

This Decision shall take effect on the day of its publication in the Official Journal.

Done at Brussels, 22 July 2002.

For the Council

The President

P. S. Møller

(1) OJ C 51 E, 26.2.2002, p. 345.

(2) Opinion delivered on 9 April 2002 (not yet published in the Official Journal).

(3) OJ C 124, 3.5.2000, p. 1.

(4) OJ L 82, 22.3.2001, p. 1.

(5) OJ L 186, 7.7.2001, p. 1 (Grotius II - Criminal).

(6) OJ L 186, 7.7.2001, p. 7 (Stop II).

(7) OJ L 186, 7.7.2001, p. 4 (Oisin II).

(8) OJ L 186, 7.7.2001, p. 11.

(9) OJ L 99, 31.3.1998, p. 8.

(10) OJ C 172, 18.6.1999, p. 1.

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FORM	Decision sui generis
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TYPDOC	3 ; secondary legislation ; 2002 ; D
PUBREF	Official Journal L 203 , 01/08/2002 P. 0005 - 0008
DESCRIPT	criminal law ; EU judicial cooperation ; EU police cooperation ; vocational training ; information transfer ; Community programme ; financing
PUB	2002/08/01
DOC	2002/07/22
INFORCE	2002/08/01=PE
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MODIFIES	52001PC0646..... Adoption.....
SUB	Justice and home affairs
REGISTER	19300000 ; 19400000
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2001/427/JHA: Council Decision of 28 May 2001 setting up a European crime prevention network

Council Decision

of 28 May 2001

setting up a European crime prevention network

(2001/427/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union and in particular Articles 30(1), 31 and 34(2)(c) thereof,

Having regard to the initiative of the French Republic and the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament,

Whereas:

(1) The European Parliament adopted a Resolution on 16 December 1993 on small-scale crime in urban areas and its links with organised crime(1) and a Resolution on 17 November 1998 on guidelines and measures for the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it(2).

(2) Article 29 of the Treaty states that the objective of the Union in this area is to be achieved by preventing and combating crime, organised or otherwise.

(3) The Vienna Action Plan called for crime prevention measures to be drawn up in the five years following the entry into force of the Treaty of Amsterdam.

(4) The Tampere European Council of 15 and 16 October 1999 concluded that there was a need to develop crime prevention measures, to exchange best practices and to strengthen the network of competent national authorities for crime prevention, as well as cooperation between national organisations specialising in this field, specifying that this cooperation could have as its chief priorities juvenile, urban and drug-related crime. To this end, a study of the possibility of a programme financed by the Community was called for.

(5) The European Union Strategy for the beginning of the new millennium on the prevention and control of organised crime(3) calls in Recommendation 6 for the Council to be assisted by suitably qualified experts on crime prevention, such as the national focal points, or by establishing a network of experts from national crime prevention organisations.

(6) Several major seminars and conferences on crime prevention, most notably those held in Stockholm in 1996, in Noordwijk in 1997, in London in 1998 and in the Algarve in 2000 called for the establishment of a network within the European Union to develop cooperation on crime prevention. The High Level Conference in the Algarve also highlighted the need for a multidisciplinary, joint approach to crime prevention. The conference in Zaragoza in 1996 also pointed to this need in highlighting the strong links between organised crime and crime in general.

(7) Society as a whole must be involved in the development of a partnership between national, local and regional public authorities, non-governmental organisations, the private sector and citizens. The causes of crime are multiple and must therefore be dealt with by measures at different levels, by different groups in society, in partnership with the players involved who have different powers and experience, including civil society.

(8) Since the majority of the crimes of which citizens of the European Union are victims are committed in urban areas, urban policies must also be taken into consideration. In so doing, emphasis should be given to any kind of urban violence that affects the normal functioning of the community,

HAS DECIDED AS FOLLOWS:

Article 1

1. A European Crime Prevention Network, hereinafter referred to as "the Network" is hereby set up.

2. Network national representatives and a Secretariat shall ensure the proper functioning of the Network in accordance with this Decision.

3. Crime prevention covers all measures that are intended to reduce or otherwise contribute to reducing crime and citizens' feeling of insecurity, both quantitatively and qualitatively, either through directly deterring criminal activities or through policies and interventions designed to reduce the potential for crime and the causes of crime. It includes work by government, competent authorities, criminal justice agencies, local authorities, and the specialist associations they have set up in Europe, the private and voluntary sectors, researchers and the public, supported by the media.

Article 2

1. The Network shall consist of contact points designated by each Member State.

2. Each Member State shall designate not more than three contact points.

3. These contact points shall include at least one representative from the national authorities competent for crime prevention in its many aspects.

4. Researchers or academics specialising in this field, as well as other actors in crime prevention, may be designated as contact points. In all instances Member States should ensure that researchers or academics, as well as other actors in crime prevention, such as non-governmental organisations, local authorities and the private sector, are involved through the appointed contact points.

5. The Commission shall also designate a contact point. Europol and the European Monitoring Centre for Drugs (EMCDDA) are associated with the work in matters with which they are concerned. Other relevant bodies may be associated with the work.

6. Each Member State shall ensure that its contact points have sufficient knowledge of at least one other official language of the Union to enable them to communicate with the contact points in the other Member States.

Article 3

1. The Network shall contribute to developing the various aspects of crime prevention at Union level and shall support crime prevention activities at local and national level. Although covering all types of criminality, the Network shall pay particular attention to the fields of juvenile,

urban and drug-related crime.

2. In particular, the Network shall:

(a) facilitate cooperation, contacts and exchanges of information and experience between Member States and between national organisations, as well as between Member States and the Commission, other constituent entities of the Council and other groups of experts and networks specialising in crime prevention matters;

(b) collect and analyse information on existing crime prevention activities, the evaluation thereof and the analysis of best practices, and collect and analyse existing data on criminality and on its development in the Member States, in order to contribute to consideration of future national and European decisions. The Network shall also assist the Council and the Member States with questionnaires on crime and crime prevention;

(c) contribute to identifying and developing the main areas for research, training and evaluation in the crime prevention field;

(d) organise conferences, seminars, meetings and other activities designed to promote consideration of these specific matters, and to disseminate the results thereof;

(e) organise activities that stimulate and improve the exchange of experiences and best practices;

(f) develop cooperation with applicant countries, third countries and international organisations and bodies;

(g) provide its expertise to the Council and to the Commission, where necessary and upon request, with a view to assisting them in all matters concerning crime prevention;

(h) report to the Council on its activities each year, through the competent working bodies, and indicate the areas for priority action in its work programme for the following year. The Council shall take note of and endorse the report and forward it to the European Parliament.

Article 4

To accomplish its tasks, the Network shall:

(a) favour a multidisciplinary approach;

(b) be in close contact, through the contact points, with crime prevention bodies, local authorities, local partnerships and civil society as well as with research institutions and non-governmental organisations in the Member States;

(c) set up and operate a website, containing its regular reports and any other useful information, particularly a compendium of best practices;

(d) endeavour to use and promote the results of projects, relevant for crime prevention, funded through Union programmes.

Article 5

1. The Network shall hold its first meeting on 28 August 2001.

2. The Network shall meet at least once every six months on the invitation of the Presidency of

the Council at that time.

3. In conjunction with meetings of the Network, the Network National representatives, made up of one representative from each Member State designated in accordance with Article 2(3), shall meet to decide on the matters referred to under Article 5(4).

4. The Network national representatives shall decide on the Network's annual programme including a financial plan. They shall, in particular, determine:

- the priority fields to be examined;

- the main specific actions to be carried out (seminars and conferences, studies and research, training programmes...);

- the structure of the web site.

They shall also draw up the annual report on the activities of the Network.

The decisions of the Network national representatives shall be adopted by unanimity.

The Network national representatives' meeting shall be chaired by the representative of the Member State which is holding the Presidency of the Council at the time.

They shall meet at least once during each Presidency. They shall draw up their Rules of Procedure, to be adopted by unanimity.

5. The Secretariat for the Network shall be provided by the Commission.

6. The Network Secretariat and its activities shall be financed from the general budget of the European Union.

7. The Secretariat shall be responsible for drafting the Network's annual programme and the annual report on the Network's activities. It shall carry out everyday Network activities involving collating, analysing and disseminating information in liaison with the national contact points. It shall assist the Network members in devising, formulating and implementing projects. It shall establish and maintain the website of the Network. When performing its functions, the Secretariat shall work closely together with the Network National representatives.

Article 6

The Council shall evaluate the activities of the Network in the three years following the adoption of this Decision.

Article 7

This Decision shall take effect on the day of its adoption.

Done at Brussels, 28 May 2001.

For the Council

The President

T. Bodström

(1) OJ C 20, 24.1.1994, p. 188.

(2) OJ C 379, 7.12.1998, p. 44.

(3) OJ C 124, 3.5.2000, p. 1.

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DESCRIPT	fight against crime ; prevention of delinquency ; cooperation policy ; EC countries ; trans-European network
PUB	2001/06/08
DOC	2001/05/28
INFORCE	2001/05/28=PE
ENDVAL	9999/99/99
LEGBASE	11997M030-P1..... 11997M031..... 11997M034-P2PTC).....
LEGCIT	51993IP0289..... 11997M029..... 51998IP0376..... 32000F0503.....
MODIFIES	32000Y1216(04)..... Relation.....
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REGISTER	19400000 ; 19302000
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Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

Council Framework Decision 2003/577/JHA

of 22 July 2003

on the execution in the European Union of orders freezing property or evidence

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative by the Republic of France, the Kingdom of Sweden and the Kingdom of Belgium(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) The European Council, meeting in Tampere on 15 and 16 October 1999, endorsed the principle of mutual recognition, which should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.

(2) The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent judicial authorities quickly to secure evidence and to seize property which are easily movable.

(3) On 29 November 2000 the Council, in accordance with the Tampere conclusions, adopted a programme of measures to implement the principle of mutual recognition in criminal matters, giving first priority (measures 6 and 7) to the adoption of an instrument applying the principle of mutual recognition to the freezing of evidence and property.

(4) Cooperation between Member States, based on the principle of mutual recognition and immediate execution of judicial decisions, presupposes confidence that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality.

(5) Rights granted to the parties or bona fide interested third parties should be preserved.

(6) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to freeze property for which a freezing order has been issued when there are reasons to believe, on the basis of objective elements, that the freezing order is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent any Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media,

HAS ADOPTED THIS FRAMEWORK DECISION:

TITLE I SCOPE

Article 1

Objective

The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. It shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

Article 2

Definitions

For the purposes of this Framework Decision:

(a) "issuing State" shall mean the Member State in which a judicial authority, as defined in the national law of the issuing State, has made, validated or in any way confirmed a freezing order in the framework of criminal proceedings;

(b) "executing State" shall mean the Member State in whose territory the property or evidence is located;

(c) "freezing order" property that could be subject to confiscation or evidence;

(d) "property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers:

- is the proceeds of an offence referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or

- constitutes the instrumentalities or the objects of such an offence;

(e) "evidence" shall mean objects, documents or data which could be produced as evidence in criminal proceedings concerning an offence referred to in Article 3.

Article 3

Offences

1. This Framework Decision applies to freezing orders issued for purposes of:

(a) securing evidence, or

(b) subsequent confiscation of property.

2. The following offences, as they are defined by the law of the issuing State, and if they are punishable in the issuing State by a custodial sentence of a maximum period of at least three years shall not be subject to verification of the double criminality of the act:

- participation in a criminal organisation,

- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the Protection of the European Communities' Financial Interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Tribunal,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide, at any time, acting unanimously after consultation of the European

Parliament under the conditions laid down in Article 39(1) of the Treaty, to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 14 of this Framework Decision, whether the list should be extended or amended.

4. For cases not covered by paragraph 2, the executing State may subject the recognition and enforcement of a freezing order made for purposes referred to in paragraph 1(a) to the condition that the acts for which the order was issued constitute an offence under the laws of that State, whatever the constituent elements or however described under the law of the issuing State.

For cases not covered by paragraph 2, the executing State may subject the recognition and enforcement of a freezing order made for purposes referred to in paragraph 1(b) to the condition that the acts for which the order was issued constitute an offence which, under the laws of that State, allows for such freezing, whatever the constituent elements or however described under the law of the issuing State.

TITLE II PROCEDURE FOR EXECUTING FREEZING ORDERS

Article 4

Transmission of freezing orders

1. A freezing order within the meaning of this Framework Decision, together with the certificate provided for in Article 9, shall be transmitted by the judicial authority which issued it directly to the competent judicial authority for execution by any means capable of producing a written record under conditions allowing the executing State to establish authenticity.

2. The United Kingdom and Ireland, respectively, may, before the date referred to in Article 14(1), state in a declaration that the freezing order together with the certificate must be sent via a central authority or authorities specified by it in the declaration. Any such declaration may be modified by a further declaration or withdrawn any time. Any declaration or withdrawal shall be deposited with the General Secretariat of the Council and notified to the Commission. These Member States may at any time by a further declaration limit the scope of such a declaration for the purpose of giving greater effect to paragraph 1. They shall do so when the provisions on mutual assistance of the Convention implementing the Schengen Agreement are put into effect for them.

3. If the competent judicial authority for execution is unknown, the judicial authority in the issuing State shall make all necessary inquiries, including via the contact points of the European Judicial Network(3), in order to obtain the information from the executing State.

4. When the judicial authority in the executing State which receives a freezing order has no jurisdiction to recognise it and take the necessary measures for its execution, it shall, ex officio, transmit the freezing order to the competent judicial authority for execution and shall so inform the judicial authority in the issuing State which issued it.

Article 5

Recognition and immediate execution

1. The competent judicial authorities of the executing State shall recognise a freezing order, transmitted in accordance with Article 4, without any further formality being required and shall

forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 7 or one of the grounds for postponement provided for in Article 8.

Whenever it is necessary to ensure that the evidence taken is valid and provided that such formalities and procedures are not contrary to the fundamental principles of law in the executing State, the judicial authority of the executing State shall also observe the formalities and procedures expressly indicated by the competent judicial authority of the issuing State in the execution of the freezing order.

A report on the execution of the freezing order shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

2. Any additional coercive measures rendered necessary by the freezing order shall be taken in accordance with the applicable procedural rules of the executing State.

3. The competent judicial authorities of the executing State shall decide and communicate the decision on a freezing order as soon as possible and, whenever practicable, within 24 hours of receipt of the freezing order.

Article 6

Duration of the freezing

1. The property shall remain frozen in the executing State until that State has responded definitively to any request made under Article 10(1)(a) or (b).

2. However, after consulting the issuing State, the executing State may in accordance with its national law and practices lay down appropriate conditions in the light of the circumstances of the case in order to limit the period for which the property will be frozen. If, in accordance with those conditions, it envisages lifting the measure, it shall inform the issuing State, which shall be given the opportunity to submit its comments.

3. The judicial authorities of the issuing State shall forthwith notify the judicial authorities of the executing State that the freezing order has been lifted. In these circumstances it shall be the responsibility of the executing State to lift the measure as soon as possible.

Article 7

Grounds for non-recognition or non-execution

1. The competent judicial authorities of the executing State may refuse to recognise or execute the freezing order only if:

(a) the certificate provided for in Article 9 is not produced, is incomplete or manifestly does not correspond to the freezing order;

(b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the freezing order;

(c) it is instantly clear from the information provided in the certificate that rendering judicial

assistance pursuant to Article 10 for the offence in respect of which the freezing order has been made, would infringe the ne bis in idem principle;

(d) if, in one of the cases referred to in Article 3(4), the act on which the freezing order is based does not constitute an offence under the law of the executing State; however, in relation to taxes or duties, customs and exchange, execution of the freezing order may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

2. In case of paragraph 1(a), the competent judicial authority may:

(a) specify a deadline for its presentation, completion or correction; or

(b) accept an equivalent document; or

(c) exempt the issuing judicial authority from the requirement if it considers that the information provided is sufficient.

3. Any decision to refuse recognition or execution shall be taken and notified forthwith to the competent judicial authorities of the issuing State by any means capable of producing a written record.

4. In case it is in practice impossible to execute the freezing order for the reason that the property or evidence have disappeared, have been destroyed, cannot be found in the location indicated in the certificate or the location of the property or evidence has not been indicated in a sufficiently precise manner, even after consultation with the issuing State, the competent judicial authorities of the issuing State shall likewise be notified forthwith.

Article 8

Grounds for postponement of execution

1. The competent judicial authority of the executing State may postpone the execution of a freezing order transmitted in accordance with Article 4:

(a) where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable;

(b) where the property or evidence concerned have already been subjected to a freezing order in criminal proceedings, and until that freezing order is lifted;

(c) where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted. However, this point shall only apply where such an order would have priority over subsequent national freezing orders in criminal proceedings under national law.

2. A report on the postponement of the execution of the freezing order, including the grounds for the postponement and, if possible, the expected duration of the postponement, shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

3. As soon as the ground for postponement has ceased to exist, the competent judicial authority of the executing State shall forthwith take the necessary measures for the execution of the freezing order and inform the competent authority in the issuing State thereof by any means capable of producing

a written record.

4. The competent judicial authority of the executing State shall inform the competent authority of the issuing State about any other restraint measure to which the property concerned may be subjected.

Article 9

Certificate

1. The certificate, the standard form for which is given in the Annex, shall be signed, and its contents certified as accurate, by the competent judicial authority in the issuing State that ordered the measure.

2. The certificate must be translated into the official language or one of the official languages of the executing State.

3. Any Member State may, either when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the institutions of the European Communities.

Article 10

Subsequent treatment of the frozen property

1. The transmission referred to in Article 4:

(a) shall be accompanied by a request for the evidence to be transferred to the issuing State;

or

(b) shall be accompanied by a request for confiscation requiring either enforcement of a confiscation order that has been issued in the issuing State or confiscation in the executing State and subsequent enforcement of any such order;

or

(c) shall contain an instruction in the certificate that the property shall remain in the executing State pending a request referred to in (a) or (b). The issuing State shall indicate in the certificate the (estimated) date for submission of this request. Article 6(2) shall apply.

2. Requests referred to in paragraph 1(a) and (b) shall be submitted by the issuing State and processed by the executing State in accordance with the rules applicable to mutual assistance in criminal matters and the rules applicable to international cooperation relating to confiscation.

3. However, by way of derogation from the rules on mutual assistance referred to in paragraph 2, the executing State may not refuse requests referred to under paragraph 1(a) on grounds of absence of double criminality, where the requests concern the offences referred to in Article 3(2) and those offences are punishable in the issuing State by a prison sentence of at least three years.

Article 11

Legal remedies

1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies without suspensive effect against a freezing order executed pursuant to Article 5, in order to preserve their legitimate interests; the action shall be brought before a court in the issuing State or in the executing State in accordance with the national law of each.

2. The substantive reasons for issuing the freezing order can be challenged only in an action brought before a court in the issuing State.

3. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.

4. The issuing and executing States shall take the necessary measures to facilitate the exercise of the right to bring an action mentioned in paragraph 1, in particular by providing adequate information to interested parties.

5. The issuing State shall ensure that any time limits for bringing an action mentioned in paragraph 1 are applied in a way that guarantees the possibility of an effective legal remedy for the interested parties.

Article 12

Reimbursement

1. Without prejudice to Article 11(2), where the executing State under its law is responsible for injury caused to one of the parties mentioned in Article 11 by the execution of a freezing order transmitted to it pursuant to Article 4, the issuing State shall reimburse to the executing State any sums paid in damages by virtue of that responsibility to the said party except if, and to the extent that, the injury or any part of it is exclusively due to the conduct of the executing State.

2. Paragraph 1 is without prejudice to the national law of the Member States on claims by natural or legal persons for compensation of damage.

TITLE III FINAL PROVISIONS

Article 13

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 14

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework

Decision before 2 August 2005.

2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established using this information and a written report by the Commission, the Council shall, before 2 August 2006, assess the extent to which Member States have complied with the provisions of this Framework Decision.

3. The General Secretariat of the Council shall notify Member States and the Commission of the declarations made pursuant to Article 9(3).

Article 15

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Union.

Done at Brussels, 22 July 2003.

For the Council

The President

G. Alemanno

(1) OJ C 75, 7.3.2001, p. 3.

(2) Opinion delivered on 11 June 2002 (not yet published in the Official Journal).

(3) Council Joint Action 98/428/JHA of 29 June 1998 on the Creation of the European Judicial Network (OJ L 191, 7.7.1998, p. 4).

ANNEX

CERTIFICATE PROVIDED FOR IN ARTICLE 9

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DOCNUM	32003F0577
AUTHOR	Council
FORM	framework decision

TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2003 SEC_3_TYP_F
PUBREF	Official Journal L 196 , 02/08/2003 P. 0045 - 0055
DESCRIPT	penalty ; judicial cooperation ; confiscation of property
PUB	2003/08/02
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TRANSPOS	2005/08/02
LEGBASE	12002M031-P2PTB)..... 12002M034-P2.....
LEGCIT	31998F0428.....
EARLACTS	52001IG0307(02).....Relation.....
SUB	Justice and home affairs
REGISTER	19302000
PREPWORK	initiative ;OJ C 75/2001 P 3 Opinion European Parliament;given on 11/06/2002
DATES	of document: 22/07/2003 of effect: 22/08/2003; Entry into force Date pub. See Art 15 end of validity: 99/99/9999 of transposition: 02/08/2005; At the latest See Art 14

2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision

Council Framework Decision

of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000(3), addresses the matter of mutual enforcement of arrest warrants.

(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union acquis: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders(4) (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union(5) and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(6).

