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of : Working Party on Cooperation in Criminal Matters

on : 20 April 2001

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No. prev. doc. : 7974/01 COPEN 14 COMIX 266

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

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The Working Party on Cooperation in Criminal Matters examined the above proposal at its meeting on 20 April 2001 on the basis of document 7974/01 COPEN 14 COMIX 266, with particular reference to Articles 3, 5, 5a, 5x, 5b and 5c of the proposal.

The revised text of the draft Protocol is set out in Annex I.

Following the meeting of the Article 36 Committee on 10 and 11 April 2001, the Presidency has circulated a revised version of Article 2 in document 7989/01 COPEN 15 COMIX 267 for the purpose of further discussions in the Article 36 Committee.

Amendments are underlined, regarding the Articles examined at the meeting as compared to document 7974/01 COPEN 14 COMIX 266, and regarding the other parts of the text as compared with document 6060/01 COPEN 4 COMIX 105. The comments made by delegations are set out in footnotes to the text.

Certain points which it has been agreed to include, or is proposed to be included, in the explanatory report to the Protocol are set out in Annex II.

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

The United Kingdom delegation has maintained its parliamentary scrutiny reservation on the draft.

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**DRAFT Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union** <sup>1</sup>

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

REFERRING to the Council Act of .....,

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

BEARING IN MIND the recommendations made by the experts when presenting the mutual evaluation reports based on Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime <sup>2</sup>,

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

HAVE AGREED ON THE FOLLOWING PROVISIONS, which shall be annexed to, and form an integral part of, the Convention on mutual assistance in criminal matters between the Member States of the European Union of 29 May 2000,<sup>3</sup> hereinafter called the “2000 Convention”:

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<sup>1</sup> The text has been changed from a draft Convention to a draft Protocol to the 2000 Convention. This change is subject to a scrutiny reservation by the French delegation.

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

<sup>3</sup> OJ C 197, 12.7.2000, page 1.

*ARTICLE 1*

*Relationship with other Conventions*

(...)<sup>1</sup>

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

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

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

(...)

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

*Traceability of the proceeds of crime*

(...)

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<sup>1</sup> Article 1 has earlier been deleted as a consequence of the change from a draft Convention to a draft Protocol.

<sup>2</sup> Following the meeting of the Article 36 Committee on 10 and 11 April 2001, the Presidency has circulated a revised version of Article 2 in document 7989/01 COPEN 15 COMIX 267 for the purpose of further discussions in the Article 36 Committee.

<sup>3</sup> The text in Article 3 has been moved to Article 6b.

<sup>4</sup> Scrutiny reservation by the French delegation on the deletion of Article 4.

## ARTICLE 5<sup>1</sup>

### *Request for lists of bank accounts*

1. Each Member State shall, under the conditions set out in this Article, take the necessary measures to ensure that, at the request of another Member State, a list is provided as quickly as possible, of the bank accounts of whatever nature held by a natural or legal person that is the subject of criminal proceedings as well as accounts of which that person is the true economic beneficiary.<sup>2</sup>

The list shall also, if requested and to the extent the information can be provided within a reasonable time, include accounts for which the person that is the subject of the proceedings has powers of attorney.<sup>3</sup>

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

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<sup>1</sup> General scrutiny reservations on Article 5 by the United Kingdom, Irish, German and Austrian delegations.

<sup>2</sup> Most delegations could accept the text and could also agree to the proposed text for the explanatory report, (see under Article 5, general, in Annex II). The Irish and United Kingdom delegations entered a reservation and thought that paragraph 1 should only oblige the Member States to set up a mechanism and should not oblige the Member States to provide a list of bank accounts in concrete cases. These delegations proposed an alternative text that followed the wording of Article 4 of the 1990 Money Laundering Convention. Such a text could read as follows: “Each Member State shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order, upon request by another Member State, that a list is provided...”.

<sup>3</sup> The Italian delegation has proposed the following text to be added to paragraph 1: “The list of the bank accounts of a natural or legal person who is not suspected or accused can also be required, provided that one or more than one of these bank accounts were at the disposal of the persons indicated in paragraphs 1 and 2 and are relevant to the offence at the basis of the request for judicial assistance. Without consent of the requested State the results of the ascertainment shall only be used to carry out the investigations.” The text has not yet been discussed in the Working Party.