(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the

European Council referred to as the "cornerstone" of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance.

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

(14) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, the personal data processed in the context of the implementation of this Framework Decision should be protected in accordance with the principles of the said Convention,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,

- terrorism,

- trafficking in human beings,

- sexual exploitation of children and child pornography,

- illicit trafficking in narcotic drugs and psychotropic substances,

- illicit trafficking in weapons, munitions and explosives,

- corruption,

- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,

- laundering of the proceeds of crime,

- counterfeiting currency, including of the euro,

- computer-related crime,

- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged

by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 5

Guarantees to be given by the issuing Member State in particular cases

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Article 6

Determination of the competent judicial authorities

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7

Recourse to the central authority

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing

Member State.

Article 8

Content and form of the European arrest warrant

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

(g) if possible, other consequences of the offence.

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

CHAPTER 2

SURRENDER PROCEDURE

Article 9

Transmission of a European arrest warrant

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.

Article 10

Detailed procedures for transmitting a European arrest warrant

1. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network(8), in order to obtain that information from the executing Member State.

2. If the issuing judicial authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.

3. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant.

4. The issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity.

5. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

6. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

Article 11

Rights of a requested person

1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.

2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Article 12

Keeping the person in detention

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

Article 13

Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the "speciality rule", referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.

2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.

3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

Article 14

Hearing of the requested person

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

Article 15

Surrender decision

1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

Article 16

Decision in the event of multiple requests

1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

2. The executing judicial authority may seek the advice of Eurojust(9) when making the choice referred to in paragraph 1.

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

4. This Article shall be without prejudice to Member States' obligations under the Statute of the International Criminal Court.

Article 17

Time limits and procedures for the decision to execute the European arrest warrant

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

Article 18

Situation pending the decision

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

Article 19

Hearing the person pending the decision

1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

Article 20

Privileges and immunities

1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived.

The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

Article 21

Competing international obligations

This Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State which issued the European arrest warrant. The time limits referred to in Article 17 shall not start running until the day on which these speciality rules cease to apply. Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

Article 22

Notification of the decision

The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the European arrest warrant.

Article 23

Time limits for surrender of the person

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

Article 24

Postponed or conditional surrender

1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.

2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

Article 25

Transit

1. Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:

(a) the identity and nationality of the person subject to the European arrest warrant;

(b) the existence of a European arrest warrant;

(c) the nature and legal classification of the offence;

(d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

3. The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.

4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply mutatis mutandis. In particular the expression "European arrest warrant" shall be deemed to be replaced by "extradition request".

CHAPTER 3

EFFECTS OF THE SURRENDER

Article 26

Deduction of the period of detention served in the executing Member State

1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

Article 27

Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way

as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

Article 28

Surrender or subsequent extradition

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

(a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

(b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

(c) where the requested person is not subject to the speciality rule, in accordance with Article 27(3)(a), (e), (f) and (g).

3. The executing judicial authority consents to the surrender to another Member State according to the following rules:

(a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8(1) and a translation as stated in Article 8(2);

(b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;

(c) the decision shall be taken no later than 30 days after receipt of the request;

(d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

Article 29

Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

(a) may be required as evidence, or

(b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

Article 30

Expenses

1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.

2. All other expenses shall be borne by the issuing Member State.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

Article 31

Relation to other legal instruments

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Members States.

Article 32

Transitional provision

1. Extradition requests received before 1 January 2004 will continue to be governed by existing

instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.

Article 33

Provisions concerning Austria and Gibraltar

1. As long as Austria has not modified Article 12(1) of the "Auslieferungs- und Rechtshilfegesetz" and, at the latest, until 31 December 2008, it may allow its executing judicial authorities to refuse the enforcement of a European arrest warrant if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law.

2. This Framework Decision shall apply to Gibraltar.

Article 34

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. When doing so, each Member State may indicate that it will apply immediately this Framework Decision in its relations with those Member States which have given the same notification.

The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to Article 7(2), Article 8(2), Article 13(4) and Article 25(2). It shall also have the information published in the Official Journal of the European Communities.

3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System.

Article 35

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Done at Luxembourg, 13 June 2002.

For the Council

The President

M. Rajoy Brey

(1) OJ C 332 E, 27.11.2001, p. 305.

(2) Opinion delivered on 9 January 2002 (not yet published in the Official Journal).

(3) OJ C 12 E, 15.1.2001, p. 10.

(4) OJ L 239, 22.9.2000, p. 19.

(5) OJ C 78, 30.3.1995, p. 2.

(6) OJ C 313, 13.10.1996, p. 12.

(7) OJ C 364, 18.12.2000, p. 1.

(8) Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network (OJ L 191, 7.7.1998, p. 4).

(9) Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

ANNEX

EUROPEAN ARREST WARRANT(1)

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

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(1) This warrant must be written in, or translated into, one of the official languages of the executing Member State, when that State is known, or any other language accepted by that State.

Statements made by certain Member States on the adoption of the Framework Decision

Statements provided for in Article 32

Statement by France:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, France states that as executing Member State it will continue to deal with requests relating to acts committed before 1 November 1993, the date of entry into

force of the Treaty on European Union signed in Maastricht on 7 February 1992, in accordance with the extradition system applicable before 1 January 2004.

Statement by Italy:

Italy will continue to deal in accordance with the extradition rules in force with all requests relating to acts committed before the date of entry into force of the framework decision on the European arrest warrant, as provided for in Article 32 thereof.

Statement by Austria:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, Austria states that as executing Member State it will continue to deal with requests relating to punishable acts committed before the date of entry into force of the framework decision in accordance with the extradition system applicable before that date.

Statements provided for in Article 13(4)

Statement by Belgium:

The consent of the person concerned to his or her surrender may be revoked until the time of surrender.

Statement by Denmark:

Consent to surrender and express renunciation of entitlement to the speciality rule may be revoked in accordance with the relevant rules applicable at any time under Danish law.

Statement by Ireland:

In Ireland, consent to surrender and, where appropriate, express renunciation of the entitlement to the "specialty" rule referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Finland:

In Finland, consent to surrender and, where appropriate, express renunciation of entitlement to the "speciality rule" referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Sweden:

Consent or renunciation within the meaning of Article 13(1) may be revoked by the party whose surrender has been requested. Revocation must take place before the decision on surrender is executed.

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2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

Council Decision

of 28 February 2002

setting up Eurojust with a view to reinforcing the fight against serious crime

(2002/187/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the Federal Republic of Germany and to that of the Portuguese Republic, the French Republic, the Kingdom of Sweden and the Kingdom of Belgium(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) It is necessary to improve judicial cooperation between the Member States further, in particular in combating forms of serious crime often perpetrated by transnational organisations.

(2) The effective improvement of judicial cooperation between the Member States requires the immediate adoption of structural measures at European Union level to facilitate the optimal coordination of action for investigations and prosecutions covering the territory of more than one Member State with full respect for fundamental rights and freedoms.

(3) In order to reinforce the fight against serious organised crime, the Tampere European Council of 15 and 16 October 1999, in particular in point 46 of its conclusions, decided on the setting up of a unit (Eurojust) composed of prosecutors, magistrates or police officers of equivalent competence.

(4) This Eurojust unit is set up by this Decision as a body of the European Union with legal personality and financed from the general budget of the European Union, except as regards the salaries and emoluments of the national members and assisting persons, which are borne by their Member State of origin.

(5) The objectives of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)(3) are also relevant to Eurojust. The Eurojust College should adopt the necessary implementing measures to achieve those objectives. It should take full account of the sensitive work carried out by Eurojust in the context of investigations and prosecutions. In this connection, OLAF should be denied access to documents, evidence, reports, notes or information, in whatever form, which are held or created in the course of these activities, whether under way or already concluded, and the transmission of such documents, evidence, reports, notes and information to OLAF should be prohibited.

(6) In order to be able to attain its objectives as efficiently as possible, Eurojust should fulfil its tasks either through one or more of its national members or acting as a College.

(7) The competent authorities of the Member States should be able to exchange information with Eurojust in accordance with arrangements which serve and observe the interests of public service.

(8) Eurojust's jurisdiction is without prejudice to the Community's competence to protect its own financial interests and is also without prejudice to existing conventions and agreements, in

particular the European Convention on Mutual Assistance in Criminal Matters (Council of Europe) signed in Strasbourg on 20 April 1959, and also the Convention on Mutual Assistance on Criminal Matters between the Member States of the European Union(4) adopted by the Council on 29 May 2000, and the Protocol(5) thereto adopted on 16 October 2001.

(9) In order to achieve its objectives, Eurojust processes personal data by automated means or in structured manual files. Accordingly, the necessary steps should be taken to guarantee a level of data protection which corresponds at least to that which results from the application of the principles of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe) signed in Strasbourg on 28 January 1981, together with subsequent amendments thereto, in particular the Protocol opened for signature on 8 November 2001, once such amendments are in force between the Member States.

(10) In order to help ensure and check that personal data are processed properly by Eurojust, a joint supervisory body should be set up which, given the composition of Eurojust, should consist of a panel of judges or, if the constitutional or national system of a Member State so requires, of persons exercising an equivalent function which gives them sufficient independence. The powers of this joint supervisory body should be without prejudice to the jurisdiction of national courts or to the arrangements for any appeals which may be brought before them.

(11) In order to ensure harmonious coordination of the various activities pursued by the Union and the Community and having regard to Article 29 and Article 36(2) of the Treaty, the Commission should be fully involved in Eurojust's proceedings concerning general questions and questions coming within its competence. Eurojust's rules of procedure should detail the arrangements for the Commission to participate in Eurojust's proceedings in areas within its jurisdiction.

(12) Provisions should be laid down to ensure that Eurojust and the European Police Office (Europol)(6) establish and maintain close cooperation.

(13) Eurojust and the European Judicial Network set up by Joint Action 98/428/JHA(7) should have a privileged relationship. To that end, the secretariat of the Network should be placed within the Eurojust secretariat.

(14) In order to facilitate activities of Eurojust, the Member States should put in place or designate one or more national correspondents.

(15) Insofar as is necessary for the fulfilment of its tasks, it should be possible for Eurojust to initiate cooperation with non-Member States and for agreements to be concluded to that effect, primarily with the candidate countries for accession to the Union and other countries with which arrangements have been agreed.

(16) Since the adoption of this Decision means that major new legislative measures must be approved in the Member States, provision should be made for certain transitional provisions.

(17) Point 57 of the Laeken European Council conclusions of 14 and 15 December 2001 provided for Eurojust to be able to begin operations in The Hague, pending overall agreement on the seats of certain agencies.

(18) This Decision respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty and reflected in the Charter of Fundamental Rights of the European Union,

HAS DECIDED AS FOLLOWS:

Article 1

Establishment and legal personality

This Decision establishes a unit, referred to as "Eurojust", as a body of the Union.

Eurojust shall have legal personality.

Article 2

Composition

1. Eurojust shall be composed of one national member seconded by each Member State in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence.

2. Each national member may be assisted by one person. If necessary and with the agreement of the College referred to in Article 10, several persons may assist the national member. One of these assistants may replace the national member.

Article 3

Objectives

1. In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be:

(a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the Treaties;

(b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

(c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.

2. In accordance with the rules laid down by this Decision and at the request of a Member State's competent authority, Eurojust may also assist investigations and prosecutions concerning only that Member State and a non-Member State where an agreement establishing cooperation pursuant to Article 27(3) has been concluded with the said State or where in a specific case there is an essential interest in providing such assistance.

3. In accordance with the rules laid down by this Decision and at the request either of a Member State's competent authority or of the Commission, Eurojust may also assist investigations and prosecutions concerning only that Member State and the Community.

Article 4

Competences

1. The general competence of Eurojust shall cover:

(a) the types of crime and the offences in respect of which Europol is at all times competent to act pursuant to Article 2 of the Europol Convention of 26 July 1995;

(b) the following types of crime:

- computer crime,

- fraud and corruption and any criminal offence affecting the European Community's financial interests,

- the laundering of the proceeds of crime,

- environmental crime,

- participation in a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union(8);

(c) other offences committed together with the types of crime and the offences referred to in points (a) and (b).

2. For types of offences other than those referred to in paragraph 1, Eurojust may in addition, in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State.

Article 5

Tasks of Eurojust

1. In order to accomplish its objectives, Eurojust shall fulfil its tasks:

(a) through one or more of the national members concerned in accordance with Article 6, or

(b) as a College in accordance with Article 7:

(i) when so requested by one or more of the national members concerned by a case dealt with by Eurojust, or

(ii) when the case involves investigations or prosecutions which have repercussions at Union level or which might affect Member States other than those directly concerned, or

(iii) when a general question relating to the achievement of its objectives is involved, or

(iv) when otherwise provided for in this Decision.

2. When it fulfils its tasks, Eurojust shall indicate whether it is acting through one or more of the national members within the meaning of Article 6 or as a College within the meaning of Article 7.

Article 6

Tasks of Eurojust acting through its national members

When Eurojust acts through its national members concerned, it:

(a) may ask the competent authorities of the Member States concerned to consider:

(i) undertaking an investigation or prosecution of specific acts;

(ii) accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

(iii) coordinating between the competent authorities of the Member States concerned;

(iv) setting up a joint investigation team in keeping with the relevant cooperation instruments;

(v) providing it with any information that is necessary for it to carry out its tasks;

(b) shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed;

(c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

(d) shall give assistance in order to improve cooperation between the competent national authorities;

(e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;

(f) shall, in the cases referred to Article 3(2) and (3) and with the agreement of the College, assist investigations and prosecutions concerning the competent authorities of only one Member State;

(g) may, in accordance with its objectives and within the framework of Article 4(1) in order to improve cooperation and coordination between the competent authorities, forward requests for judicial assistance when they:

(i) are made by the competent authority of a Member State;

(ii) concern an investigation or prosecution conducted by that authority in a specific case, and

(iii) necessitate its intervention with a view to coordinated action.

Article 7

Tasks of Eurojust acting as a College

When Eurojust acts as a College, it:

(a) may in relation to the types of crime and the offences referred to in Article 4(1) ask the competent authorities of the Member States concerned, giving its reasons:

(i) to undertake an investigation or prosecution of specific acts;

(ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

(iii) to coordinate between the competent authorities of the Member States concerned;

(iv) to set up a joint investigation team in keeping with the relevant cooperation instruments;

(v) to provide it with any information that is necessary for it to carry out its tasks;

(b) shall ensure that the competent authorities of the Member States inform each other of investigations and prosecutions of which it has been informed and which have repercussions at Union level or which might affect Member States other than those directly concerned;

(c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

(d) shall give assistance in order to improve cooperation between the competent authorities of the Member States, in particular on the basis of Europol's analysis;

(e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;

(f) may assist Europol, in particular by providing it with opinions based on analyses carried out by Europol;

(g) may supply logistical support in the cases referred to in points (a), (c) and (d) above. Such logistical support may include assistance for translation, interpretation and the organisation of coordination meetings.

Article 8

Reasons

If the competent authorities of the Member State concerned decide not to comply with a request referred to in Article 7(a), they shall inform Eurojust of their decision and of the reasons for it unless, in the cases referred to in Article 7(a)(i), (ii) and (v), they are unable to give their reasons because:

(i) to do so would harm essential national security interests, or

(ii) to do so would jeopardise the success of investigations under way or the safety of individuals.

Article 9

National members

1. National members shall be subject to the national law of their Member State as regards their status. The length of a national member's term of office shall be determined by the Member State of origin. It shall be such as to allow Eurojust to operate properly.

2. All information exchanged between Eurojust and Member States, including requests made within the framework of Article 6(a), shall be directed through the national member.

3. Each Member State shall define the nature and extent of the judicial powers it grants its national member within its own territory. It shall also define the right for a national member to act in relation to foreign judicial authorities, in accordance with its international commitments. When appointing its national member and at any other time if appropriate, the Member State shall notify

Eurojust and the Council General Secretariat of its decision so that the latter can inform the other Member States. The latter shall undertake to accept and recognise the prerogatives thus conferred insofar as they are in conformity with international commitments.

4. In order to meet Eurojust's objectives, the national member shall have access to the information contained in the national criminal records or in any other register of his Member State in the same way as stipulated by his national law in the case of a prosecutor, judge or police officer of equivalent competence.

5. A national member may contact the competent authorities of his Member State directly.

6. In the performance of his tasks a national member shall, where appropriate, make it known whether he is acting in accordance with the judicial powers granted to him under paragraph 3.

Article 10

College

1. The College shall consist of all the national members. Each national member shall have one vote.

2. After consulting the joint supervisory body provided for in Article 23 as regards the provisions on the processing of personal data, the Council shall approve Eurojust's rules of procedure on a proposal from the College which has previously been adopted unanimously by the latter. The provisions of the rules of procedure which concern the processing of personal data may be made the subject of separate approval by the Council.

3. When acting in accordance with Article 7(a), the College shall take its decisions by a two-thirds majority. Other decisions of the College shall be taken in accordance with the rules of procedure.

Article 11

Role of the Commission

1. The Commission shall be fully associated with the work of Eurojust, in accordance with Article 36(2) of the Treaty. It shall participate in that work in the areas within its competence.

2. As regards work carried out by Eurojust on the coordination of investigations and prosecutions, the Commission may be invited to provide its expertise.

3. For the purpose of enhancing cooperation between Eurojust and the Commission, Eurojust may agree on necessary practical arrangements with the Commission.

Article 12

National correspondents

1. Each Member State may put in place or appoint one or more national correspondents. It shall be a matter of high priority to put in place or appoint such a correspondent for terrorism matters. Relations between the national correspondent and the competent authorities of the Member States

shall be governed by national law. A national correspondent shall have his place of work in the Member State which appointed him.

2. Where a Member State appoints a national correspondent, he may be a contact point of the European Judicial Network.

3. Relations between the national member and the national correspondent shall not preclude direct relations between the national member and his competent authorities.

Article 13

Exchanges of information with the Member States and between national members

1. The competent authorities of the Member States may exchange with Eurojust any information necessary for the performance of its tasks in accordance with Article 5.

2. In accordance with Article 9, the national members of Eurojust shall be empowered to exchange any information necessary for the performance of its tasks, without prior authorisation, among themselves or with their Member State's competent authorities.

Article 14

Processing of personal data

1. Insofar as it is necessary to achieve its objectives, Eurojust may, within the framework of its competence and in order to carry out its tasks, process personal data, by automated means or in structured manual files.

2. Eurojust shall take the necessary measures to guarantee a level of protection for personal data at least equivalent to that resulting from the application of the principles of the Council of Europe Convention of 28 January 1981 and subsequent amendments thereto where they are in force in the Member States.

3. Personal data processed by Eurojust shall be adequate, relevant and not excessive in relation to the purpose of the processing, and, taking into account the information provided by the competent authorities of the Member States or other partners in accordance with Articles 13 and 26, accurate and up-to-date. Personal data processed by Eurojust shall be processed fairly and lawfully.

4. In accordance with this Decision, Eurojust shall establish an index of data relating to investigations and may establish temporary work files which also contain personal data.

Article 15

Restrictions on the processing of personal data

1. When processing data in accordance with Article 14(1), Eurojust may process only the following personal data on persons who, under the national legislation of the Member States concerned, are the subject of a criminal investigation or prosecution for one or more of the types of crime and the offences defined in Article 4:

(a) surname, maiden name, given names and any alias or assumed names;

(b) date and place of birth;

(c) nationality;

(d) sex;

(e) place of residence, profession and whereabouts of the person concerned;

(f) social security numbers, driving licences, identification documents and passport data;

(g) information concerning legal persons if it includes information relating to identified or identifiable individuals who are the subject of a judicial investigation or prosecution;

(h) bank accounts and accounts with other financial institutions;

(i) description and nature of the alleged offences, the date on which they were committed, the criminal category of the offences and the progress of the investigations;

(j) the facts pointing to an international extension of the case;

(k) details relating to alleged membership of a criminal organisation.

2. When processing data in accordance with Article 14(1), Eurojust may process only the following personal data on persons who, under the national legislation of the Member States concerned, are regarded as witnesses or victims in a criminal investigation or prosecution regarding one or more of the types of crime and the offences defined in Article 4:

(a) surname, maiden name, given names and any alias or assumed names;

(b) date and place of birth;

(c) nationality;

(d) sex;

(e) place of residence, profession and whereabouts of the person concerned;

(f) the description and nature of the offences involving them, the date on which they were committed, the criminal category of the offences and the progress of the investigations.

3. However, in exceptional cases, Eurojust may also, for a limited period of time, process other personal data relating to the circumstances of an offence where they are immediately relevant to and included in ongoing investigations which Eurojust is helping to coordinate, provided that the processing of such specific data is in accordance with Articles 14 and 21.

The Data Protection Officer referred to in Article 17 shall be informed immediately of recourse to this paragraph.

Where such other data refer to witnesses or victims within the meaning of paragraph 2, the decision to process them shall be taken jointly by at least two national members.

4. Personal data, processed by automated or other means, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning health or sex life may be processed by Eurojust only when such data are necessary for the national investigations concerned as well as for coordination within Eurojust.

The Data Protection Officer shall be informed immediately of recourse to this paragraph.

Such data may not be processed in the index referred to in Article 16(1).

Where such other data refer to witnesses or victims within the meaning of paragraph 2, the decision

to process them shall be taken by the College.