[3. The obligation set out in this Article only applies if the investigation concerns an offence punishable in the requesting State by a penalty involving deprivation of liberty or a detention order of a maximum period of at least 2 years.]<sup>1</sup>

4. The authority making the request shall in the request:

- state why it considers the requested information relevant for the purpose of the investigation into the offence;<sup>2</sup>
- state on what grounds it presumes that banks in the requested Member State hold the accounts;
- include any information available which may facilitate the execution of the request.

5. Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.<sup>3</sup>

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<sup>1</sup> This text was supported by nine delegations (B/DK/ESP/F/FIN/GR/I/P/S). The other six delegations could not accept a 2 years penalty threshold. The German and Luxembourg delegations wanted the scope limited to serious crimes or a list of crimes. The Netherlands delegation could accept such a scope but preferred a 4 years penalty threshold. The Austrian delegation wanted to restrict the scope and could accept a list of crimes or a 4 years penalty threshold. The United Kingdom and Irish delegations thought that the obligation should only apply to requests concerning investigations into whether and by how much the person under investigation has benefited from criminal activities. The French, Danish, Belgium, Portuguese, Finnish, Austrian, Spanish and United Kingdom delegations could as a compromise solution consider a list of crime, possibly for a transitional period (Portugal).

<sup>2</sup> The Luxembourg delegation entered a scrutiny reservation and preferred the following text: "The requesting Member State shall state in the request how it considers that the requested information is linked to the offence under investigation." The Austrian delegation entered a scrutiny reservation.

<sup>3</sup> Most delegations could accept the text and could also agree to the proposed text for the explanatory report, (see Under Article 5, general, in Annex II). The Irish and United Kingdom delegations preferred the former text with the following addition: "The decision to provide the list shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that Member State." The Italian delegation entered a reservation and thought that the exact conditions the Member States may apply should be specified in the text. The French and Spanish delegations shared this view. In this context the French delegation, supported by the Belgium and Portuguese delegations, proposed that it should be made clear that the Member States may not as a ground for refusal invoke the principle of proportionality.

ARTICLE 5a<sup>1 2</sup>

*Requests for information on banking transactions*

1. On request by the requesting State, the requested State shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.<sup>3 4 5</sup>
2. The obligation set out in this Article only applies to the extent the information is in the possession of the bank keeping the account.
3. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purposes of the investigations into the offence.<sup>6</sup>
4. Member States may make the execution of a request according to this Article dependent on the same conditions as they apply in respect of requests for search and seizure.<sup>7</sup>

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<sup>1</sup> General scrutiny reservations on Article 5a by the United Kingdom, Irish and Austrian delegations. The United Kingdom delegation thought this provision only reflected already existing practice and that the Article therefore was unnecessary.

<sup>2</sup> The Austrian, Luxembourg and Netherlands delegations maintained their reservations and wanted to limit the scope of this Article to serious crimes/certain types of crimes or investigations.

<sup>3</sup> See proposed text for the explanatory report, under Article 5a in Annex II.

<sup>4</sup> Scrutiny reservations on the reference to sending and recipient accounts by the Austrian, Luxembourg and Netherlands delegations.

<sup>5</sup> The Irish and United Kingdom delegations proposed the same alternative text for paragraph 1 as proposed in footnote to Article 5, paragraph 1.

<sup>6</sup> The Luxembourg delegation entered a scrutiny reservation and preferred the same text as proposed in the footnote to Article 5, paragraph 4. The Austrian delegation entered a scrutiny reservation.

<sup>7</sup> The Italian delegation entered a reservation and thought that the exact conditions the Member States may apply should be specified in the text. The Irish delegation also referred to its comments on Article 5(5) (*cf.* footnote to Article 5, paragraph 5).

*Article 5x*<sup>1</sup>

*Requests for monitoring of banking transactions*

1. On request by the requesting State, the requested State shall monitor, during a specified period, the banking operations carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.<sup>2</sup>
2. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purposes of the investigations into the offence.<sup>3</sup>
3. The practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and requested Member States. The requested Member State may make the execution of the request subject to any condition which would have to be observed in a similar domestic case.

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

*Confidentiality*

Each Member State shall take the necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the requesting State in accordance with articles 5, 5a or 5x or that an investigation is being carried out.

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<sup>1</sup> General scrutiny reservations on Article 5x by the Irish, German, Austrian, Netherlands, Portuguese, Finnish, Danish and United Kingdom delegations.

<sup>2</sup> The Irish and United Kingdom delegations proposed the same alternative text for paragraph 1 as proposed in the footnote to Article 5, paragraph 1.