Article 16

Index and temporary work files

1. In order to achieve its objectives, Eurojust shall maintain an automated data file constituting an index of data relating to investigations in which non-personal data and personal data referred to in Article 15(1)(a) to (i) and (k) and paragraph 2 may be stored. That index shall be intended to:

(a) support the management and coordination of investigations and prosecutions which Eurojust is assisting, in particular by the cross-referencing of information;

(b) facilitate access to information on ongoing investigations and prosecutions;

(c) facilitate the monitoring of lawfulness and compliance with the provisions of this Decision concerning the processing of personal data.

2. The index shall contain references to temporary work files processed within the framework of Eurojust.

3. In the performance of their duties under Articles 6 and 7, the national members of Eurojust may process data on the individual cases on which they are working in a temporary work file. They shall allow the Data Protection Officer and, if the College so decides, the other national members and employees authorised to access files to have access to the work file. Each new work file that contains personal data shall be communicated to the Data Protection Officer.

Article 17

Data Protection Officer

1. Eurojust shall have a specially appointed Data Protection Officer, who shall be a member of the staff. Within that framework, he shall be under the direct authority of the College. In the performance of the duties referred to in this Article, he shall take instructions from no-one.

2. The Data Protection Officer shall in particular have the following tasks:

(a) ensuring, in an independent manner, lawfulness and compliance with the provisions of this Decision concerning the processing of personal data;

(b) ensuring that a written record of the transmission and receipt, for the purposes of Article 19(3) in particular, of personal data is kept in accordance with the provisions to be laid down in the rules of procedure, under the security conditions laid down in Article 22;

(c) ensuring that data subjects are informed of their rights under this Decision at their request.

3. In the performance of his tasks, the Officer shall have access to all the data processed by Eurojust and to all Eurojust premises.

4. When he finds that in his view processing has not complied with this Decision, the Officer shall:

(a) inform the College, which shall acknowledge receipt of the information;

(b) refer the matter to the joint supervisory body if the College has not resolved the non-compliance of the processing within a reasonable time.

Article 18

Authorised access to personal data

Only national members and their assistants referred to in Article 2(2) and authorised Eurojust staff may, for the purpose of achieving Eurojust's objectives, have access to personal data processed by Eurojust.

Article 19

Right of access to personal data

1. Every individual shall be entitled to have access to personal data concerning him processed by Eurojust under the conditions laid down in this Article.

2. Any individual wishing to exercise his right to have access to data concerning him which are stored at Eurojust, or to have them checked in accordance with Article 20, may make a request to that effect free of charge in the Member State of his choice, to the authority appointed for that purpose in that Member State, and that authority shall refer it to Eurojust without delay.

3. The right of any individual to have access to personal data concerning him or to have them checked shall be exercised in accordance with the laws and procedures of the Member State in which the individual has made his request. If, however, Eurojust can ascertain which authority in a State transmitted the data in question, that authority may require that the right of access be exercised in accordance with the rules of the law of that Member State.

4. Access to personal data shall be denied if:

(a) such access may jeopardise one of Eurojust's activities;

(b) such access may jeopardise any national investigation which Eurojust is assisting;

(c) such access may jeopardise the rights and freedoms of third parties.

5. The decision to grant this right of access shall take due account of the status, with regard to the data stored by Eurojust, of those individuals submitting the request.

6. The national members concerned by the request shall deal with it and reach a decision on Eurojust's behalf. The request shall be dealt with in full within three months of receipt. Where the members are not in agreement, they shall refer the matter to the College, which shall take its decision on the request by a two-thirds majority.

7. If access is denied or if no personal data concerning the applicant are processed by Eurojust, the latter shall notify the applicant that it has carried out checks, without giving any information which could reveal whether or not the applicant is known.

8. If the applicant is not satisfied with the reply given to his request, he may appeal against that decision before the joint supervisory body. The joint supervisory body shall examine whether or not the decision taken by Eurojust is in conformity with this Decision.

9. The competent law enforcement authorities of the Member States shall be consulted by Eurojust

before a decision is taken. They shall subsequently be notified of its contents through the national members concerned.

Article 20

Correction and deletion of personal data

1. In accordance with Article 19(3), every individual shall be entitled to ask Eurojust to correct, block or delete data concerning him if they are incorrect or incomplete or if their input or storage contravenes this Decision.

2. Eurojust shall notify the applicant if it corrects, blocks or deletes the data concerning him. If the applicant is not satisfied with Eurojust's reply, he may refer the matter to the Joint Supervisory Body within thirty days of receiving Eurojust's decision.

3. At the request of a Member State's competent authorities, national member or national correspondent, if any, and under their responsibility, Eurojust shall, in accordance with its rules of procedure, correct or delete personal data being processed by Eurojust which were transmitted or entered by that Member State, its national member or its national correspondent. The Member States' competent authorities and Eurojust, including the national member or national correspondent, if any, shall in this context ensure that the principles laid down in Article 14(2) and (3) and in Article 15(4) are complied with.

4. If it emerges that personal data processed by Eurojust are incorrect or incomplete or that their input or storage contravenes the provisions of this Decision, Eurojust shall block, correct or delete such data.

5. In the cases referred to in paragraphs 3 and 4, all the suppliers and addressees of such data shall be notified immediately. In accordance with the rules applicable to them, the addressees, shall then correct, block or delete those data in their own systems.

Article 21

Time limits for the storage of personal data

1. Personal data processed by Eurojust shall be stored by Eurojust for only as long as is necessary for the achievement of its objectives.

2. The personal data referred to in Article 14(1) which have been processed by Eurojust may not be stored beyond:

(a) the date on which prosecution is barred under the statute of limitations of all the Member States concerned by the investigation and prosecutions;

(b) the date on which the judicial decision of the last of the Member States concerned by the investigation or prosecutions which justified coordination by Eurojust became final;

(c) the date on which Eurojust and the Member States concerned mutually established or agreed that it was no longer necessary for Eurojust to coordinate the investigation and prosecutions.

3. (a) Observance of the storage periods referred to in paragraph 2 shall be reviewed constantly by appropriate automated processing. Nevertheless, a review of the need to store the data shall

be carried out every three years after they were entered.

(b) When one of the storage deadlines referred to in paragraph 2 has expired, Eurojust shall review the need to store the data longer in order to enable it to achieve its objectives and it may decide by way of derogation to store those data until the following review.

(c) Where data has been stored by way of derogation pursuant to point (b) a review of the need to store those data shall take place every three years.

4. Where a file exists containing non-automated and unstructured data, once the deadline for storage of the last item of automated data from the file has elapsed all the documents in the file shall be returned to the authority which supplied them and any copies shall be destroyed.

5. Where Eurojust has coordinated an investigation or prosecutions, the national members concerned shall inform Eurojust and the other Member States concerned of all the judicial decisions relating to the case which have become final in order, inter alia, that paragraph 2(b) may be applied.

Article 22

Data security

1. Eurojust and, insofar as it is concerned by data transmitted from Eurojust, each Member State, shall, as regards the processing of personal data within the framework of this Decision, protect personal data against accidental or unlawful destruction, accidental loss or unauthorised disclosure, alteration and access or any other unauthorised form of processing.

2. The rules of procedure shall contain the technical measures and the organisational arrangements needed to implement this Decision with regard to data security and in particular measures designed to:

(a) deny unauthorised persons access to data processing equipment used for processing personal data;

(b) prevent the unauthorised reading, copying, modification or removal of data media;

(c) prevent the unauthorised input of data and the unauthorised inspection, modification or deletion of stored personal data;

(d) prevent the use of automated data processing systems by unauthorised persons using data communication equipment;

(e) ensure that persons authorised to use an automated data processing system only have access to the data covered by their access authorisation;

(f) ensure that it is possible to verify and establish to which bodies personal data are transmitted when data are communicated;

(g) ensure that it is subsequently possible to verify and establish which personal data have been input into automated data processing systems and when and by whom the data were input;

(h) prevent unauthorised reading, copying, modification or deletion of personal data during transfers of personal data or during transportation of data media.

Article 23

Joint Supervisory Body

1. An independent joint supervisory body shall be established to monitor collectively the Eurojust activities referred to in Articles 14 to 22 in order to ensure that the processing of personal data is carried out in accordance with this Decision. In order to fulfil these tasks, the Joint Supervisory Body shall be entitled to have full access to all files where such personal data are processed. Eurojust shall provide the Joint Supervisory Body with all information from such files that it requests and shall assist that body in its tasks by every other means.

The Joint Supervisory Body shall meet at least once in each half year. It shall also meet within the three months following the lodging of an appeal and may be convened by its chairman when at least two Member States so request.

In order to set up the Joint Supervisory Body, each Member State, acting in accordance with its legal system, shall appoint a judge who is not a member of Eurojust, or, if its constitutional or national system so requires a person holding an office giving him sufficient independence, for inclusion on the list of judges who may sit on the Joint Supervisory Body as members or ad hoc judges. No such appointment shall be for less than eighteen months. Revocation of the appointment shall be governed by the principles for removal applicable under the national law of the Member State of origin. Appointment and removal shall be communicated to both the Council General Secretariat and Eurojust.

2. The Joint Supervisory Body shall be composed of three permanent members and, as provided for in paragraph 4, ad hoc judges.

3. A judge appointed by a Member State shall become a permanent member one year before his Member State assumes the Presidency of the Council and shall remain a permanent member for eighteen months.

The judge appointed by the Member State holding the Presidency of the Council shall chair the Joint Supervisory Body.

4. One or more ad hoc judges shall also have seats, but only for the duration of the examination of an appeal concerning personal data from the Member State which has appointed them.

5. The composition of the Joint Supervisory Body shall remain the same for the duration of an appeals procedure even if the permanent members have reached the end of their term of office pursuant to paragraph 3.

6. Each member and ad hoc judge shall be entitled to one vote. In the event of a tied vote, the chairman shall have the casting vote.

7. The Joint Supervisory Body shall examine appeals submitted to it in accordance with Article 19(8) and Article 20(2) and carry out controls in accordance with paragraph 1, first subparagraph, of this Article. If the Joint Supervisory Body considers that a decision taken by Eurojust or the processing of data by it is not compatible with this Decision, the matter shall be referred to Eurojust, which shall accept the decision of the Joint Supervisory Body.

8. Decisions of the Joint Supervisory Body shall be final and binding on Eurojust.

9. The persons appointed by the Member States in accordance with paragraph 1, third subparagraph, presided over by the chairman of the Joint Supervisory Body, shall adopt internal rules of procedure which, for the purpose of the examination of appeals, lay down objective criteria for the appointment of the Body's members.

10. Secretariat costs shall be borne by the Eurojust budget. The secretariat of the Joint Supervisory Body shall enjoy independence in the discharge of its function within the Eurojust secretariat.

11. The members of the Joint Supervisory Body shall be subject to the obligation of confidentiality laid down in Article 25.

12. The Joint Supervisory Body shall submit an annual report to the Council.

Article 24

Liability for unauthorised or incorrect processing of data

1. Eurojust shall be liable, in accordance with the national law of the Member State where its headquarters are situated, for any damage caused to an individual which results from unauthorised or incorrect processing of data carried out by it.

2. Complaints against Eurojust pursuant to the liability referred to in paragraph 1 shall be heard by the courts of the Member State where its headquarters are situated.

3. Each Member State shall be liable, in accordance with its national law, for any damage caused to an individual which results from unauthorised or incorrect processing carried out by it of data which were communicated to Eurojust.

Article 25

Confidentiality

1. The national members and their assistants referred to in Article 2(2), Eurojust staff and national correspondents, if any, and the Data Protection Officer shall be bound by an obligation of confidentiality, without prejudice to Article 9(1).

2. The obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust.

3. The obligation of confidentiality shall also apply after leaving office or employment or after the termination of the activities of the persons referred to in paragraphs 1 and 2.

4. Without prejudice to Article 9(1), the obligation of confidentiality shall apply to all information received by Eurojust.

Article 26

Relations with partners

1. Eurojust shall establish and maintain close cooperation with Europol, in so far as is relevant for the performance of the tasks of Eurojust and for achieving its objectives, taking account of the need to avoid duplication of effort. The essential elements of such cooperation shall be determined by an agreement to be approved by the Council, after consultation of the Joint Supervisory Body concerning the provisions on data protection.

2. Eurojust shall maintain privileged relations with the European Judicial Network based on consultation and complementarity, especially between the national member, the contact points of the same Member State and the national correspondent, if any. In order to ensure efficient cooperation the following

measures shall be taken:

(a) Eurojust shall have access to centralised information from the European Judicial Network in accordance with Article 8 of Joint Action 98/428/JHA and to the telecommunication network set up under Article 10 of the said Joint Action;

(b) by way of derogation from Article 9(3) of Joint Action 98/428/JHA, the secretariat of the European Judicial Network shall form part of the Eurojust secretariat. It shall function as a separate and autonomous unit. It shall be able to draw on the resources of Eurojust which are necessary for the performance of the European Judicial Network's tasks. The rules applying to Eurojust staff shall apply to the staff of the European Judicial Network's secretariat where this is not incompatible with the operational autonomy of the European Judicial Network's secretariat;

(c) The national members of Eurojust may attend meetings of the European Judicial Network at the invitation of the latter. European Judicial Network contact points may be invited on a case-by-case basis to attend Eurojust meetings.

3. Eurojust shall establish and maintain close cooperation with OLAF. To that end, OLAF may contribute to Eurojust's work to coordinate investigations and prosecution procedures regarding the protection of the financial interests of the Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation.

4. For purposes of the receipt and transmission of information between Eurojust and OLAF, and without prejudice to Article 9, Member States shall ensure that the national members of Eurojust shall be regarded as competent authorities of the Member States solely for the purposes of Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)(9). The exchange of information between OLAF and national members shall be without prejudice to the information which must be given to other competent authorities under these regulations.

5. Eurojust may, in order to accomplish its objectives, establish contacts and exchange experiences of a non-operational nature with other bodies, in particular international organisations.

6. Eurojust may, on a case-by-case basis, cooperate with liaison magistrates of the Member States, within the meaning of Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union(10).

Article 27

Exchanges of information with partners

1. In accordance with this Decision, Eurojust may exchange any information necessary for the performance of its tasks with:

(a) bodies competent by virtue of provisions adopted within the framework of the Treaties;

(b) international organisations and bodies;

(c) authorities of third States which are competent for investigations and prosecutions.

2. Before Eurojust exchanges any information with the entities referred to in paragraph 1(b) and (c), the national member of the Member State which submitted the information shall give his consent to the transfer of that information. In appropriate cases the national member shall consult the

competent authorities of the Member States.

3. Eurojust may conclude cooperation agreements, approved by the Council, with third States and the entities referred to in paragraph 1. Such agreements may, in particular, contain provisions concerning arrangements for the secondment of liaison officers or liaison magistrates to Eurojust. They may also contain provisions concerning the exchange of personal data. In that event the Joint Supervisory Body shall be consulted by Eurojust.

To resolve urgent matters, Eurojust may also cooperate with the entities referred to in paragraph 1(b) and (c) without concluding an agreement with them provided that such cooperation does not involve the transmission of personal data to them by Eurojust.

4. Without prejudice to paragraph 3, the transmission of personal data by Eurojust to the entities referred to in paragraph 1(b) and to the authorities referred to in paragraph 1(c) of third States which are not subject to the Council of Europe Convention of 28 January 1981 may be effected only when an adequate level of data protection is ensured.

5. Any subsequent failure, or substantial likelihood of failure, on the part of the third States or entities referred to in paragraph 1(b) and (c) to meet the conditions referred to in paragraph 4 shall immediately be communicated by Eurojust to the Joint Supervisory Body and the Member States concerned. The Joint Supervisory Body may prevent the further exchange of personal data with the relevant entities until it is satisfied that adequate remedies have been provided.

6. However, even if the conditions referred to in paragraphs 3 and 4 are not fulfilled, a national member may, acting in his national capacity, by way of exception and with the sole aim of taking urgent measures to counter imminent serious danger threatening a person or public security, carry out an exchange of information involving personal data. The national member shall be responsible for the legality of authorising the communication. The national member shall keep a record of communications of data and of the grounds for such communications. The communication of data shall be authorised only if the recipient gives an undertaking that the data will be used only for the purpose for which it was communicated.

Article 28

Organisation and operation

1. The College shall be responsible for the organisation and operation of Eurojust.

2. The College shall elect a President from among the national members and may, if it considers it necessary, elect at most two Vice-Presidents. The result of the election shall be submitted to the Council for its approval.

3. The President shall exercise his duties on behalf of the College and under its authority, direct its work and monitor the daily management ensured by the Administrative Director. The rules of procedure shall specify the cases in which his decisions or actions shall require prior authorisation or a report to the College.

4. The term of office of the President shall be three years. He may be re-elected once. The term of office of any Vice-President(s) shall be governed by the rules of procedure.

5. Eurojust shall be assisted by a secretariat headed by an Administrative Director.

6. Eurojust shall exercise over its staff the powers devolved to the Appointing Authority. The College shall adopt appropriate rules for the implementation of this paragraph in accordance with

the rules of procedure.

Article 29

Administrative Director

1. The Administrative Director of Eurojust shall be appointed unanimously by the College. The College shall set up a selection board which, following a call for applications, shall establish a list of candidates from among whom the College shall choose the Administrative Director.

2. The term of office of the Administrative Director shall be five years. It shall be renewable.

3. The Administrative Director shall be subject to the rules and regulations applicable to officials and other servants of the European Communities.

4. The Administrative Director shall work under the authority of the College and its President, acting in accordance with Article 28(3). He may be removed from office by the College by a two-thirds majority.

5. The Administrative Director shall be responsible, under the supervision of the President, for the day-to-day administration of Eurojust and for staff management.

Article 30

Staff

1. Eurojust staff shall be subject to the rules and regulations applicable to the officials and other servants of the European Communities, particularly as regards their recruitment and status.

2. Eurojust staff shall consist of staff recruited according to the rules and regulations referred to in paragraph 1, taking into account all the criteria referred to in Article 27 of the Staff Regulations of Officials of the European Communities laid down by Regulation (EEC, Euratom, ECSC) No 259/68(11), including their geographical distribution. They shall have the status of permanent staff, temporary staff or local staff. At the request of the Administrative Director, and in agreement with the President on behalf of the College, Community officials may be seconded to Eurojust by the Community institutions as temporary staff. Member States may second national experts to Eurojust. For this last case, the College shall adopt the necessary implementing arrangements.

3. Under the authority of the College, the staff shall carry out its tasks bearing in mind the objectives and mandate of Eurojust, without seeking or accepting instructions from any government, authority, organisation or person extraneous to Eurojust.

Article 31

Assistance with interpreting and translation

1. The official linguistic arrangements of the Union shall apply to Eurojust proceedings.

2. The annual report to the Council, referred to in the second subparagraph of Article 32(1), shall be drawn up in the official languages of the Union institutions.

Article 32

Information to the European Parliament and the Council

1. The President, on behalf of the College, shall report to the Council in writing every year on the activities and management, including budgetary management, of Eurojust.

To that end, the College shall prepare an annual report on the activities of Eurojust and on any criminal policy problems within the Union highlighted as a result of Eurojust's activities. In that report, Eurojust may also make proposals for the improvement of judicial cooperation in criminal matters.

The President shall also submit any report or any other information on the operation of Eurojust which may be required of him by the Council.

2. Each year the Presidency of the Council shall forward a report to the European Parliament on the work carried out by Eurojust and on the activities of the Joint Supervisory Body.

Article 33

Finance

1. The salaries and emoluments of the national members and assistants referred to in Article 2(2) shall be borne by their Member State of origin.

2. Where national members act within the framework of Eurojust's tasks, the relevant expenditure shall be regarded as operational expenditure within the meaning of Article 41(3) of the Treaty.

Article 34

Budget

1. Forecasts shall be made of all Eurojust revenue and expenditure for each financial year, which shall be the same as the calendar year. Revenue and expenditure shall be entered in the budget, which shall include the establishment plan which shall be submitted to the budget authority competent for the general budget of the European Union. The establishment plan shall consist of posts of a permanent or temporary nature and a reference to national experts seconded, and shall state the number, grade and category of the staff employed by Eurojust for the financial year in question.

2. Revenue and expenditure shall be balanced in the Eurojust budget.

3. Without prejudice to other resources, Eurojust revenue may include a subsidy entered in the general budget of the European Union.

4. Eurojust expenditure shall include inter alia expenditure relating to interpreters and translators, expenditure on security, administrative and infrastructure expenditure, operational and rental costs, travel expenses of members of Eurojust and its staff and costs arising from contracts with third parties.

Article 35

Drawing up of the budget

1. Each year the Administrative Director shall draw up a preliminary draft Eurojust budget covering expenditure for the following financial year. He shall submit this preliminary draft to the College.

2. Not later than 1 March each year, the College shall adopt the draft budget for the following year and shall submit it to the Commission.

3. On the basis of that draft budget, the Commission shall propose, within the framework of the budget procedure, the annual subsidy to be fixed for the Eurojust budget.

4. On the basis of the annual subsidy thus determined by the budget authority competent for the general budget of the European Union, the College shall adopt the Eurojust budget at the beginning of each financial year, and adjust it to the various contributions made to Eurojust and the funds coming from other sources.

Article 36

Implementation of the budget and discharge

1. The Administrative Director shall, as authorising officer, implement the Eurojust budget. He shall report to the College on the implementation of the budget.

No later than 31 March each year, the President, assisted by the Administrative Director, shall submit to the European Parliament, the Court of Auditors and the Commission detailed accounts of all revenue and expenditure for the previous financial year. The Court of Auditors shall examine them in accordance with Article 248 of the Treaty establishing the European Community.

2. The European Parliament, on a recommendation from the Council, shall give a discharge to Eurojust in respect of implementation of the budget before 30 April of year n + 2.

Article 37

Financial regulation applicable to the budget

The financial regulation applicable to the Eurojust budget shall be adopted unanimously by the College, having received the opinions of the Commission and of the Court of Auditors, in accordance with Article 142 of the Financial Regulation applicable to the general budget of the European Communities(12).

Article 38

Audit

1. An audit of commitments and payments in respect of all expenditure and the supervision of the establishment and collection of all Eurojust revenue shall be carried out by a financial controller

appointed by the College.

2. The College shall appoint an internal auditor who shall be responsible in particular for providing, in accordance with the relevant international standards, an assurance regarding the proper functioning of the systems and procedures for implementing the budget. The internal auditor may not be either the authorising officer or the accountant. The College may ask the Commission's internal auditor to carry out these duties.

3. The auditor shall report his findings and recommendations to Eurojust and submit a copy of the report to the Commission. Eurojust shall, in the light of the auditor's reports, take the necessary measures in response to these recommendations.

4. The rules laid down by Regulation (EC) No 1073/1999 shall apply to Eurojust. The College shall adopt the necessary implementing measures.

Article 39

Access to documents

On the basis of a proposal by the Administrative Director, the College shall adopt rules for access to Eurojust documents, taking account of the principles and limits stated in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(13).

Article 40

Territorial application

This Decision shall apply to Gibraltar, which shall be represented by the national member for the United Kingdom.

Article 41

Transitional provisions

1. The national members of the Provisional Judicial Cooperation Unit appointed by the Member States under the Council Decision 2000/799/JHA of 14 December 2000 setting up a Provisional Judicial Cooperation Unit(14) shall take on the role of national member of Eurojust under Article 2 of this Decision until the national member of the Member State concerned is definitively appointed but not after the end of the second month after the entry into force of this Decision, on which date their functions shall cease.

As such, the national members of the Provisional Unit shall enjoy all the powers of national members under this Decision.

The definitive appointment of a national member shall take effect on the day designated by the Member State for that purpose when notifying the General Secretariat of the Council by official post.

2. During the three months following the entry into force of this Decision, a Member State may

declare that until the date laid down in Article 42 it will not apply to certain Articles, in particular Articles 9 and 13, on the grounds that such application is not compatible with its national law. The General Secretariat of the Council shall inform the Member States and the Commission of any such declaration.

3. As long as the Council has not approved Eurojust's rules of procedure the College shall take all its decisions by a two-thirds majority save where this Decision provides for a unanimous decision.

4. The Member States shall ensure that until the definitive establishment of Eurojust all measures necessary are taken to guarantee that all cases dealt with by the Provisional Judicial Cooperation Unit, in particular in connection with the coordination of investigations and prosecutions, can continue to be dealt with effectively by national members. National members shall pursue at least the same objectives and perform the same functions as the Provisional Judicial Cooperation Unit.

Article 42

Transposition

If necessary the Member States shall bring their national law into conformity with this Decision at the earliest opportunity and in any case no later than 6 September 2003.

Article 43

Entry into force

This Decision shall enter into force on the day of its publication in the Official Journal of the European Communities without prejudice to Article 41. On that date the Provisional Judicial Cooperation Unit shall cease to exist.

Done at Brussels, 28 February 2002.

For the Council

The President

A. Acebes Paniagua

(1) OJ C 206, 19.7.2000, p. 1 and

OJ C 243, 24.8.2000, p. 15.

(2) OJ C 34 E, 7.2.2002, p. 347 and opinion delivered on 29 November 2001 (not yet published in the Official Journal).

(3) OJ L 136, 31.5.1999, p. 1.

(4) OJ C 197, 12.7.2000, p. 3.

(5) OJ C 326, 26.11.2001, p. 2.

(6) OJ C 316, 27.11.1995, p. 1.

(7) OJ L 191, 7.7.1998, p. 4.

(8) OJ L 351, 29.12.1998, p. 1.

(9) OJ L 136, 31.5.1999, p. 8.

(10) OJ L 105, 27.4.1996, p. 1.

(11) OJ L 56, 4.3.1968. Regulation as last amended by Regulation (EC, ECSC, Euratom) No 2581/2001 (OJ L 345, 29.12.2001, p. 1).

(12) OJ L 356, 31.12.1977, p. 1. Regulation as last amended by Regulation (EC, ECSC, Euratom) No 762/2001 (OJ L 111, 20.4.2001, p. 1).

(13) OJ L 145, 31.5.2001, p. 43.

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Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union (Text approved by the Council on 14 October 2002)

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

(Text approved by the Council on 14 October 2002)

(2002/C 257/01)

I. INTRODUCTION

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

The initiative was originally framed as a new Convention designed to supplement in particular the 1959 Council of Europe Convention on mutual assistance in criminal matters (hereinafter referred to as the "European Mutual Assistance Convention") and the Convention on mutual assistance in criminal matters between the Member States of the European Union adopted on 29 May 2000(2) (hereinafter referred to as "the 2000 Convention"). In the course of the negotiations the instrument was changed into a Protocol to the 2000 Convention and supplemented by certain provisions which were not originally covered (Articles 3 and 9). One provision in the original draft relating to abolishment of the dual criminality requirement was not included in the Protocol.

The Protocol was established by the Council on 16 October 2001(3) and was signed on the same day by all Member States. Norway and Iceland informed the Council that they were in agreement with the content of the provision applicable to them (Article 8). A declaration by the Council relating to the dual criminality requirement and other issues of refusals of requests was entered in the minutes of the Council at the adoption of the instrument(4).

II. GENERAL OBSERVATIONS

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

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

III. COMMENTS ON INDIVIDUAL ARTICLES

A. Assistance relating to bank accounts

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

Article 1: Requests for information on bank accounts

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

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

Paragraph 1

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

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

It was understood during the negotiations that accounts that are controlled by the person under investigation include accounts of which that person is the true economic beneficiary and that this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special purpose funds, the identity of the settlers or beneficiaries of which is unknown. The concept of economic beneficiary should be interpreted in accordance with Article 3(7) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering(5), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001(6) (hereinafter referred to as "the Money Laundering Directive").

Accounts for which the person that is the subject of the proceedings has powers of attorney are

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

Paragraph 2

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

Paragraph 3

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

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

The reference to the offences referred to in the Europol Convention - as amended - means that all forms of offences listed in Article 2 of that Convention and in the Annex to the Convention are covered(7). It should be noted that the reference to the Europol Convention does not include a reference to the qualifications set out in Article 2 relating to factual indications that an organised criminal structure is involved or that a common approach is required.

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

- terrorism,

- unlawful drug trafficking(8),

- trafficking in nuclear and radioactive substances,

- illegal immigrant smuggling,

- trade in human beings,

- motor vehicle crime,

- crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property,

- illegal money-laundering activities in connection with these forms of crime or specific manifestations thereof, and

- related criminal offences(9).

The offences referred to in the Annex to the Europol Convention(10) are the following:

- murder, grievous bodily injury,

- illicit trade in human organs and tissue,

- kidnapping, illegal restraint and hostage-taking,

- racism and xenophobia,

- organised robbery,

- illicit trafficking in cultural goods, including antiquities and works of art,

- swindling and fraud,

- racketeering and extortion,

- counterfeiting and product piracy,

- forgery of administrative documents and trafficking therein,

- forgery of money and means of payment,

- computer crime,

- corruption,

- illicit trafficking in arms, ammunition and explosives,

- illicit trafficking in endangered animal species,

- illicit trafficking in endangered plant species and varieties,

- environmental crime, and

- illicit trafficking in hormonal substances and other growth promoters.

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

- fraud affecting the European Communities' financial interests,

- the intentional preparation or supply of false, incorrect or incomplete statements or documents having the same effect (if it is not already punishable as a principal offence or as participation

in, instigation of, or attempt to commit, fraud)(11),

- passive corruption which damages or is likely to damage the European Communities' financial interests,

- active corruption which damages or is likely to damage the European Communities' financial interests, and

- money laundering related to the proceeds of fraud as referred to, at least in serious cases, and of active and passive corruption as referred to.

Paragraph 4

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

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

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

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

Paragraph 5

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

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

The right for a Member State to make the execution dependent on the condition that the request is consistent with its law must be interpreted in the light of the obligations set out in the Article; the requested State must not jeopardise the practical effect of paragraphs 1 to 4 of the Article by applying this condition. The possibilities for a Member State to refuse assistance on the ground that the request is not consistent with its law are therefore limited. This means for example that a Member State cannot refuse a request made under Article 1 solely because its national law does

not provide for the production of information relating to the existence of bank accounts in criminal investigations, or because its national provisions on search and seizure normally demands a higher threshold than that set in paragraph 3. On the other hand the provision allows a judicial control in the requested State. Since there are no common rules in this respect, the nature of that control may be different in the different Member States. In general terms it means that the requested State will be able to put the request before a judicial authority for an assessment of the request with regard to national conditions, including constitutional requirements, that are not covered in Article 1. Such conditions might include, for example, privileged information.

Paragraph 6

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

Article 2: Requests for information on banking transactions

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

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

Paragraph 1

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

Paragraph 1 gives provisions on assistance not only relating to the particulars of a specified bank account and to banking operations that have been carried out through it during a specified period but also provides that the requested State shall provide assistance relating to "the particulars of any sending or recipient account". The purpose of this is to clarify that it is not enough that

the requested State, in response to a request, provides information that a certain amount of money was sent to/from the account or from/to another account on a certain date but also to provide the requesting State with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the requesting State to proceed with a request for assistance in respect of that account (making use of the simplified procedure provided for in Article 6 if the account is held in the same State or making a new request to another State, as the case may be). This will enable the requesting State to trace the movements of money from account to account. When providing the particulars of any sending or recipient account, as mentioned here, the requested State will take into account, as appropriate, its obligations under the 1981 European Convention for the protection of individuals with regard to automatic processing of personal data.

Paragraph 2

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

Paragraph 3

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

Paragraph 4

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

Article 3: Requests for monitoring of banking transactions

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

Paragraph 1

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

Paragraph 2

This provision corresponds to Article 2(3).

Paragraph 3

This provision is a copy of Article 12(2) of the 2000 Convention relating to controlled deliveries. This means inter alia that the requested Member State may apply conditions, including penalty thresholds and dual criminality, which would have to be observed in a similar domestic case.

Paragraph 4

Paragraph 4 states that the practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and the requested State. This gives the requested State full control of the conditions under which the monitoring shall take place and allows the requesting and requested State to agree for example on monitoring on a day-by-day basis or that monitoring on a weekly basis is enough having regard to the circumstances of the case. It is left to the requested

State to decide if real-time monitoring can be provided or not.

Article 4: Confidentiality

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

B. Additional measures and requests

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

Article 5: Obligation to inform

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

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

Article 6: Additional requests for mutual assistance

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

Paragraph 1

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

Paragraph 2

The rationale behind the provision in paragraph 2 is that experience has shown that not all authorities of the Member States are prepared to accept that an additional request is made directly by e.g. a foreign prosecutor or investigating judge who is present in the requested State when its request is executed. The provision in paragraph 2 will ensure that such an additional request can be made

on the spot and that the additional request does not have to be sent from the territory of the requesting State. The application of the provision in the individual case presupposes that the person that is present in the requested State is competent under Article 24 of the European Mutual assistance Convention or Article 24 of the 2000 Convention to make a request for mutual assistance.

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

C. Grounds for refusals

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

Article 7: Banking secrecy

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

Since Article 3 of the European Mutual Assistance Convention applies, Member States are allowed to apply formalities and procedures provided for in its domestic law(12).

Article 8: Fiscal offences

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

Article 9: Political offences

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

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

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

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

(b) Offences of conspiracy or association which correspond to the description of behaviour referred to in Article 3(4) of the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(13), to commit one or more of the offences referred to

in Articles 1 and 2 of the 1977 Convention.

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

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

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

Article 10: Forwarding refusals to the Council and involvement of Eurojust(14)

Paragraph 1

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

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

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

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

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

The third and last indent of paragraph 1 was, even though covered by the second indent, introduced primarily for the purpose of high-lighting the need to follow up the application of Article 1(5) and more specifically the application of the condition regarding the consistency with national law.

This provision was included because several Member States expressed concerns that the possibility to apply national law otherwise might dilute the obligation provided for in Article 1.

Paragraph 2

Article 10(2) is a reminder that the competent authorities of a Member State may, once Eurojust has been established, make use of Eurojust in solving any difficulties concerning the execution of a request in relation to the provisions referred to in paragraph 1. The Council adopted on 28 February 2002 Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime(15). Article 10(2) does not provide any competencies for Eurojust - these are laid down in the said Council Decision. Article 10(2) can be used in case the requested State is not able to assist in accordance with the wishes of the requesting State. Eurojust may of course only deal with a case reported to Eurojust to the extent that it falls within the competence of Eurojust. The two national members of Eurojust - the member of the requesting State and the member of the requested State - can in such a case be made aware of the conflict and can assist in finding a solution which is acceptable to both States. The assistance of Eurojust is, in contrast to the provisions in paragraph 1, available in pending cases.

D. Final provisions

Article 11: reservations

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

Article 12: Territorial application

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

Article 13: Entry into force

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

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

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

with effect from a later date, the Protocol also applies between those Member States with effect from that date.

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

Article 14: Acceding States

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

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

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

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

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

Article 15: Position of Iceland and Norway

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

Article 16: Entry into force for Iceland and Norway

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

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

Paragraph 2 covers the situation where the Protocol enters into force for a Member State when the provisions of Article 8 of the Protocol are already in operation in relation to Iceland and/or Norway. Paragraph 3 provides that Article 8 shall not become binding on Iceland and Norway before the entry into force of the provisions referred to in Article 2(1) of the 2000 Convention in relation to those countries. Paragraph 4 ensures that the provisions of Article 8 will enter into force for Iceland and/or Norway at the latest when they become operational for all the 15 Member States

who were members of the Union when the Convention was adopted.

Article 17: Depository

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

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

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

(3) OJ C 326, 21.11.2001, p. 1.

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

(5) OJ L 166, 28.6.1991, p. 77.

(6) OJ L 344, 28.12.2001, p. 76.

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

(8) For the purpose of Article 2 of the Europol Convention, "unlawful trafficking" means the criminal offences listed in Article 3(1) of the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and the provisions amending or replacing that Convention.

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

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

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

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

(13) OJ C 313, 23.10.1996, p. 11.

(14) See Council Declaration relating to the dual criminality and other issues of refusals of

requests in footnote to Chapter I.

(15) OJ L 63, 6.3.2002, p. 1.

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

(Text approved by the Council on 14 October 2002)

(2002/C 257/01)

I. INTRODUCTION

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

The initiative was originally framed as a new Convention designed to supplement in particular the 1959 Council of Europe Convention on mutual assistance in criminal matters (hereinafter referred to as the "European Mutual Assistance Convention") and the Convention on mutual assistance in criminal matters between the Member States of the European Union adopted on 29 May 2000(2) (hereinafter referred to as "the 2000 Convention"). In the course of the negotiations the instrument was changed into a Protocol to the 2000 Convention and supplemented by certain provisions which were not originally covered (Articles 3 and 9). One provision in the original draft relating to abolishment of the dual criminality requirement was not included in the Protocol.

The Protocol was established by the Council on 16 October 2001(3) and was signed on the same day by all Member States. Norway and Iceland informed the Council that they were in agreement with the content of the provision applicable to them (Article 8). A declaration by the Council relating to the dual criminality requirement and other issues of refusals of requests was entered in the minutes of the Council at the adoption of the instrument(4).

II. GENERAL OBSERVATIONS

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

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

III. COMMENTS ON INDIVIDUAL ARTICLES

A. Assistance relating to bank accounts

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

Article 1: Requests for information on bank accounts

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

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

Paragraph 1

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

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

It was understood during the negotiations that accounts that are controlled by the person under investigation include accounts of which that person is the true economic beneficiary and that this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special purpose funds, the identity of the settlers or beneficiaries of which is unknown. The concept of economic beneficiary should be interpreted in accordance with Article 3(7) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering(5), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001(6) (hereinafter referred to as "the Money Laundering Directive").

Accounts for which the person that is the subject of the proceedings has powers of attorney are

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

Paragraph 2

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

Paragraph 3

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

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

The reference to the offences referred to in the Europol Convention - as amended - means that all forms of offences listed in Article 2 of that Convention and in the Annex to the Convention are covered(7). It should be noted that the reference to the Europol Convention does not include a reference to the qualifications set out in Article 2 relating to factual indications that an organised criminal structure is involved or that a common approach is required.

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

- terrorism,
- unlawful drug trafficking(8),
- trafficking in nuclear and radioactive substances,
- illegal immigrant smuggling,
- trade in human beings,
- motor vehicle crime,
- crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property,
- illegal money-laundering activities in connection with these forms of crime or specific manifestations thereof, and
- related criminal offences(9).

The offences referred to in the Annex to the Europol Convention(10) are the following:

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

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

- fraud affecting the European Communities' financial interests,
- the intentional preparation or supply of false, incorrect or incomplete statements or documents having the same effect (if it is not already punishable as a principal offence or as participation

in, instigation of, or attempt to commit, fraud)(11),

- passive corruption which damages or is likely to damage the European Communities' financial interests,

- active corruption which damages or is likely to damage the European Communities' financial interests, and

- money laundering related to the proceeds of fraud as referred to, at least in serious cases, and of active and passive corruption as referred to.

Paragraph 4

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

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

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

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

Paragraph 5

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

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

The right for a Member State to make the execution dependent on the condition that the request is consistent with its law must be interpreted in the light of the obligations set out in the Article; the requested State must not jeopardise the practical effect of paragraphs 1 to 4 of the Article by applying this condition. The possibilities for a Member State to refuse assistance on the ground that the request is not consistent with its law are therefore limited. This means for example that a Member State cannot refuse a request made under Article 1 solely because its national law does

not provide for the production of information relating to the existence of bank accounts in criminal investigations, or because its national provisions on search and seizure normally demands a higher threshold than that set in paragraph 3. On the other hand the provision allows a judicial control in the requested State. Since there are no common rules in this respect, the nature of that control may be different in the different Member States. In general terms it means that the requested State will be able to put the request before a judicial authority for an assessment of the request with regard to national conditions, including constitutional requirements, that are not covered in Article 1. Such conditions might include, for example, privileged information.

Paragraph 6

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

Article 2: Requests for information on banking transactions

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

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

Paragraph 1

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

Paragraph 1 gives provisions on assistance not only relating to the particulars of a specified bank account and to banking operations that have been carried out through it during a specified period but also provides that the requested State shall provide assistance relating to "the particulars of any sending or recipient account". The purpose of this is to clarify that it is not enough that

the requested State, in response to a request, provides information that a certain amount of money was sent to/from the account or from/to another account on a certain date but also to provide the requesting State with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the requesting State to proceed with a request for assistance in respect of that account (making use of the simplified procedure provided for in Article 6 if the account is held in the same State or making a new request to another State, as the case may be). This will enable the requesting State to trace the movements of money from account to account. When providing the particulars of any sending or recipient account, as mentioned here, the requested State will take into account, as appropriate, its obligations under the 1981 European Convention for the protection of individuals with regard to automatic processing of personal data.

Paragraph 2

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

Paragraph 3

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

Paragraph 4

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

Article 3: Requests for monitoring of banking transactions

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

Paragraph 1

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

Paragraph 2

This provision corresponds to Article 2(3).

Paragraph 3

This provision is a copy of Article 12(2) of the 2000 Convention relating to controlled deliveries. This means inter alia that the requested Member State may apply conditions, including penalty thresholds and dual criminality, which would have to be observed in a similar domestic case.

Paragraph 4

Paragraph 4 states that the practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and the requested State. This gives the requested State full control of the conditions under which the monitoring shall take place and allows the requesting and requested State to agree for example on monitoring on a day-by-day basis or that monitoring on a weekly basis is enough having regard to the circumstances of the case. It is left to the requested

State to decide if real-time monitoring can be provided or not.

Article 4: Confidentiality

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

B. Additional measures and requests

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

Article 5: Obligation to inform

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

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

Article 6: Additional requests for mutual assistance

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

Paragraph 1

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

Paragraph 2

The rationale behind the provision in paragraph 2 is that experience has shown that not all authorities of the Member States are prepared to accept that an additional request is made directly by e.g. a foreign prosecutor or investigating judge who is present in the requested State when its request is executed. The provision in paragraph 2 will ensure that such an additional request can be made

on the spot and that the additional request does not have to be sent from the territory of the requesting State. The application of the provision in the individual case presupposes that the person that is present in the requested State is competent under Article 24 of the European Mutual assistance Convention or Article 24 of the 2000 Convention to make a request for mutual assistance.

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

C. Grounds for refusals

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

Article 7: Banking secrecy

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

Since Article 3 of the European Mutual Assistance Convention applies, Member States are allowed to apply formalities and procedures provided for in its domestic law(12).

Article 8: Fiscal offences

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

Article 9: Political offences

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

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

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

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

(b) Offences of conspiracy or association which correspond to the description of behaviour referred to in Article 3(4) of the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(13), to commit one or more of the offences referred to

in Articles 1 and 2 of the 1977 Convention.

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

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

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

Article 10: Forwarding refusals to the Council and involvement of Eurojust(14)

Paragraph 1

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

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

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

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

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

The third and last indent of paragraph 1 was, even though covered by the second indent, introduced primarily for the purpose of high-lighting the need to follow up the application of Article 1(5) and more specifically the application of the condition regarding the consistency with national law.