<sup>3</sup> The Luxembourg delegation entered a scrutiny reservation and preferred the same text as proposed in the footnote to Article 5, paragraph 4. The Austrian delegation entered a scrutiny reservation.

<sup>4</sup> Scrutiny reservation on Article 5b by the Austrian and German delegations.



*ARTICLE 6*  
*Obligation to inform*

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

*Article 6a*  
*Additional requests for mutual assistance*

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

*ARTICLE 6b*<sup>1</sup>  
*Banking secrecy*

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

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<sup>1</sup> This Article was formerly Article 3.

<sup>2</sup> Scrutiny reservation on Article 6b by the Austrian and United Kingdom delegations.  
Reservation by the Luxembourg delegation which thought that the Article should not only cover banking secrecy but also secrecy applying to certain other professions.

*ARTICLE 7*<sup>1</sup>

*Fiscal offences*

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

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

3. Article 50 of the Schengen Convention is hereby repealed.<sup>2</sup>

*ARTICLE 7a*<sup>3</sup>

*Political offences*

A request for mutual assistance may not be refused solely on the grounds that the request concerns an offence which the requested Member State considers a political offence, an offence connected with a political offence or an offence inspired by political motives.

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<sup>1</sup> The Luxembourg delegation entered a reservation and thought that there was a lack of consistency between Article 7 and Article 8.

<sup>2</sup> The Austrian delegation entered a scrutiny reservation.

<sup>3</sup> Following the discussions on Article 8(1), this new Article was introduced at the meeting on 8 and 9 March. Most delegations entered scrutiny reservations.

ARTICLE 8<sup>1</sup>

Forwarding refusals to the Council

(...)<sup>2</sup>

(...) If a request is refused on the basis of Article (2)(b) of the 1959 Convention or Article 22 (2)(b) of the Benelux Treaty, and the requesting Member State maintains its request, and no solution can be found, the reasoned decision to refuse the request shall be forwarded to the Council for information by the requested Member State, for possible consideration (...).

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

ARTICLE 9

Multidisciplinary structures<sup>4</sup>

(...)

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<sup>1</sup> The text was changed substantially during the meeting on 8 and 9 March. Most delegations entered a scrutiny reservation. However, most delegations thought they would be able to accept the text. The Luxembourg delegation entered a reservation and thought that there was a lack of consistency between Article 7 and 7a of the draft the one hand and Article 8 of the draft on the other.

<sup>2</sup> The Finnish delegation has proposed the following text: “Member States may not refuse a request for mutual assistance on the basis of Article 2(b) of the 1959 Convention, except where the execution of the request would be contrary to the principles of fundamental human rights of the subject of investigations or otherwise contrary to the public policy (*ordre public*).” The text has not yet been discussed.

<sup>3</sup> The French, Spanish, Italian and Belgium delegations entered a reservation and called for more details on the procedure in case of disagreement (cf. Article 8 in COPEN 4).

<sup>4</sup> Subject to a scrutiny reservation by the French delegation, it was agreed to delete Article 9.

*ARTICLE 10*

*Reservations*

No reservations may be entered in respect of this Protocol [other than those for which it makes express provision].<sup>1</sup>

*ARTICLE 11*

*Entry into force*

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.
2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Protocol .
3. This Protocol shall enter into force in the eight Member States concerned ninety days after the notification referred to in paragraph 2 by that Member State of the European Union at the time of adoption by the Council of the Act establishing this Protocol which is the eighth to complete that formality. If, however, the 2000 Convention has not entered into force on that date, this Protocol shall enter into force on the date on which the 2000 Convention enters into force.
4. Any notification by a Member State subsequent to the entry into force of this Protocol under paragraph 3 shall have the effect that, ninety days after such notification, this Protocol shall enter into force as between that Member State and those Member States for which this Protocol has already entered into force.
5. Before the entry into force of this Protocol pursuant to paragraph 3, any Member State may, when giving the notification referred to in paragraph 2 or at any time thereafter, declare that it will apply this Protocol in its relations with Member States which have made the same declaration. Such declarations shall take effect ninety days after the date of deposit thereof.

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<sup>1</sup> The text in square brackets has been inserted in the light of Article 2. It has been worded as in the 2000 Convention.

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

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

## *ARTICLE 12*<sup>2</sup>

### *Accession of new Member States*

1. This Protocol shall be open to accession by any State which becomes a member of the European Union and which accedes to the 2000 Convention.