This provision was included because several Member States expressed concerns that the possibility to apply national law otherwise might dilute the obligation provided for in Article 1.

Paragraph 2

Article 10(2) is a reminder that the competent authorities of a Member State may, once Eurojust has been established, make use of Eurojust in solving any difficulties concerning the execution of a request in relation to the provisions referred to in paragraph 1. The Council adopted on 28 February 2002 Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime(15). Article 10(2) does not provide any competencies for Eurojust - these are laid down in the said Council Decision. Article 10(2) can be used in case the requested State is not able to assist in accordance with the wishes of the requesting State. Eurojust may of course only deal with a case reported to Eurojust to the extent that it falls within the competence of Eurojust. The two national members of Eurojust - the member of the requesting State and the member of the requested State - can in such a case be made aware of the conflict and can assist in finding a solution which is acceptable to both States. The assistance of Eurojust is, in contrast to the provisions in paragraph 1, available in pending cases.

D. Final provisions

Article 11: reservations

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

Article 12: Territorial application

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

Article 13: Entry into force

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

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

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

with effect from a later date, the Protocol also applies between those Member States with effect from that date.

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

Article 14: Acceding States

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

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

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

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

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

Article 15: Position of Iceland and Norway

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

Article 16: Entry into force for Iceland and Norway

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

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

Paragraph 2 covers the situation where the Protocol enters into force for a Member State when the provisions of Article 8 of the Protocol are already in operation in relation to Iceland and/or Norway. Paragraph 3 provides that Article 8 shall not become binding on Iceland and Norway before the entry into force of the provisions referred to in Article 2(1) of the 2000 Convention in relation to those countries. Paragraph 4 ensures that the provisions of Article 8 will enter into force for Iceland and/or Norway at the latest when they become operational for all the 15 Member States

who were members of the Union when the Convention was adopted.

Article 17: Depository

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

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

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

(3) OJ C 326, 21.11.2001, p. 1.

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

(5) OJ L 166, 28.6.1991, p. 77.

(6) OJ L 344, 28.12.2001, p. 76.

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

(8) For the purpose of Article 2 of the Europol Convention, "unlawful trafficking" means the criminal offences listed in Article 3(1) of the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and the provisions amending or replacing that Convention.

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

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

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

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

(13) OJ C 313, 23.10.1996, p. 11.

(14) See Council Declaration relating to the dual criminality and other issues of refusals of

requests in footnote to Chapter I.

(15) OJ L 63, 6.3.2002, p. 1.

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Agreement on extradition between the European Union and the United States of America

Agreement

on extradition between the European Union and the United States of America

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>TABLE POSITION>

THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA,

DESIRING further to facilitate cooperation between the European Union Member States and the United States of America,

DESIRING to combat crime in a more effective way as a means of protecting their respective democratic societies and common values,

HAVING DUE REGARD for rights of individuals and the rule of law,

MINDFUL of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law,

DESIRING to conclude an Agreement relating to the extradition of offenders,

HAVE AGREED AS FOLLOWS:

Article 1

Object and Purpose

The Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation in the context of applicable extradition relations between the Member States and the United States of America governing extradition of offenders.

Article 2

Definitions

1. "Contracting Parties" shall mean the European Union and the United States of America.

2. "Member State" shall mean a Member State of the European Union.

3. "Ministry of Justice" shall, for the United States of America, mean the United States Department of Justice; and for a Member State, its Ministry of Justice, except that with respect to a Member State in which functions described in Articles 3, 5, 6, 8 or 12 are carried out by its Prosecutor General, that body may be designated to carry out such function in lieu of the Ministry of Justice in accordance with Article 19, unless the United States and the Member State concerned agree to designate another body.

Article 3

Scope of application of this Agreement in relation to bilateral extradition treaties with Member States

1. The European Union, pursuant to the Treaty on European Union, and the United States of America shall ensure that the provisions of this Agreement are applied in relation to bilateral extradition treaties between the Member States and the United States of America, in force at the time of the entry into force of this Agreement, under the following terms:

(a) Article 4 shall be applied in place of bilateral treaty provisions that authorise extradition exclusively with respect to a list of specified criminal offences;

(b) Article 5 shall be applied in place of bilateral treaty provisions governing transmission, certification, authentication or legalisation of an extradition request and supporting documents transmitted by the requesting State;

(c) Article 6 shall be applied in the absence of bilateral treaty provisions authorising direct transmission of provisional arrest requests between the United States Department of Justice and the Ministry of Justice of the Member State concerned;

(d) Article 7 shall be applied in addition to bilateral treaty provisions governing transmission of extradition requests;

(e) Article 8 shall be applied in the absence of bilateral treaty provisions governing the submission of supplementary information; where bilateral treaty provisions do not specify the channel to be used, paragraph 2 of that Article shall also be applied;

(f) Article 9 shall be applied in the absence of bilateral treaty provisions authorising temporary surrender of persons being proceeded against or serving a sentence in the requested State;

(g) Article 10 shall be applied, except as otherwise specified therein, in place of, or in the absence of, bilateral treaty provisions pertaining to decision on several requests for extradition of the same person;

(h) Article 11 shall be applied in the absence of bilateral treaty provisions authorising waiver of extradition or simplified extradition procedures;

(i) Article 12 shall be applied in the absence of bilateral treaty provisions governing transit; where bilateral treaty provisions do not specify the procedure governing unscheduled landing of aircraft, paragraph 3 of that Article shall also be applied;

(j) Article 13 may be applied by the requested State in place of, or in the absence of, bilateral treaty provisions governing capital punishment;

(k) Article 14 shall be applied in the absence of bilateral treaty provisions governing treatment of sensitive information in a request.

2. (a) The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America.

(b) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement and having bilateral extradition treaties with the United States of America, take the measures referred to in subparagraph (a).

(c) The Contracting Parties shall endeavour to complete the process described in subparagraph (b) prior to the scheduled accession of a new Member State, or as soon as possible thereafter.

The European Union shall notify the United States of America of the date of accession of new Member States.

3. If the process described in paragraph 2(b) is not completed by the date of accession, the provisions of this Agreement shall apply in the relations between that new Member State and the United States of America as from the date on which they have notified each other and the European Union of the completion of their internal procedures for that purpose.

Article 4

Extraditable offences

1. An offence shall be an extraditable offence if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. An offence shall also be an extraditable offence if it consists of an attempt or conspiracy to commit, or participation in the commission of, an extraditable offence. Where the request is for enforcement of the sentence of a person convicted of an extraditable offence, the deprivation of liberty remaining to be served must be at least four months.

2. If extradition is granted for an extraditable offence, it shall also be granted for any other offence specified in the request if the latter offence is punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met.

3. For the purposes of this Article, an offence shall be considered an extraditable offence:

(a) regardless of whether the laws in the requesting and requested States place the offence within the same category of offences or describe the offence by the same terminology;

(b) regardless of whether the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; and

(c) in criminal cases relating to taxes, customs duties, currency control and the import or export of commodities, regardless of whether the laws of the requesting and requested States provide for the same kinds of taxes, customs duties, or controls on currency or on the import or export of the same kinds of commodities.

4. If the offence has been committed outside the territory of the requesting State, extradition shall be granted, subject to the other applicable requirements for extradition, if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws of the requested State do not provide for the punishment of an offence committed outside its territory in similar circumstances, the executive authority of the requested State, at its discretion, may grant extradition provided that all other applicable requirements for extradition are met.

Article 5

Transmission and authentication of documents

1. Requests for extradition and supporting documents shall be transmitted through the diplomatic

channel, which shall include transmission as provided for in Article 7.

2. Documents that bear the certificate or seal of the Ministry of Justice, or Ministry or Department responsible for foreign affairs, of the requesting State shall be admissible in extradition proceedings in the requested State without further certification, authentication, or other legalisation.

Article 6

Transmission of requests for provisional arrest

Requests for provisional arrest may be made directly between the Ministries of Justice of the requesting and requested States, as an alternative to the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may also be used to transmit such a request.

Article 7

Transmission of documents following provisional arrest

1. If the person whose extradition is sought is held under provisional arrest by the requested State, the requesting State may satisfy its obligation to transmit its request for extradition and supporting documents through the diplomatic channel pursuant to Article 5(1), by submitting the request and documents to the Embassy of the requested State located in the requesting State. In that case, the date of receipt of such request by the Embassy shall be considered to be the date of receipt by the requested State for purposes of applying the time limit that must be met under the applicable extradition treaty to enable the person's continued detention.

2. Where a Member State on the date of signature of this Agreement, due to the established jurisprudence of its domestic legal system applicable at such date, cannot apply the measures referred to in paragraph 1, this Article shall not apply to it, until such time as that Member State and the United States of America, by exchange of diplomatic note, agree otherwise.

Article 8

Supplemental information

1. The requested State may require the requesting State to furnish additional information within such reasonable length of time as it specifies, if it considers that the information furnished in support of the request for extradition is not sufficient to fulfil the requirements of the applicable extradition treaty.

2. Such supplementary information may be requested and furnished directly between the Ministries of Justice of the States concerned.

Article 9

Temporary surrender

1. If a request for extradition is granted in the case of a person who is being proceeded against or is serving a sentence in the requested State, the requested State may temporarily surrender the person sought to the requesting State for the purpose of prosecution.

2. The person so surrendered shall be kept in custody in the requesting State and shall be returned to the requested State at the conclusion of the proceedings against that person, in accordance with the conditions to be determined by mutual agreement of the requesting and requested States. The time spent in custody in the territory of the requesting State pending prosecution in that State may be deducted from the time remaining to be served in the requested State.

Article 10

Requests for extradition or surrender made by several States

1. If the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person.

2. If a requested Member State receives an extradition request from the United States of America and a request for surrender pursuant to the European arrest warrant for the same person, either for the same offence or for different offences, the competent authority of the requested Member State shall determine to which State, if any, it will surrender the person. For this purpose, the competent authority shall be the requested Member State's executive authority if, under the bilateral extradition treaty in force between the United States and the Member State, decisions on competing requests are made by that authority; if not so provided in the bilateral extradition treaty, the competent authority shall be designated by the Member State concerned pursuant to Article 19.

3. In making its decision under paragraphs 1 and 2, the requested State shall consider all of the relevant factors, including, but not limited to, factors already set forth in the applicable extradition treaty, and, where not already so set forth, the following:

(a) whether the requests were made pursuant to a treaty;

(b) the places where each of the offences was committed;

(c) the respective interests of the requesting States;

(d) the seriousness of the offences;

(e) the nationality of the victim;

(f) the possibility of any subsequent extradition between the requesting States; and

(g) the chronological order in which the requests were received from the requesting States.

Article 11

Simplified extradition procedures

If the person sought consents to be surrendered to the requesting State, the requested State may, in accordance with the principles and procedures provided for under its legal system, surrender

the person as expeditiously as possible without further proceedings. The consent of the person sought may include agreement to waiver of protection of the rule of specialty.

Article 12

Transit

1. A Member State may authorise transportation through its territory of a person surrendered to the United States of America by a third State, or by the United States of America to a third State. The United States of America may authorise transportation through its territory of a person surrendered to a Member State by a third State, or by a Member State to a third State.

2. A request for transit shall be made through the diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice of the Member State concerned. The facilities of Interpol may also be used to transmit such a request. The request shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.

3. Authorisation is not required when air transportation is used and no landing is scheduled on the territory of the transit State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to paragraph 2. All measures necessary to prevent the person from absconding shall be taken until transit is effected, as long as the request for transit is received within 96 hours of the unscheduled landing.

Article 13

Capital punishment

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

Article 14

Sensitive information in a request

Where the requesting State contemplates the submission of particularly sensitive information in support of its request for extradition, it may consult the requested State to determine the extent to which the information can be protected by the requested State. If the requested State cannot protect the information in the manner sought by the requesting State, the requesting State shall determine whether the information shall nonetheless be submitted.

Article 15

Consultations

The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.

Article 16

Temporal application

1. This Agreement shall apply to offences committed before as well as after it enters into force.

2. This Agreement shall apply to requests for extradition made after its entry into force. Nevertheless, Articles 4 and 9 shall apply to requests pending in a requested State at the time this Agreement enters into force.

Article 17

Non-derogation

1. This Agreement is without prejudice to the invocation by the requested State of grounds for refusal relating to a matter not governed by this Agreement that is available pursuant to a bilateral extradition treaty in force between a Member State and the United States of America.

2. Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.

Article 18

Future bilateral extradition treaties with Member States

This Agreement shall not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement.

Article 19

Designation and notification

The European Union shall notify the United States of America of any designation pursuant to Article 2(3) and Article 10(2), prior to the exchange of written instruments described in Article 3(2) between the Member States and the United States of America.

Article 20

Territorial application

1. This Agreement shall apply:

(a) to the United States of America;

(b) in relation to the European Union to:

- Member States,

- territories for whose external relations a Member State has responsibility, or countries that are not Member States for whom a Member State has other duties with respect to external relations, where agreed upon by exchange of diplomatic note between the Contracting Parties, duly confirmed by the relevant Member State.

2. The application of this Agreement to any territory or country in respect of which extension has been made in accordance with subparagraph (b) of paragraph 1 may be terminated by either Contracting Party giving six months' written notice to the other Contracting Party through the diplomatic channel, where duly confirmed between the relevant Member State and the United States of America.

Article 21

Review

The Contracting Parties agree to carry out a common review of this Agreement as necessary, and in any event no later than five years after its entry into force. The review shall address in particular the practical implementation of the Agreement and may also include issues such as the consequences of further development of the European Union relating to the subject matter of this Agreement, including Article 10.

Article 22

Entry into force and termination

1. This Agreement shall enter into force on the first day following the third month after the date on which the Contracting Parties have exchanged instruments indicating that they have completed their internal procedures for this purpose. These instruments shall also indicate that the steps specified in Article 3(2) have been completed.

2. Either Contracting Party may terminate this Agreement at any time by giving written notice to the other Party, and such termination shall be effective six months after the date of such notice.

In witness whereof the undersigned Plenipotentiaries have signed this Agreement

Done at Washington DC on the twenty-fifth day of June in the year two thousand and three in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic.

Por la Union Europea/For Den Europæiske Union/Für die Europäische Union/>ISO_7>Aéa ôçí Åoñù=auê«

êíùoç/>ISO_1>For the European Union/Pour l'Union européenne/Per l'Unione europea/Voor de Europese Unie/Pela Uniao Europeia/Euroopan unionin puolesta/På Europeiska unionens vägnar

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Por los Estados Unidos de América/For Amerikas Forenede Stater/Für die Vereinigten Staaten von Amerika/>ISO_7>Aéa ôéo Çíùi¡íåo áïeéôåßåo ôço A8åñéê«o/>ISO_1>For the United States of America/Pour les Etats-Unis d'Amérique/Per gli Stati Uniti d'America/Voor de Verenigde Staten van Amerika/Pelos Estados Unidos da América/Amerikan yhdysvaltojen puolesta/På Amerikas förenta staters vägnar

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Explanatory Note on the Agreement on Extradition between the European Union and the United States of America

This Explanatory Note reflects understandings regarding the application of certain provisions of the Agreement on Extradition between the European Union and the United States of America (hereinafter "the Agreement") agreed between the Contracting Parties.

On Article 10

Article 10 is not intended to affect the obligations of States Parties to the Rome Statute of the International Criminal Court, nor to affect the rights of the United States of America as a non-Party with regard to the International Criminal Court.

On Article 18

Article 18 provides that the Agreement shall not preclude the conclusion, after its entry into force, of bilateral agreements on extradition between a Member State and the United States of America consistent with the Agreement.

Should any measures set forth in the Agreement create an operational difficulty for either one or more Member States or the United States of America, such difficulty should in the first place be resolved, if possible, through consultations between the Member State or Member States concerned and the United States of America, or, if appropriate, through the consultation procedures set out in this Agreement. Where it is not possible to address such operational difficulty through consultations alone, it would be consistent with the Agreement for future bilateral agreements between the Member State or Member States and the United States of America to provide an operationally feasible alternative mechanism that would satisfy the objectives of the specific provision with respect to which the difficulty has arisen.

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Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP

Council Decision 2003/48/JHA

of 19 December 2002

on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30, 31 and Article 34(2)(c) thereof,

Having regard to the initiative of the Kingdom of Spain(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) At its extraordinary meeting on 21 September 2001, the European Council stated that terrorism is a real challenge to the world and to Europe and that the fight against terrorism will be a priority objective of the European Union.

(2) On 28 September 2001 the United Nations Security Council adopted Resolution 1373 (2001) laying down wide-ranging strategies to combat terrorism and in particular for the fight against the financing of terrorism.

(3) On 8 October 2001 the Council of the European Union reaffirmed the determination of the European Union and its Member States to play their full part, in a coordinated manner, in the global coalition against terrorism, under the aegis of the United Nations.

(4) On 19 October 2001 the European Council stated that it is determined to combat terrorism in every form throughout the world and that it will continue its efforts to strengthen the coalition of the international community to combat terrorism in every shape and form, for example by increased cooperation between the operational services responsible for combating terrorism: Europol, Eurojust, the intelligence services, police forces and judicial authorities.

(5) Article 4 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism(3) provides that Member States shall, through police and judicial cooperation in criminal matters, within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. Such assistance shall be based on and fully exploit the existing powers of the Member States in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States. Assistance will be provided in conformity with the national laws of the Member States, in particular those with regard to confidentiality of criminal investigations.

(6) Common Position 2001/931/CFSP and the additional measures contemplated in this Decision concern particular persons, groups and entities listed in the Annex to that Common Position, which is regularly being updated.

(7) Whilst Common Position 2001/931/CFSP sets out certain guarantees to ensure that persons, groups and entities are listed only if there is sufficient cause to do so, the Council shall draw the necessary consequences from any final finding and enforceable interim orders to the

contrary by a court of the Member States.

(8) This Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP,

HAS DECIDED AS FOLLOWS:

Article 1

For the purposes of this Decision:

(a) "the listed persons, groups or entities" means the persons, groups or entities listed in the Annex to Common Position 2001/931/CFSP;

(b) "terrorist offences" means the offences referred to in Articles 1 to 3 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism(4);

(c) "Europol Convention" means the Convention of 26 July 1995 on the establishment of a European Police Office(5);

(d) "Eurojust Decision" means Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime(6);

(e) "Joint investigation teams" shall be understood as in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams(7).

Article 2

1. Each Member State shall designate a specialised service within its police services, which, in accordance with national law, will have access to and collect all relevant information concerning and resulting from criminal investigations conducted by its law enforcement authorities with respect to terrorist offences involving any of the listed persons, groups or entities.

2. Each Member State shall take necessary measures to ensure that at least the following information collected by the specialised service, is communicated to Europol, through the national unit of that Member State, in accordance with national law and insofar as permitted by the provisions of the Europol Convention, with a view to its processing pursuant to Article 10, and particularly Article 10(6), of that Convention:

(a) data which identify the person, group or entity;

(b) acts under investigation and their specific circumstances;

(c) links with other relevant cases of terrorist offences;

(d) the use of communications technologies;

(e) the threat posed by the possession of weapons of mass destruction.

Article 3

1. Each Member State shall designate a Eurojust national correspondent for terrorism matters under Article 12 of the Eurojust Decision or a appropriate judicial or other competent authority or, where its legal system so provides, more than one authority, and shall, in accordance with national law, ensure that this correspondent or appropriate judicial or other competent authority has access to and can collect all relevant information concerning and resulting from criminal proceedings conducted under the responsibility of its judicial authorities, with regard to terrorist offences involving any of the listed persons, groups or entities.

2. Each Member State shall take necessary measures to ensure that at least the following information, collected by the national correspondent or by the appropriate judicial or other competent authority, is communicated to Eurojust, in accordance with national law, and insofar as permitted by, the provisions of the Eurojust Decision, in order to enable it to carry out its tasks:

(a) data which identify the person, group or entity;

(b) acts under investigation or prosecution and their specific circumstances;

(c) links with other relevant cases of terrorist offences;

(d) the existence of mutual legal assistance requests, including letters rogatory, which may have been made by or to another Member State, as well as the results of these.

Article 4

Member States shall, where appropriate, take the necessary measures to set up joint investigation teams in order to carry out criminal investigations into terrorist offences involving any of the listed persons, groups or entities.

Article 5

Member States shall ensure that all relevant data that they communicate to Europol and Eurojust, pursuant to Articles 2 and 3, and that relate to any of the listed persons, groups or entities or to offences that they are deemed to have committed or are about to commit, can be exchanged between Europol and Eurojust insofar as provided by the agreement on cooperation to be signed between these two bodies, in accordance with the Europol Convention and the Eurojust Decision.

Article 6

Each Member State shall take the necessary measures to ensure that requests from other Member States for mutual legal assistance and recognition and enforcement of judgements in connection with terrorist offences involving any of the listed persons, groups or entities, are dealt with as a matter of urgency and shall be given priority.

Article 7

Each Member State shall take the necessary measures to ensure that any relevant information included in document, file, item of information, object or other means of evidence, seized or confiscated in the course of criminal investigations or criminal proceedings in connection with terrorist offences against any of the listed persons, groups or entities, can be made accessible or available immediately to the authorities of other interested Member States in accordance with national law and relevant international legal instruments where investigations against those listed persons, groups or entities are being carried out in connection with terrorist offences or might be initiated.

Article 8

This Decision shall take effect on the day following that of its publication in the Official Journal.

Done at Brussels, 19 December 2002.

For the Council

The President

L. Espersen

(1) OJ C 126, 28.5.2002, p. 22.

(2) Opinion given on 24 September 2002 (not yet published in the Official Journal).

(3) OJ L 344, 28.12.2001, p. 93.

(4) OJ L 164, 22.6.2002, p. 3.

(5) OJ C 316, 27.11.1995, p. 2.

(6) OJ L 63, 6.3.2002, p. 1.

(7) OJ L 162, 20.6.2002, p. 1.

DOCNUM	32003D0048
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2003 ; D
PUBREF	Official Journal L 016 , 22/01/2003 P. 0068 - 0070
DESCRIPT	Europol ; Eurojust ; information transfer ; terrorism ; EU police cooperation ; EU judicial cooperation ; access to information

PUB	2003/01/22
DOC	2002/12/19
INFORCE	2003/01/23=PE
ENDVAL	9999/99/99
LEGBASE	11997M030..... 11997M031..... 11997M034-P2PTC).....
LEGCIT	41995A1127(01)..... 11997M006..... 32001E0931..... 32002D0187..... 32002F0465..... 32002F0475.....
EARLACTS	52002IG0528(01).....Relation.....
SUB	Justice and home affairs
REGISTER	19301000
PREPWORK	initiative ;OJ C 126/2002 P 22 Opinion European Parliament;given on 24/09/2002
DATES	of document: 19/12/2002 of effect: 23/01/2003; Takes effect Date pub. + 1 See Art 8 end of validity: 99/99/9999

Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism

Council Regulation (EC) No 871/2004

of 29 April 2004

concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism

THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Community, and in particular Article 66 thereof,

Having regard to the initiative of the Kingdom of Spain(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) The Schengen Information System, hereinafter referred to as "SIS", set up pursuant to the provisions of Title IV of the Convention of 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders(3), hereinafter referred to as "the 1990 Schengen Convention", constitutes an essential tool for the application of the provisions of the Schengen acquis as integrated into the framework of the European Union.

(2) The need to develop a new, second generation SIS, hereinafter referred to as "SIS II", with a view to the enlargement of the European Union and allowing for the introduction of new functions, while benefiting from the latest developments in the field of information technology, has been recognised and the first steps have been taken to develop this new system.

(3) Certain adaptations of existing provisions and the introduction of certain new functions can already be realised with respect to the current version of the SIS, in particular as far as concerns the provision of access to certain types of data entered in the SIS for authorities the proper performance of whose tasks would be facilitated were they able to search these data, including Europol and the national members of Eurojust, the extension of the categories of missing objects about which alerts may be entered and the recording of transmissions of personal data. The technical facilities required for the purpose first need to be established in each Member State.

(4) The Conclusions of the Laeken European Council of 14 and 15 December 2001 and in particular Conclusions 17 (cooperation between specialised counter-terrorism services), 43 (Eurojust and police cooperation with regard to Europol) and the Action Plan of 21 September 2001 against terrorism refer to the need to enhance the SIS and improve its capabilities.

(5) Moreover, it is useful to enact provisions with respect to the exchange of all supplementary information through the authorities designated for that purpose in all Member States (Supplementary Information Request at National Entry), giving these authorities a common legal E basis within the provisions of the 1990 Schengen Convention and setting out rules on deletion of data kept by these authorities.

(6) The amendments to be made to this effect to the provisions of the Schengen acquis dealing with the SIS consist of two parts: this Regulation and a Council Decision based on Articles 30(1)(a) and (b), 31(a) and (b) and 34(2)(c) of the Treaty on European Union. The reason for this is that, as set out in Article 93 of the 1990 Schengen Convention, the purpose of the SIS is

to maintain public policy and public security, including national security, in the territories of the Member States and to apply the provisions of the said Convention relating to the movement of persons in those territories, by using information communicated via the SIS in accordance with the provisions of that Convention. Since some of the provisions of the 1990 Schengen Convention are to be applied for both purposes at the same time, it is appropriate to modify such provisions in identical terms through parallel acts based on each of the Treaties.

(7) This Regulation is without prejudice to the adoption in future of the necessary legislation describing in detail the legal architecture, objectives, operation and use of SIS II, such as, but not limited to, rules further defining the categories of data to be entered into the system, the purposes for which they are to be entered and the criteria for their entry, rules concerning the content of SIS records, the interlinking of alerts, compatibility between alerts and further rules on access to SIS data and the protection of personal data and their control.

(8) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point G of Decision 1999/437/EC(4), on certain arrangements for the application of that Agreement.

(9) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide within a period of six months after the Council has adopted this Regulation whether it will implement it in its national law.

(10) This Regulation constitutes a development of the SIS for the purpose of its application in relation to provisions of the Schengen acquis relating to the movement of persons; the United Kingdom has not applied to and does not take part in the SIS for these purposes, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis(5); the United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(11) This Regulation constitutes a development of the SIS for the purpose of its application in relation to provisions of the Schengen acquis relating to the movement of persons; Ireland has not applied to and does not take part in the Schengen Information System for these purposes, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis(6); Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

(12) This Regulation constitutes an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession,

HAS ADOPTED THIS REGULATION:

Article 1

The provisions of the 1990 Schengen Convention are hereby amended as follows:

1. the following paragraph shall be added to Article 92:

"4. Member States shall in accordance with national legislation exchange through the authorities designated for that purpose (Sirene) all supplementary information necessary in connection with the entry of alerts and for allowing the appropriate action to be taken in cases where persons in respect of whom, and objects in respect of which, data have been entered in the Schengen Information System, are found as a result of searches made in this System. Such information shall be used only for the purpose for which it was transmitted."

2. points (a) to (i) of the first paragraph of Article 94(3) shall be replaced by the following:

"(a) surname and forenames, any aliases possibly entered separately;

(b) any specific objective physical characteristics not subject to change;

(c) (...);

(d) place and date of birth;

(e) sex;

(f) nationality;

(g) whether the persons concerned are armed, violent or have escaped;

(h) reason for the alert;

(i) action to be taken;"

3. the following sentence shall be added at the end of Article 101(1):

"However, access to data entered in the SIS and the right to search such data directly may also be exercised by national judicial authorities, inter alia, those responsible for the initiation of public prosecutions in criminal proceedings and judicial inquiries prior to indictment, in the performance of their tasks, as set out in national legislation."

4. Article 101(2) shall be replaced by the following:

"2. In addition, access to data entered in accordance with Article 96 and data concerning documents relating to persons entered in accordance with Article 100(3)(d) and (e) and the right to search such data directly may be exercised by the authorities responsible for issuing visas, the central authorities responsible for examining visa applications and the authorities responsible for issuing residence permits and for the administration of legislation on aliens in the context of the application of the provisions of this Convention relating to the movement of persons. Access to data by these authorities shall be governed by the national law of each Member State."

5. the second sentence of Article 102(4) shall be replaced by the following:

"By way of derogation, data entered under Article 96 and data concerning documents relating to persons entered under Article 100(3)(d) and (e) may be used in accordance with the national law of each Member State for the purposes of Article 101(2) only."

6. Article 103 shall be replaced by the following:

"Article 103

Each Member State shall ensure that every transmission of personal data is recorded in the national section of the Schengen Information System by the data file management authority for the purposes of checking whether the search is admissible or not. The record may only be used for this purpose and shall be deleted at the earliest after a period of one year and at the latest after a period

of three years."

7. the following Article shall be inserted:

"Article 112 A

1. Personal data held in files by the authorities referred to in Article 92(4) as a result of information exchange pursuant to that paragraph, shall be kept only for such time as may be required to achieve the purposes for which they were supplied. They shall in any event be deleted at the latest one year after the alert or alerts concerning the person or object concerned have been deleted from the Schengen Information System.

2. Paragraph 1 shall not prejudice the right of a Member State to keep in national files data relating to a particular alert which that Member State has issued or to an alert in connection with which action has been taken on its territory. The period of time for which such data may be held in such files shall be governed by national law."

8. the following Article shall be inserted:

"Article 113 A

1. Data other than personal data held in files by the authorities referred to in Article 92(4) as a result of information exchange pursuant to that paragraph, shall be kept only for such time as may be required to achieve the purposes for which they were supplied. They shall in any event be deleted at the latest one year after the alert or alerts concerning the person or object concerned have been deleted from the Schengen Information System.

2. Paragraph 1 shall not prejudice the right of a Member State to keep in national files data relating to a particular alert which that Member State has issued or to an alert in connection with which action has been taken on its territory. The period of time for which such data may be held in such files shall be governed by national law."

Article 2

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

2. It shall apply from a date to be fixed by the Council, acting unanimously, as soon as the necessary preconditions have been fulfilled. The Council may decide to set different dates for the application of different provisions.

3. Any Decision of the Council in accordance with paragraph 2 shall be published in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 29 April 2004.

For the Council

The President

M. McDowell

(1) OJ C 160, 4.7.2002, p. 5.

(2) OJ C 31 E, 5.2.2004, p.122.

(3) OJ L 239, 22.9.2000, p. 19.

(4) OJ L 176, 10.7.1999, p. 31.

(5) OJ L 131, 1.6.2000, p. 43.

(6) OJ L 64, 7.3.2002, p. 20.

DOCNUM	32004R0871
AUTHOR	Council
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2004 ; R
PUBREF	Official Journal L 162 , 30/04/2004 P. 0029 - 0031
DESCRIPT	Schengen Information System ; terrorism ; free movement of persons ; information transfer ; dataprocessing
PUB	2004/04/30
DOC	2004/04/29
INFORCE	2004/05/20=EV ; 0000/00/00=MA
ENDVAL	9999/99/99
LEGBASE	12002E066.....
LEGCIT	11997D/PRO/05..... 21999A0710(02)..... 31999D0437..... 32000D0365..... 12002E..... 12002M030..... 12002M031..... 12002M034..... 32002D0192..... 12003T/AFI.....
MODIFIES	42000A0922(02)..... Amendment..... Addition ART 92.4 from DATEFF 42000A0922(02)..... Amendment..... Completion ART 101.1 from DATEFF 42000A0922(02)..... Amendment..... Amendment ART 102.4 from DATEFF 42000A0922(02)..... Amendment..... Addition ART 112 BI from DATEFF

42000A0922(02)..... Amendment..... Addition ART 113 BI from DATEFF
42000A0922(02)..... Amendment..... Replacement ART 103 from DATEFF
42000A0922(02)..... Amendment..... Replacement ART 101.2 from DATEFF
42000A0922(02)..... Amendment..... Amendment ART 94.3 from DATEFF
52002IG0704(01)..... Relation.....

SUB Principles, objectives and tasks of the Treaties ; Free movement of persons

REGISTER 01100000 ; 19101000 ; 19100000

PREPWORK initiative ;OJ C 160/2002 P 5
Opinion European Parliament;OJ C 31E/2004 P 122

DATES of document: 29/04/2004
of effect: 20/05/2004; Entry into force Date pub. + 20 See Art 2.1
of effect: 00/00/0000; Implementation See Art 2.2
end of validity: 99/99/9999

2003/335/JHA: Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes

Council Decision 2003/335/JHA

of 8 May 2003

on the investigation and prosecution of genocide, crimes against humanity and war crimes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30, 31 and 34(2)(c) thereof,

Having regard to the initiative of the Kingdom of Denmark(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) The International Criminal Tribunals for the former Yugoslavia and for Rwanda have since 1995 been investigating, prosecuting and bringing to justice violations of international law in connection with war, genocide and crimes against humanity.

(2) The Rome Statute of the International Criminal Court of 17 July 1998, which has been ratified by all Member States of the European Union, affirms that the most serious crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes, must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.

(3) The Rome Statute recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such international crimes.

(4) The Rome Statute emphasises that the International Criminal Court established under it is to be complementary to national criminal jurisdictions. Effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes should be ensured without interference with the jurisdiction of the International Criminal Court.

(5) The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law.

(6) Member States are being confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union.

(7) The competent authorities of the Member States are to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law.

(8) The relevant national law enforcement and immigration authorities, although having separate tasks and responsibilities, should cooperate very closely in order to enable effective investigation and prosecution of such crimes by the competent authorities that have jurisdiction at national level.

(9) Member States should ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes.

(10) The successful outcome of effective investigation and prosecution of such crimes also requires close cooperation at transnational level between authorities of the States Parties to the Rome Statute, including the Member States.

(11) On 13 June 2002, the Council adopted Decision 2002/494/JHA setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes(3). Member States should ensure that full use is made of the contact points to facilitate cooperation between the competent international authorities.

(12) In Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court(4), the Member States declared that the crimes within the jurisdiction of the International Criminal Court are of concern for all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof,

HAS DECIDED AS FOLLOWS:

Article 1

Objective

The aim of this Decision is to increase cooperation between national units in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes as defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July 1998.

Article 2

Information to law enforcement authorities

1. The Member States shall take the necessary measures in order for the law enforcement authorities to be informed when facts are established which give rise to a suspicion that an applicant for a residence permit has committed crimes as referred to in Article 1 which may lead to prosecution in a Member State or in international criminal courts.

2. Member States shall take the necessary measures to ensure that the relevant national law enforcement and immigration authorities are able to exchange the information, which they require in order to carry out their tasks effectively.

Article 3

Investigation and prosecution

1. Member States shall assist one another in investigating and prosecuting the crimes referred to in Article 1 in accordance with relevant international agreements and national law.

2. Where, in connection with the processing of an application for a residence permit, the immigration authorities become aware of facts which give rise to a suspicion that the applicant has participated in crimes referred to in Article 1, and where it emerges that the applicant has previously sought

permission to reside in another Member State, the law enforcement authorities may apply to the competent law enforcement authorities in the latter Member State with a view to obtaining relevant information, including information from the immigration authorities.

3. Insofar as the law enforcement authorities in a Member State become aware that a person suspected of crimes as referred to in Article 1 is in another Member State, they shall inform the competent authorities in the latter Member State of their suspicions and the basis thereof. Such information shall be provided in accordance with relevant international agreements and national law.

Article 4

Structures

Member States shall consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question.

Article 5

Coordination and periodic meetings

1. Member States shall coordinate ongoing efforts to investigate and prosecute persons suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes.

2. At the Presidency's initiative, the contact points designated under Article 1 of Decision 2002/494/JHA, shall meet at regular intervals with a view to exchanging information about experiences, practices and methods. These meetings may take place in conjunction with meetings within the European Judicial Network and, depending on the circumstances, representatives from the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the International Criminal Court and other international bodies may also be invited to take part in such meetings.

Article 6

Compliance with data protection legislation

Any kind of exchange of information or other kind of processing of personal data under this Decision shall take place in full compliance with the requirements flowing from the applicable international and domestic data protection legislation.

Article 7

Implementation

Member States shall take the necessary measures to comply with this Decision by 8 May 2005.

Article 8

Territorial application

This Decision shall apply to Gibraltar.

Article 9

Taking effect

This Decision shall take effect on the day of its publication in the Official Journal of the European Union.

Done at Brussels, 8 May 2003.

For the Council

The President

M. Chrisochoïdis

(1) OJ C 223, 19.9.2002, p. 19.

(2) Opinion of 17 December 2002 (not yet published in the Official Journal).

(3) OJ L 167, 26.6.2002, p. 1.

(4) OJ L 155, 12.6.2001, p. 19.

DOCNUM	32003D0335
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2003 ; D
PUBREF	Official Journal L 118 , 14/05/2003 P. 0012 - 0014
DESCRIPT	judicial inquiry ; information transfer ; EU judicial cooperation ; war crime ; crime against humanity ; legal proceedings ; criminal procedure
PUB	2003/05/14
DOC	2003/05/08
INFORCE	2003/05/14=PE

DEADL1	2005/05/08
ENDVAL	9999/99/99
LEGBASE	12002M030..... 12002M031..... 12002M034-P2PTC).....
LEGCIT	32001E0443..... 32002D0494.....
SUB	Justice and home affairs
REGISTER	19302000
PREPWORK	initiative ;OJ C 223/2002 P 19 Opinion European Parliament;given on 17.12.2002
DATES	of document: 08/05/2003 of effect: 14/05/2003; Takes effect Date pub. See Art 9 end of validity: 99/99/9999 deadline: 08/05/2005; See Art 8

2002/494/JHA: Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes

Council Decision

of 13 June 2002

setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes

(2002/494/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Title VI of the Treaty on European Union, and in particular Article 30 and Article 34(2)(c) thereof,

Having regard to the initiative of the Kingdom of the Netherlands,

Having regard to the opinion of the European Parliament(1),

Whereas:

(1) The International Criminal Tribunals for the former Yugoslavia and for Rwanda have since 1995 been investigating, prosecuting and bringing to justice violations of laws and customs of war, genocide and crimes against humanity.

(2) The Rome Statute of the International Criminal Court of 17 July 1998 affirms that the most serious crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes, must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.

(3) The Rome Statute recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such international crimes.

(4) The Rome Statute emphasises that the International Criminal Court established under it is to be complementary to national criminal jurisdictions.

(5) All Member States of the European Union have either signed or ratified the Rome Statute.

(6) The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law.

(7) Member States are being confronted with persons who were involved in such crimes and are seeking refuge within the European Union's frontiers.

(8) The successful outcome of effective investigation and prosecution of such crimes at national level depends to a high degree on close cooperation between the various authorities involved in combating them.

(9) It is essential that the relevant authorities of the States Parties to the Rome Statute, including the Member States of the European Union, cooperate closely in this connection.

(10) Close cooperation will be enhanced if the Member States make provision for direct communication between centralised, specialised contact points.

(11) Close cooperation between such contact points may provide a more complete overview of persons involved in such crimes, including the question of in which Member States they are the subject

of investigation.

(12) The Member States, in Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court(2), have expressed that the crimes within the jurisdiction of the International Criminal Court are of concern for all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof.

(13) This Decision does not affect any convention, agreement or arrangement regarding mutual assistance in criminal matters between judicial authorities,

HAS DECIDED AS FOLLOWS:

Article 1

Designation and notification of contact points

1. Each Member State shall designate a contact point for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes such as those defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July 1998.

2. Each Member State shall notify the General Secretariat of the Council in writing of its contact point within the meaning of this Decision. The General Secretariat shall ensure that this notification is passed on to the Member States, and inform the Member States of any changes in these notifications.

Article 2

Collection and exchange of information

1. Each contact point's task shall be to provide on request, in accordance with the relevant arrangements between Member States and applicable national law, any available information that may be relevant in the context of investigations into genocide, crimes against humanity and war crimes as referred to in Article 1(1), or to facilitate cooperation with the competent national authorities.

2. Within the limits of the applicable national law, contact points may exchange information without a request to that effect.

Article 3

Informing the European Parliament

The Council will inform the European Parliament of the functioning and effectiveness of the European network of contact points in the context of the annual debate held by the European Parliament pursuant to Article 39 of the Treaty.

Article 4

Implementation

Member States shall ensure that they are able to cooperate fully in accordance with the provisions of this Decision at the latest one year after this Decision takes effect.

Article 5

Taking effect

This Decision shall take effect on the date of its adoption.

Done at Luxembourg, 13 June 2002.

For the Council

The President

M. Rajoy Brey

(1) OJ C 295, 20.10.2001, p. 7.

(2) Opinion delivered on 9 April 2002 (not yet published in the Official Journal).

DOCNUM	32002D0494
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Union
TYPDOC	3 ; secondary legislation ; 2002 ; D
PUBREF	Official Journal L 167 , 26/06/2002 P. 0001 - 0002
DESCRIPT	crime against humanity ; war crime ; information network ; international cooperation ; international human rights law
PUB	2002/06/26
DOC	2002/06/13
INFORCE	2002/06/13=PE
ENDVAL	9999/99/99
LEGBASE	11997M030..... 11997M034-P2PTC).....
LEGCIT	11997M039..... 32001E0443.....

SUB	Justice and home affairs
REGISTER	19301000
PREPWORK	initiative ;OJ C 295/2001 P 7 Opinion European Parliament;given on 09/04/2002
DATES	of document: 13/06/2002 of effect: 13/06/2002; Takes effect Date of document See Art 5 end of validity: 99/99/9999

Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests - Declaration concerning the simultaneous adoption of the Convention on the protection of the European Communities' financial interests and the Protocol on the interpretation by way of preliminary rulings, by the Court of Justice of the European Communities, of that Convention - Declaration made pursuant to Article 2

ANNEX

PROTOCOL drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests

THE HIGH CONTRACTING PARTIES,

HAVE AGREED on the following provisions, which shall be annexed to the Convention:

Article 1

The Court of Justice of the European Communities shall have jurisdiction, pursuant to the conditions laid down in this Protocol, to give preliminary rulings on the interpretation of the Convention on the protection of the European Communities' financial interests and the Protocol to that Convention drawn up on 27 September 1996 (1), hereinafter referred to as 'the first Protocol`.

Article 2

1. By a declaration made at the time of the signing of this Protocol or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol to that Convention pursuant to the conditions specified in either paragraph 2 (a) or paragraph 2 (b).

2. A Member State making a declaration pursuant to paragraph 1 may specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

Article 3

1. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of that Court of Justice shall apply.

2. In accordance with the Statute of the Court of Justice of the European Communities, any Member State, whether or not it has made a declaration pursuant to Article 2, shall be entitled to submit statements of case or written observations to the Court of Justice of the European Communities in cases which arise pursuant to Article 1.

Article 4

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 depositary of the completion of their respective constitutional requirements for adopting this Protocol and communicate to him any declaration made pursuant to Article 2.

3. This Protocol shall enter into force 90 days after the notification, referred to in paragraph 2, by the Member State which, being a member of the European Union on the date of adoption by the Council of the Act drawing up this Protocol, is the last to fulfil that formality. However, it shall at the earliest enter into force at the same time as the Convention on the protection of the European Communities' financial interests.

Article 5

1. This Protocol shall be open to accession by any State that becomes a member of the European Union.

2. Instruments of accession shall be deposited with the depositary.

3. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

4. This Protocol shall enter into force with respect to any State that accedes to it 90 days after the date of deposit of its instrument of accession, or on the date of the entry into force of this Protocol if the latter has not yet come into force when the said period of 90 days expires.

Article 6

Any State that becomes a member of the European Union and accedes to the Convention on the protection of the European Communities' financial interests in accordance with Article 12 thereof shall accept the provisions of this Protocol.

Article 7

1. Amendments to this Protocol may be proposed by any Member State, being a High Contracting Party. Any proposal for an amendment shall be sent to the depositary, who shall forward it to the Council.

2. Amendments shall be established by the Council, which shall recommend that they be adopted by the Member States in accordance with their respective constitutional requirements.

3. Amendments thus established shall enter into force in accordance with the provisions of Article 4.

Article 8

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

2. The depositary shall publish in the Official Journal of the European Communities the notifications, instruments or communications concerning this Protocol.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Protocolo.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne protokol.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschriften unter dieses Protokoll gesetzt.

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In witness whereof the undersigned Plenipotentiaries have signed this Protocol.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas du présent protocole.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an bProtacal seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit protocol hebben gesteld.

Em fé do que, os plenipotenciarios abaixo assinados apuseram as suas assinaturas no final do presente protocolo.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän pöytäkirjan.

Till bevis på detta har undertecknade befullmäktigade ombud undertecknat detta fördrag.

Hecho en Bruselas, el veintinueve de noviembre de mil novecientos noventa y seis, en un unico ejemplar, en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, siendo cada uno de estos textos igualmente auténtico.

Udfærdiget i Bruxelles, den niogtyvende november nitten hundrede og seksoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk

og tysk, idet hver af disse tekster har samme gyldighed.

Geschehen zu Brüssel am neunundzwanzigsten November neunzehnhundertsechsundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist.

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Done at Brussels, this twenty-ninth day of November in the year one thousand nine hundred and ninety-six, 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.

Fait à Bruxelles, le vingt-neuf novembre mil neuf cent quatre-vingt-seize, en un exemplaire unique, en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, chaque texte faisant également foi.

Arna dhéanamh sa Bhruiséil, an naou la is fiche de Shamhain, míle naoi gcéad nocha a sé, i scríbhinn bhunaidh amhain sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san Iodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis, agus comhudaras ag gach ceann de na téacsanna sin.

Fatto a Bruxelles, il ventinove novembre millenovecentonovantasei, in unico esemplare in lingua danese, finlandese, francese, greca, inglese, irlandese, italiana, olandese, portoghese, spagnola, svedese e tedesca, ciascun testo facente ugualmente fede.

Gedaan te Brussel, de negenentwintigste november negentienhonderd zesennegentig, opgesteld in één exemplaar in de Deense, de Duitse, de Engelse, de Finse, de Griekse, de Ierse, de italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde elk der teksten gelijkelijk authentiek.

Feito em Bruxelas, em vinte e nove de Novembro de mil novecentos e noventa e seis, exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana, neerlandesa, portuguesa e sueca, fazendo igualmente fé todos os textos.

Tehty Brysselissä kahdentenakymmenentenäyhdeksäntenä päivänä marraskuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäkuusi yhtenä kappaleena englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä, ja jokainen teksti on yhtä todistusvoimainen.

Utfärdat i Bryssel den tjugonionde november nittonhundranittiosex i ett enda original på danska, engelska, finska, franska, grekiska, iriska, italienska, nederländska, portugisiska, spanska, svenska och tyska språken, vilka texter är lika giltiga.

Pour le gouvernement du royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

(1) OJ No C 313, 23. 10. 1996, p. 1.

DECLARATION concerning the simultaneous adoption of the Convention on the protection of the European Communities' financial interests and the Protocol on the interpretation by way of preliminary rulings, by the Court of Justice of the European Communities, of that Convention

The representatives of the Governments of the Member States of the European Union meeting within the Council,

At the time of the signing of the Council Act drawing up the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests,

Wishing to ensure that the said Convention is interpreted as effectively and uniformly as possible as from its entry into force,

Declare themselves willing to take appropriate steps to ensure that the national procedures for adopting the Convention on the protection of the European Communities' financial interests and the Protocol concerning its interpretation are completed simultaneously at the earliest opportunity.

En fe de lo cual los plenipotenciarios abajo firmantes firman la presente declaracion.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne erklæring.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschriften unter diese Erklärung gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ä«eùoç.

In witness whereof the undersigned Plenipotentiaries have signed this Declaration.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente déclaration.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an Dearbhu seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente dichiarazione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder deze verklaring hebben gesteld.

Em fé do que, os plenipotenciarios abaixo assinados apuseram as respectivas assinaturas no final da presente declaraçao.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän julistuksen.

Till bevis på detta har undertecknade befullmäktigade ombud undertecknat denna förklaring.

Hecho en Bruselas, el veintinueve de noviembre de mil novecientos noventa y seis.

Udfærdiget i Bruxelles, den niogtyvende november nitten hundrede og seksoghalvfems.

Geschehen zu Brüssel am neunundzwanzigsten November neunzehnhundertsechsundneunzig.

êaéíå oôéo Añoi¡eeåo, oôéo åßêïoé åíí¡a Iïåiâñßïo eéa åííéaêüoéa åíåí«íôa ¡ié.

Done at Brussels on the twenty-ninth day of November in the year one thousand nine hundred and ninety-six.

Fait à Bruxelles, le vingt-neuf novembre mil neuf cent quatre-vingt-seize.

Arna dhéanamh sa Bhruiséil, an naou la is fiche de Shamhain, míle naoi gcéad nocha a sé.

Fatto a Bruxelles, addí ventinove novembre millenovecentonovantasei.

Gedaan te Brussel, de negenentwintigste november negentienhonderd zesennegentig.

Feito em Bruxelas, em vinte e nove de Novembro de mil novecentos e noventa e seis.

Tehty Brysselissä kahdentenakymmenentenäyhdeksäntenä päivänä marraskuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäkuusi.

Som skedde i Bryssel den tjugonionde november nittonhundranittiosex.

Pour le gouvernement du royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

Declaration made pursuant to Article 2

At the time of the signing of this Protocol, the following declared that they accepted the jurisdiction of the Court of Justice of the European Communities in accordance with the procedures laid down in Article 2:

The French Republic, Ireland and the Portuguese Republic in accordance with the procedures laid down in Article 2 (2) (a);

The Federal Republic of Germany, the Hellenic Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, in accordance with the procedures laid down in Article 2 (2) (b).

DECLARATION

The Federal Republic of Germany, the Hellenic Republic, the Kingdom of the Netherlands and the Republic of Austria, reserve the right to make provision in their national law to the effect that, where a question relating to the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto is raised in a case pending before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice.

For the Kingdom of Denmark and the Kingdom of Spain, the declaration(s) will be made at the time of adoption.

DOCNUM	41997A0520(01)
AUTHOR	Representatives of the Governments of the Member States
FORM	Protocol
TREATY	European Union
TYPDOC	4 ; supplementary legal acts ; 1997 ; A
PUBREF	Official Journal C 151 , 20/05/1997 P. 0002 - 0014
DESCRIPT	EC agreement ; European Community ; financial policy ; jurisdiction of the courts ; EC Court of Justice
PUB	1997/05/20
DOC	1996/11/29
INFORCE	2002/10/17=EV

ENDVAL	9999/99/99
SIGNED	1996/11/29=Brussels
LEGBASE	11992MK03.....
LEGCIT	11957E/PRO/CJ/00..... 31991X0704(02)..... 41996A1023(01).....
SUBSPREP	Relation..... 31997F0520(01).....
SUB	Justice and home affairs
REGISTER	19300000
AUTLANG	The official languages ; German ; Danish ; Spanish ; English ; French ; Italian ; Dutch ; Finnish ; Greek ; Swedish ; Portuguese ; Other than Community language ; Gaelic
DATES	of document: 29/11/1996 of effect: 17/10/2002; Entry into force See Art 11 of signature: 29/11/1996; Brussels end of validity: 99/99/9999

**Judgment of the Court
of 14 January 1997
The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England.
Reference for a preliminary ruling: Court of Appeal (England and Wales) - United Kingdom.
Foreign and security policy - Common commercial policy - Blocking of funds - Sanctions against the Republics of Serbia and Montenegro.
Case C-124/95.**

1 Common commercial policy - National measures of foreign and security policy - Restrictions on exports - Obligation to respect Community provisions

(EC Treaty, Art. 113)

2 Common commercial policy - Common export rules - Sanctions against Serbia and Montenegro - Prohibition of exports to those non-member countries - Exception for medical products - National rules placing restrictions on payments for exports duly effected from other Member States - Not permissible - Justification - Legal certainty - None

(EC Treaty, Art. 113; Council Regulations No 2603/69, Arts 1 and 11, and No 1432/92)

3 Common commercial policy - National measures infringing Community rules - Justification based on the existence of agreements concluded prior to the EEC Treaty - Conditions - Matter for determination by the national court

(EC Treaty, Arts 113 and 234)

4 The powers retained by the Member States in the field of foreign and security policy must be exercised in a manner consistent with Community law and, in particular, with the provisions adopted by the Community in the sphere of the common commercial policy provided for by Article 113 of the Treaty. They cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security policy objectives.

5 The common commercial policy provided for by Article 113 of the Treaty, as implemented by Regulation No 1432/92, prohibiting trade between the Community and the Republics of Serbia and Montenegro, and by Regulation No 2603/69, establishing common rules for exports, precludes Member State A from adopting, for the purpose of ensuring effective application of United Nations Security Council Resolution 757 (1992), measures prohibiting Serbian or Montenegrin funds deposited in its territory from being released in order to pay for goods exported by a national of Member State B from Member State B to Serbia or Montenegro on the ground that Member State A allows payment for such exports to be made only if the exports take place from its own territory and they have been authorized by its own competent authorities pursuant to Regulation No 1432/92, when the goods in question have been classified by the United Nations Sanctions Committee as products intended for strictly medical purposes and the competent authorities of Member State B have issued export authorization for them in accordance with Regulation No 1432/92.

Article 1 of Regulation No 2603/69 implements the principle of freedom to export at Community level and must therefore be interpreted as prohibiting not only quantitative restrictions on exports of goods from the Community to third countries but also measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead to an export prohibition. Since the measures in issue constitute a restriction on the payment of the price of the goods, which is an essential element of an export transaction, they are equivalent to a quantitative restriction on exports.

In addition, since effective application of the sanctions can be ensured by other Member States' authorization procedures, as provided for by Regulation No 1432/92, recourse to Article 11 of

Regulation No 2603/69, which authorizes the adoption or application by the Member States of quantitative restrictions on exports for reasons inter alia of public security, cannot be justified.

6 National measures which prove to be contrary to the common commercial policy provided for in Article 113 of the Treaty and to the Community regulations implementing that policy are justified under Article 234 of the Treaty only if they are necessary to ensure that the Member State concerned performs its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State.

In proceedings for a preliminary ruling it is not for the Court but for the national court to determine which obligations are imposed by an earlier agreement on the Member State concerned and to ascertain their ambit so as to determine the extent to which they thwart application of the provisions of Community law in question.

In Case C-124/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Court of Appeal (England and Wales) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

H.M. Treasury

and

The Bank of England

ex parte Centro-Com Srl

on the interpretation of Articles 113 and 234 of the EC Treaty and Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro (OJ 1992 L 151, p. 4),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida and J.L. Murray (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Centro-Com Srl, by R. Luzzatto, of the Milan Bar,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and S. Richards and R. Thompson, Barristers,

- the Belgian Government, by J. Devadder, Director of Administration in the Legal Department of the Ministry of Foreign Affairs, acting as Agent,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by I.M. Braguglia, Avvocato dello Stato, acting as Agent,

- the Netherlands Government, by J.G. Lammers, acting as Agent,

- the Commission of the European Communities, by P. Gilsdorf, Principal Legal Adviser, and C.

Bury, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Centro-Com Srl, represented by Riccardo Luzzatto, the United Kingdom Government, represented by John E. Collins, and Stephen Richards and Rhodri Thompson, the Netherlands Government, represented by Marc Fierstra, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by Peter Gilsdorf and Claire Bury, at the hearing on 25 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1996,

gives the following

Judgment

Costs

62 The costs incurred by the United Kingdom, Belgian, Italian and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal (England and Wales), by order of 27 May 1994, hereby rules:

1. The common commercial policy provided for in Article 113 of the EEC Treaty, as implemented by Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro and by Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports, precludes Member State A from adopting, for the purpose of ensuring effective application of United Nations Security Council Resolution 757 (1992) measures prohibiting Serbian or Montenegrin funds located in its territory from being released in order to pay for goods exported by a national of Member State B from that latter State to Serbia or Montenegro on the ground that Member State A allows payment for such exports to be made only if the exports take place from its own territory and they have been authorized by its own competent authorities pursuant to Regulation No 1432/92, when the goods in question have been classified by the United Nations Sanctions Committee as products intended for strictly medical purposes and the competent authorities of Member State B have issued export authorizations for them in accordance with Regulation No 1432/92.

2. National measures which prove to be contrary to the common commercial policy provided for in Article 113 of the Treaty and to the Community regulations implementing that policy are justified under Article 234 of the EEC Treaty only if they are necessary to ensure that the Member State concerned performs its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State.

1 By order of 27 May 1994, received at the Court on 11 April 1995, the Civil Division of the Court of Appeal (England and Wales) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 113 and 234 of the Treaty and Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro (OJ 1992 L 151, p. 4, hereinafter `the Sanctions Regulation').

2 The two questions have been raised in an action brought by Centro-Com Srl (`Centro-Com'), a company governed by Italian law, against a change of policy and four decisions of the Bank of England, acting on behalf of the Treasury, by which Barclays Bank, London, was refused authorization to transfer, from a Yugoslav account to Centro-Com, sums needed to pay for medical products exported from Italy to Montenegro.

3 On 30 May 1992, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 757 (1992), imposing sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro).

4 Under Paragraph 4(c) of Resolution 757 (1992), all States are to prevent the sale or supply by their nationals or from their territories of any commodities or products, whether or not originating in their territories, to any person or body in the Federal Republic of Yugoslavia (Serbia and Montenegro), or to any person or body for the purposes of any business carried on in or operated from that republic. However, the prohibition does not cover supplies intended strictly for medical purposes and foodstuffs, such supplies being required to be notified to the Committee established pursuant to Resolution 724 (1991).

5 Likewise, under Paragraph 5 of Resolution 757 (1992), all States are to prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to any commercial, industrial or public utility undertaking any funds or any other financial or economic resources, and from remitting funds to persons or bodies in the Federal Republic of Yugoslavia (Serbia and Montenegro), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs.

6 Within the Community, the Council gave effect to Resolution 757 (1992) by adopting the Sanctions Regulation.

7 Article 1(b) of the Sanctions Regulation prohibited as from 31 May 1992 the export to the Republics of Serbia and Montenegro of all commodities and products originating in or coming from the Community.

8 Article 2(a) of the Sanctions Regulation provides that that prohibition is not to apply, however, to `the export to the Republics of Serbia and Montenegro of commodities and products intended for strictly medical purposes and foodstuffs notified to the Committee established pursuant to Resolution 724 (1991) of the United Nations Security Council' (`the Sanctions Committee').

9 Article 3 further provides that: `Exports to the Republics of Serbia and Montenegro of commodities and products for strictly medical purposes ... as well as foodstuffs shall be subject to a prior export authorization to be issued by the competent authorities of the Member States.'

10 In accordance with Article 1 of the United Nations Act 1946, the United Kingdom Government adopted on 4 June 1992 the Serbia and Montenegro (United Nations Sanctions) Order 1992 (`the Order'), which prohibits any person from supplying or delivering any goods to a person connected with Serbia or Montenegro, except under the authority of a licence granted by the Secretary of State.

11 Article 10 of that measure provides that, except with permission granted by or on behalf of the Treasury, no person is to make any payment or part with any gold, securities or investments where such payment or transfer is an action which is likely to make available to any person connected with Serbia or Montenegro any funds or other financial or economic resources, or to remit or transfer funds to or for the benefit of any such person.

12 By a notice of 8 June 1992, the Bank of England made it clear, on behalf of the Treasury, that it would consider applications for permission to debit Serbian and Montenegrin accounts where the payments were made for charitable or humanitarian purposes. Its policy was in particular to

authorize the debiting of Serbian and Montenegrin accounts in payment for exports made for medical and humanitarian purposes to Serbia or Montenegro and approved by the United Nations, whether those exports were made from the United Kingdom or from another country.

13 After obtaining the approval of the United Nations Sanctions Committee and the prior authorization of the Italian authorities required by Article 3 of the Sanctions Regulation, Centro-Com exported from Italy, between 15 October 1992 and 6 January 1993, 15 consignments of pharmaceutical goods and blood-testing equipment to two wholesalers in Montenegro.

14 Since the payments for those exports were to be debited to a bank account held by the National Bank of Yugoslavia with Barclays Bank, the latter applied to the Bank of England, by separate letter for each consignment, for permission to debit that account. By 23 February 1993 the Bank of England had approved 11 of the 15 applications, and Barclays Bank had paid the relevant sums to Centro-Com.

15 Following reports of abuse of the authorization procedure established by the Sanctions Committee for the export of goods to Serbia and Montenegro, such as mis-description of goods and unreliability of the documents issued, or apparently issued, by that Committee, the Treasury decided to change its policy. Henceforth, payment from Serbian and Montenegrin funds held in the United Kingdom for exports of goods exempt from the sanctions, such as medical products, was to be permitted only where those exports were made from the United Kingdom.

16 As is clear from the order for reference, one of the main reasons for the new policy was to enable the United Kingdom authorities to exercise effective control over goods exported to Serbia and Montenegro so as to ensure that the goods exported actually matched their description and that no debiting of accounts held with British banks was authorized for payments for non-medical or non-humanitarian purposes.

17 In consequence, by letter of 25 February 1993 the Bank of England informed Barclays Bank that in future it would not give favourable consideration to applications for permission to debit Serbian and Montenegrin accounts held with British banks in payment for goods exported to Serbia or Montenegro from any country other than the United Kingdom. In four separate decisions the Bank of England therefore refused Barclays Bank's outstanding applications.

18 The Court of Appeal is uncertain whether that change of policy and the four contested decisions are compatible with Article 113 of the Treaty and the Sanctions Regulation. It has therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

`1. Is it compatible with the common commercial policy of the Community and, in particular, Article 113 of the EC Treaty and Council Regulation (EEC) No 1432/92 prohibiting trade between the Community and the Republics of Serbia and Montenegro (OJ 1992 L 151 of 3 June 1992, p. 4) for Member State A to adopt national measures which prohibit the release of funds located in Member State A but belonging to a person in Serbia or Montenegro in circumstances where:

(1) release of the funds is sought to pay a national of Member State B for goods exported by him from Member State B to Serbia or Montenegro;

(2) (a) the goods have been formally approved as intended strictly for medical purposes by the United Nations Sanctions Committee pursuant to UN Security Council Resolution 757;

(b) they have been exported pursuant to a prior export authorization issued by the competent authorities of Member State B pursuant to Regulation 1432/92;

(3) the national measures permit the release of funds in payment for the export of such goods from Member State A itself where the export authorization referred to at paragraph 2(b) above has been issued by the competent authorities of Member State A; and

(4) Member State A has decided that the adoption of such national measures is necessary or expedient for enabling UN Security Council Resolution 757 to be effectively applied?

2. Is the answer to Question 1 affected by the provisions of Article 234 of the EC Treaty?'

The first question

19 By this question, the national court asks in substance whether the common commercial policy provided for in Article 113 of the EEC Treaty, as implemented by the Sanctions Regulation, precludes Member State A from adopting, for the purpose of ensuring effective application of United Nations Security Council Resolution 757 (1992), measures prohibiting Serbian or Montenegrin funds located in its territory from being released in order to pay for goods exported by a national of Member State B from that latter State to Serbia or Montenegro on the ground that Member State A allows payment for such exports to be made only if the exports take place from its own territory and they have been authorized by its own competent authorities pursuant to the Sanctions Regulation, when the goods in question have been classified by the United Nations Sanctions Committee as products intended for strictly medical purposes and the competent authorities of Member State B have issued export authorizations for them in accordance with the Sanctions Regulation.

20 That question raises two problems concerning the interpretation of rules applicable in the sphere of the common commercial policy.

21 The first problem concerns the relationship between measures of foreign and security policy, such as those intended to ensure effective application of Resolution 757 (1992), on the one hand, and the common commercial policy, on the other.

22 The second problem concerns the scope of the common commercial policy and the relevant measures adopted pursuant to Article 113 of the Treaty.

The relationship between measures of foreign and security policy and the common commercial policy

23 The United Kingdom contends that the national measures at issue in the main proceedings were taken by virtue of its national competence in the field of foreign and security policy and that performance of its obligations under the Charter and under resolutions of the United Nations falls within that competence. The validity of those measures cannot be affected by the exclusive competence of the Community in relation to the common commercial policy or by the Sanctions Regulation, which does no more than implement at Community level the exercise of Member States' national competence in the field of foreign and security policy.

24 The Member States have indeed retained their competence in the field of foreign and security policy. At the material time, their cooperation in this field was governed by inter alia Title III of the Single European Act.

25 None the less, the powers retained by the Member States must be exercised in a manner consistent with Community law (see Joined Cases 6/69 and 11/69 Commission v France [1969] ECR 523, paragraph 17; Case 57/86 Greece v Commission [1988] ECR 2855, paragraph 9; Case 127/87 Commission v Greece [1988] ECR 3333, paragraph 7, and Case C-221/89 Factortame and Others [1991] ECR I-3905, paragraph 14).

26 Similarly, the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives (see Case C-70/94 Werner v Germany [1995] ECR I-3189, paragraph 10).

27 Consequently, while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions

adopted by the Community in the field of the common commercial policy provided for by Article 113 of the Treaty.

28 It was indeed in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to have recourse to a Community measure, which became the Sanctions Regulation, based on Article 113 of the Treaty.

29 As the preamble to the Sanctions Regulation shows, that regulation ensued from a decision of the Community and its Member States which was taken within the framework of political cooperation and which marked their willingness to have recourse to a Community instrument in order to implement in the Community certain aspects of the sanctions imposed on the Republics of Serbia and Montenegro by the United Nations Security Council.

30 It follows from the foregoing that, even where measures such as those in issue in the main proceedings have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy.

The scope of the common commercial policy and the relevant acts adopted pursuant to Article 113 of the Treaty

31 The United Kingdom Government contends that national measures such as those at issue in the main proceedings, which impose restrictions on the release of funds, are not on any view measures of commercial policy, so that they are not covered by the common commercial policy.

32 In this connection it is to be observed that, even if such measures do not constitute measures of commercial policy, they may nevertheless be contrary to the common commercial policy, as implemented in the Community, if and insofar as they contravene Community legislation adopted in pursuance of that policy.

33 Consequently, it is necessary to consider whether measures such as those at issue in the main proceedings are compatible, not only with the Sanctions Regulation, but also with Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590, `the Export Regulation').

34 The Sanctions Regulation contains no express provision concerning payments for exports which it authorizes.

35 In so far as Article 1(b) thereof prohibits exports to Serbia and Montenegro, the Sanctions Regulation derogates from the provisions of the Export Regulation.

36 That derogation does not, however, extend to exports to Serbia and Montenegro of products for strictly medical purposes which satisfy the conditions laid down in Articles 2(a) and 3 of the Sanctions Regulation. It follows that those exports remain subject to the common system provided for by the Export Regulation.

37 Article 1 of the Export Regulation provides: `The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation.'

38 Article 11 of that regulation provides for such an exception. It provides: `Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.'

39 The United Kingdom doubts that restrictions on the release of funds held at a bank can constitute quantitative restrictions on exports to third countries within the meaning of Article 1 of the Export Regulation.

40 It should be noted that Article 1 of the Export Regulation implements the principle of freedom to export at Community level and must therefore be interpreted as covering measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead to an export prohibition (see Case C-70/94 Werner, cited above, paragraph 22, and Case C-83/94 Leifer and Others [1995] ECR I-3231, paragraph 23).

41 National measures adopted by a Member State preventing the release of Serbian or Montenegrin funds as payment for goods that can legally be exported to Serbia or Montenegro unless those goods are exported from its own territory constitute a restriction on the payment of the price of the goods which, like the supply of goods, is an essential element of an export transaction.

42 Such measures adopted by a Member State, which restrict the principle of freedom to export at Community level, are equivalent to a quantitative restriction since their application precludes the making of payments in consideration of the supply of goods dispatched from other Member States and thus prevents such exports.

43 The United Kingdom also considers that the requirement that the goods concerned should be exported from its territory is justified on grounds of public security. Having regard to the difficulties involved in applying the system of authorizations issued by the Sanctions Committee, that requirement is necessary in order to ensure that the sanctions imposed by United Nations Security Council Resolution 757 (1992) are applied effectively, since it allows the United Kingdom authorities themselves to check the nature of goods exported to Serbia and Montenegro.

44 It is to be remembered in this regard that the concept of public security within the meaning of Article 11 of the Export Regulation covers both a Member State's internal security and its external security and that, consequently, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the external security of a Member State (see Case C-70/94 Werner, cited above, paragraphs 25 and 27, and Case C-83/94 Leifer and Others, cited above, paragraphs 26 and 28).

45 A measure intended to apply sanctions imposed by a resolution of the United Nations Security Council in order to achieve a peaceful solution to the situation in Bosnia-Herzegovina, which forms a threat to international peace and security, therefore falls within the exception provided for by Article 11 of the Export Regulation.

46 However, a Member State's recourse to Article 11 of the Export Regulation ceases to be justified if Community rules provide for the necessary measures to ensure protection of the interests enumerated in that article (see Case 72/83 Campus Oil and Others v Minister for Industry and Energy [1984] ECR 2727, paragraph 27, which concerned recourse to Article 36 of the EEC Treaty).

47 The Sanctions Regulation, which is designed to implement, uniformly throughout the Community, certain aspects of the sanctions imposed by the United Nations Security Council, lays down the conditions on which exports of medical products to the Republics of Serbia and Montenegro are to be authorized: namely, that those exports must be notified to the Sanctions Committee and export authorization must be issued by the competent authorities of the Member States.

48 In those circumstances, national measures adopted by a Member State precluding the release of Serbian or Montenegrin funds in exchange for exports to those republics unless that Member State's authorities have previously checked the nature of the products in question and issued export authorization cannot be justified, since effective application of the sanctions can be ensured by

other Member States' authorization procedures, as provided for in the Sanctions Regulation, in particular the procedure of the Member State of exportation.

49 In that respect, the Member States must place trust in each other as far as concerns the checks made by the competent authorities of the Member State from which the products in question are dispatched (see Case 46/76 Bauhuis v Netherlands [1977] ECR 5, paragraph 22, and Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 19).

50 In the present case, there is nothing to suggest that the system provided for by Article 3 of the Sanctions Regulation, whereby the Member States issue export authorizations, had not functioned properly.

51 Finally, it should be borne in mind that, since Article 11 of the Export Regulation forms an exception to the principle of freedom to export laid down in Article 1 of the Export Regulation, it must, on any view, be interpreted in a way which does not extend its effects beyond what is necessary for the protection of the interests which it is intended to guarantee (see Case C-83/94 Leifer and Others, cited above, paragraph 33).

52 In the circumstances of this case, a Member State may secure the protection of the interests involved by measures less restrictive of the right to export than a requirement that all goods should be exported from its territory. So, where a Member State has particular doubts about the accuracy of descriptions of goods appearing in an export authorization issued by the competent authorities of another Member State, it may, in particular, before giving authorization for accounts held in its territory to be debited, have resort to the collaboration established by Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1).

53 In view of the foregoing considerations, the answer to be given must be that the common commercial policy provided for in Article 113 of the Treaty, as implemented by the Sanctions Regulation and the Export Regulation, precludes Member State A from adopting, for the purpose of ensuring effective application of United Nations Security Council Resolution 757 (1992), measures prohibiting Serbian or Montenegrin funds located in its territory from being released in order to pay for goods exported by a national of Member State B from that latter State to Serbia or Montenegro on the ground that Member State A allows payment for such exports to be made only if the exports take place from its own territory and they have been authorized by its own competent authorities pursuant to the Sanctions Regulation, when the goods in question have been classified by the United Nations Sanctions Committee as products intended for strictly medical purposes and the competent authorities of Member State B have issued export authorizations for them in accordance with the Sanctions Regulation.

The second question

54 By this question the national court asks in substance whether national measures which prove to be contrary to the common commercial policy provided for in Article 113 of the Treaty and to the Community regulations implementing that policy are nevertheless justified under Article 234 of the EEC Treaty, since by those measures the Member State concerned sought to comply with its obligations under an agreement concluded with other Member States and non-member countries prior to entry into force of the EEC Treaty or accession by that Member State.

55 The first paragraph of Article 234 of the Treaty provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other, are not to be affected by the provisions of the Treaty.

56 According to settled case-law, the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member States under an earlier agreement and to comply with its corresponding obligations (see Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563, paragraph 27).

57 Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by non-member States which are parties to it (see Case C-324/93 Evans Medical and Macfarlan Smith, cited above, paragraph 28).

58 However, in proceedings for a preliminary ruling, it is not for this Court but for the national court to determine which obligations are imposed by an earlier agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of the provisions of Community law in question (see Case C-324/93 Evans Medical and Macfarlan Smith, cited above, paragraph 29).

59 So, the national court must examine whether, in the circumstances of the case before it, in which exports were approved by the United Nations Sanctions Committee and authorized by the competent authorities in the country of export, both the change of policy and the four decisions refusing to allow funds to be released are necessary in order to ensure that the Member State concerned peforms its obligations under the Charter of the United Nations and United Nations Security Council Resolution 757 (1992).

60 It should, in any event, be remembered that, when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure (see Case C-324/93 Evans Medical and Macfarlan Smith, cited above, paragraph 32).

61 The answer to this question must therefore be that national measures which prove to be contrary to the common commercial policy provided for in Article 113 of the Treaty and to the Community regulations implementing that policy are justified under Article 234 of the Treaty only if they are necessary to ensure that the Member State concerned performs its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State.

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Kapteyn

DATES of document: 14/01/1997
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Order of the Court (Fourth Chamber)
of 31 March 2004
Nicoleta Maria Georgescu.
Reference for a preliminary ruling: Amtsgericht Löbau - Germany.
Regulation (EC) No 539/2001 - Countries for which the application of the abolition of the visa requirement is suspended until a further decision of the Council - Extent of the suspension - Lack of jurisdiction of the Court.
Case C-51/03.

In Case C-51/03,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Löbau (Germany) for a preliminary ruling in the criminal proceedings before that court against

Nicoleta Maria Georgescu

on the interpretation of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1)

THE COURT (Fourth Chamber)

composed of M. J. N. Cunha Rodrigues (Rapporteur), President of the Chamber, M. J.-P. Puissochet and F. Macken, Judges

Advocate General: C. Stix Hackl,

Registrar:R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1. By order of 21 October 2002, received at the Court on 10 February 2003, the Amtsgericht Löbau (Local Court, Löbau) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

2. That question arose in criminal proceedings against Ms Georgescu, a Romanian national, for breach of German legislation on the entry and stay of foreigners.

Legal background

Community legislation

3. As its title indicates, the purpose of Regulation No 539/2001, which entered into force on 10 April 2001, is to establish the list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States (Article 1(1) and Annex I) and the list of those whose nationals are exempt from that requirement for stays of no more than three months in all (Article 1(2) and Annex II).

4. Romania is included in the list in Annex II, but an asterisk indicates that the legal position of Romanian nationals has certain particular features and refers to Article 8(2) of the regulation, which reads as follows:

However, for nationals of the country in Annex II marked with an asterisk, the date of entry into force of Article 1(2) shall be decided on subsequently by the Council, acting in accordance with

Article 67(3) of the Treaty, on the basis of the report referred to in the following subparagraph.

To this end, the Commission shall request the country concerned to indicate which undertakings it is prepared to enter into on illegal immigration and illegal residence, including the repatriation of persons from that country who are illegally resident, and report thereon to the Council. The Commission shall submit to the Council a first report, accompanied by any useful recommendations, no later than 30 June 2001.

Pending adoption by the Council of the act embodying the abovementioned decision, the requirement laid down in Article 1(1) shall be applicable to nationals of that country. Articles 2 to 6 of this Regulation shall apply in full.'

5. It is apparent from the second recital in the preamble to Council Regulation (EC) No 2414/2001 of 7 December 2001 amending Regulation No 539/2001 (OJ 2001 L 327, p. 1) that, in its report of 29 June 2001, the Commission noted the undeniable progress made by Romania as regards illegal immigration from its country, its visa policy and the controls at its borders, and also set out the commitments entered into by Romania in this field. The Commission concluded its report by recommending to the Council that Romanian nationals should be exempted from the visa requirement as from 1 January 2002.

6. The third recital in the preamble to Regulation No 2414/2001 states that [i]n order to apply the visa exemption to Romanian nationals, the provisions of Regulation (EC) No 539/2001 which provisionally maintain the visa requirement should be deleted'.

7. Regulation No 2414/2001 thus provides inter alia for, first, the deletion in Annex II to Regulation No 539/2001 of the asterisk against Romania and the footnote referring to Article 8(2) of the latter regulation and, second, the replacement of Article 8 of Regulation No 539/2001 by a new provision under which that regulation is to enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

8. Since Regulation No 2414/2001 was published on 12 December 2001, it entered into force on 1 January 2002, in accordance with Article 2, so that from that date Romanian nationals have been exempt from the visa requirement for stays of no more than three months in all.

National legislation

9. Under the first sentence of Paragraph 3(1) of the Ausländergesetz (Law on Foreigners, the AuslG'), foreigners require a permission to stay in order to enter and stay in German territory.

10. Under Paragraph 58(1)(1) of the AuslG:

Entry into German territory by a foreigner is prohibited if

1. he is not in possession of a required permission to stay...'.

11. Paragraph 92(1)(1) and (6) of the AuslG states:

A person is to be punished by imprisonment for up to one year or by a fine if he

1. contrary to the first sentence of Paragraph 3(1), stays in German territory without a permission to stay and does not enjoy temporary leave (Duldung)...

...

6. has entered German territory contrary to Paragraph 58(1)(1) or (2) ...'.

12. Under Paragraph 2(3) and (4) of the Strafgesetzbuch (German Criminal Code):

3. If the law which is in force on completion of the act is amended before the decision, the more

lenient law is to be applied.

4. A law which is to be in force for a certain period only is to be applied to acts which have been committed during its validity even if it has ceased to be in force. This does not apply if a law provides otherwise.'

13. Paragraph 407 of the Strafprozessordnung (German Criminal Procedure Code) provides:

1. In proceedings before the single judge in criminal cases and in proceedings within the jurisdiction of the local criminal court sitting with lay assessors, in the case of a less serious offence, the criminal consequences of the act may, on written application by the Public Prosecutor's Office, be determined without a hearing by a penal order in writing. The Public Prosecutor's Office shall make that application if, following the results of the investigations, it considers that a hearing is not necessary. The application must be for specified legal consequences. It starts the public prosecution.

2. Only the following legal consequences of the act may be determined, singly or in combination, by a penal order:

1. a fine, caution with reservation of a penalty, prohibition of driving, forfeiture, confiscation, destruction, rendering unusable, publication of the conviction and a fine imposed on a legal person or association,

2. withdrawal of a driving licence, where the ban is not longer than two years, and

3. dispensation from a penalty.

If the accused is represented by a defence lawyer, imprisonment of up to one year may be imposed, if its enforcement is suspended.

3. Prior hearing of the accused by the court (Paragraph 33(3)) is not required.'

14. Under Article 408(2) and (3) of the Criminal Procedure Code:

2. If the judge does not consider that there is sufficient suspicion against the accused, he shall refuse to make a penal order. That decision is equivalent to a decision refusing to open the main proceedings (Paragraphs 204, 210(2) and 211).

3. The judge must comply with the application by the Public Prosecutor's Office if there are no objections to making the penal order. He shall order a hearing, if he has objections to deciding without one, or if he wishes to differ from the legal assessment in the application for the penal order or to determine a legal consequence other than that applied for and the Public Prosecutor's Office maintains its application...'

15. Under Paragraph 210(2) of the code:

1. An immediate appeal may be brought by the Public Prosecutor's Office against a decision refusing to open the main proceedings or ordering, contrary to the application by the Public Prosecutor's Office, a transfer to a lower court.'

16. Paragraph 410 of the code provides:

1. The accused may within two weeks from notification, in writing or by making a statement recorded by the court office, lodge an objection to a penal order with the court which has made the order. Paragraphs 297 to 300 and 302(1), first sentence, and 302(2) apply accordingly.

2. The objection may be limited to specific complaints.

3. Where no objection has been lodged against a penal order in due time, it is equivalent to a

judgment with binding effect.'

17. Paragraph 411 of the code provides:

1. If the objection is lodged late or is otherwise inadmissible, it shall be rejected by decision without a hearing; an immediate appeal may be brought against the decision. Otherwise a hearing date shall be fixed.

2. The accused may be represented at the hearing by a defence lawyer with authority in writing. Paragraph 420 applies.

3. The accusation and the objection may be withdrawn before delivery of the judgment at first instance. Paragraph 303 applies by analogy. If the penal order has been made in accordance with Paragraph 408a, the accusation cannot be withdrawn.

4. When giving judgment the court is not bound by the decision in the penal order, in so far as an objection has been lodged.'

The main proceedings and the question referred for a preliminary ruling

18. It is apparent from the order for reference that by application of 1 March 2002, received by the national court on 6 March 2002, the Staatsanwaltschaft Görlitz (Public Prosecutor's Office, Görlitz (Germany)) asked for a penal order (Strafbefehl) to be made against Ms Georgescu.

19. The Görlitz Public Prosecutor's Office accuses her of having entered and stayed in German territory on 15 November 2001, contrary to the first sentence of Paragraph 3(1), Paragraph 55(1), Paragraph 58(1) and Paragraph 92(1)(1) and (6) of the AuslG and Paragraph 52 of the Criminal Code. Since the illegal entry and stay constituted several offences in the same act, the prosecutor's office asked for Ms Georgescu to be sentenced to a fine of 40 daily rates of EUR 9 each.

20. According to the national court, it is clear that, at the date of her entry into German territory, Ms Georgescu was subject to the requirement of a visa for entering and staying in Germany, in accordance also with the provisions of Regulation No 539/2001. It says that whether the conduct at issue is still punishable as an offence depends on the answer to the question referred to the Court for a preliminary ruling.

21. Paragraph 2(3) of the Criminal Code lays down the principle of most favourable treatment, under which an offender is not punished or is punished more leniently if the criminal law has in the meantime been repealed or amended in favour of the offender. In the case of framework provisions such as those of Paragraph 92(1)(1) and (6) of the AuslG, the provisions which supplement them are regarded as part of the law. That is the case with the Community legislation exempting nationals of certain third countries from the requirement of permission to stay, so that, at the date of the judgment, the defendant's conduct is in general no longer punishable, in accordance with the principle of retroactivity of the most lenient criminal law.

22. The national court adds that Paragraph 2(4) of the Criminal Code, however, makes an exception to that principle in the case of laws which are limited in time. Such a law applies where the legislature, by indicating a time-limit or in some other way, discloses the intent that the legislation it enacts is to apply only for a specified period. In the case of Regulation No 539/2001, the exception might be constituted by the fact that Romania was already included in the list of States whose nationals benefit from the exemption, with application of the exemption merely being postponed.

23. The national court observes, however, that in an order of 10 February 2002 the Amtsgericht Görlitz (Local Court, Görlitz) held that Regulation No 539/2001 does not disclose a sufficiently certain intent on the part of the legislature to subject Romanian nationals to the visa requirement for a specified period only.

24. In the context of an appeal against that order, the Görlitz Public Prosecutor's Office submitted for its part that Article 8(2) of Regulation No 539/2001 expresses the legislature's intent to subject Romanian nationals to the visa requirement for a defined period only, and that, by including Romania in the list of privileged countries, the Council decided in favour of exempting Romanian nationals forthwith from the visa requirement. That view, it said, is borne out by the preamble to Regulation No 2414/2001, from which it is apparent that the provision exempting Romanian nationals from the visa requirement was already adopted by Regulation No 539/2001 and only its applicability was temporarily delayed for a specific short period of time.

25. Finally, in an order of 9 April 2002 the Oberlandesgericht Dresden (Higher Regional Court, Dresden (Germany)) for its part held that it was clear that Regulations No 539/2001 and No 2414/2001 did not intend to alter the legal situation as regards offences committed before the latter regulation was adopted.

26. The national court observes that, if the Court were to answer the question referred in the affirmative, the defendant in the main proceedings would still be criminally liable, contrary to what would be the case if the Court answered the question in the negative.

27. In those circumstances, the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

Must Article 1(2) in conjunction with Article 8(2) of and Annex II to [Regulation No 539/2001] be interpreted as meaning that as from the entry into force of that regulation Romanian nationals now only for a specified time require a visa for entry and stay in Member States of the European Union for a period not exceeding three months?'

Jurisdiction of the Court

28. Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.

29. Article 68(1) EC states: Article 234 shall apply to this title [Title IV, Visas, asylum, immigration and other policies related to free movement of persons] under the following circumstances and conditions: where a question on the interpretation... of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.'

30. Regulation No 539/2001, as indeed also Regulation No 2414/2001, was adopted on the basis of Article 62(2)(b)(i) EC, which appears in Part III, Title IV of the EC Treaty. In those circumstances, only a national court against whose decisions there is no judicial remedy in national law may request the Court to rule on a point of the interpretation of those regulations.

31. In the present case, it is common ground that the Amtsgericht Löbau is acting in summary criminal proceedings on an application by the Public Prosecutor's Office which may lead either to the making of a penal order, which may be the subject of an objection by the defendant initiating ordinary criminal proceedings at first instance, or to a refusal by the court to make the order applied for by the Public Prosecutor's Office, which may be the subject of an immediate appeal by that office.

32. Consequently, it is clear that the Court has no jurisdiction to rule on the question put by the Amtsgericht Löbau, in that the decision in the main proceedings will be one against which there is a judicial remedy under national law.

33. In those circumstances, the Court must apply Article 92(1) of the Rules of Procedure and find of its own motion that it lacks jurisdiction.

Costs

34. The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

The Court of Justice of the European Communities manifestly has no jurisdiction to answer the question referred by the Amtsgericht Löbau (Germany) by order of 21 October 2002.

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