2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Protocol shall enter into force with respect to any State which accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not already entered into force at the time of expiry of the said period of ninety days.

5. Where this Protocol is not yet in force at the time of the deposit of their instrument of accession, Article 11(5) shall apply to acceding Member States.

6. Notwithstanding paragraphs 4 and 5, the entry into force or application of this Protocol with respect to the acceding State shall not take effect before the entry into force or application of the 2000 Convention with respect to this State.

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

<sup>2</sup> The revised paragraph 1 and the new paragraph 6 of Article 12 are proposed by the Presidency on the basis of advice from the Legal Service.

## *ARTICLE 13*

### *Position of Iceland and Norway*

Articles 2 and 7 shall constitute measures amending or based upon the provisions referred to in Annex 1 to the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis.

## *ARTICLE 13a*

### *Entry into force for Iceland and Norway*

1. Without prejudice to Article 8 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis (the "Association Agreement"), the provisions referred to in Article 13 shall enter into force for Iceland and Norway 90 days after the receipt by the Council and the Commission of the information pursuant to Article 8(2) of the Association Agreement upon fulfilment of their constitutional requirements, in their mutual relations with any Member State for which this Protocol has already entered into force pursuant to Article 11(3) or (4).
2. Any entry into force of this Protocol for a Member State after the date of entry into force of the provisions referred to in Article 13 for Iceland and Norway, shall render these provisions also applicable in the mutual relations between that Member State and Iceland and Norway.
3. The provisions referred to in Article 13 shall in any event not become binding on Iceland and Norway before the entry into force of the provisions referred to in Article 2 (1) of the 2000 Convention with respect to these two States.
4. Without prejudice to paragraphs 1, 2 and 3 above, the provisions referred to in Article 13 shall enter into force for Iceland and Norway not later than on the date of entry into force of this Protocol for the fifteenth State, being a member of the European Union at the time of the adoption by the Council of the Act establishing this Protocol.

*ARTICLE 14*

*Depositary*

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

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

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

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

For the Government of ...

For the Government of ...

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**P.M. for the Explanatory Report**

...

**Article 5**

**general**

[The Presidency proposes that the following shall be explained in the explanatory report:] This Article obliges the Member States to provide a list of bank accounts on request in concrete cases, and thereby indirectly obliges the Member States to set up a mechanism whereby they can provide such lists. It does not oblige the Member States to set up a centralised register of bank accounts but leaves to each Member State to decide how to comply with its obligations. With regard to formalities and procedure, Article 3 of the 1959 Convention and Article 4 of the 2000 Convention apply. The basic obligation to afford assistance is laid down in Article 1 of the 1959 Convention. The scope of the obligation is limited by paragraphs 2 and 3 of Article 5 of the draft Protocol. Paragraph 5 implies that Member States may equate requests under Article 5 with requests for search and seizure and thereby apply the same conditions that it applies 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 they may apply these requirements in relation to requests for search and seizure. The right for Member States to make the execution dependent on the condition that the request is consistent with its law must be interpreted in the light of the obligation in paragraphs 1 - 3. The possibilities for a Member State to refuse assistance on the ground that the request is not consistent with its law are therefore limited.<sup>1</sup>

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<sup>1</sup> The Legal Service of the Council did not exclude this interpretation and was invited to provide a written contribution concerning this interpretation.



#### Paragraph 1

It will be explained in the explanatory report that the reference to “accounts of which that person is the true economic beneficiary” 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(5) 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 and any amendment of that Article.

#### Paragraph 2

The explanatory report will specify that the expression “to the extent that the information can be provided within a reasonable time” implies an obligation to make an effort in terms of resources which is proportional to the importance and urgency of the case.

#### Paragraph 4

The explanatory report shall contain explanations on the practical application of Article 5. Having in mind the amount of work that the execution of requests for information may involve, it could in particular be specified that the requesting Member State should try to limit its request to certain types of bank accounts only and/or accounts kept by certain banks only.

#### **Article 5a**

[ The Presidency proposes that the following shall be explained in the explanatory report:] Since this instrument builds on the 1959 Convention and the 2000 Convention this Article applies in respect of the same proceedings as those referred to in Article 1 of the 1959 Convention and Article 3 of the 2000 Convention.

## **Article 5x**

### Paragraph 3

The explanatory report shall give some examples of what is meant by practical details, e.g. if real-time monitoring is needed or if it can take place on a day-by-day or on an weekly basis.

## **Article 6b**

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

The explanatory report will explain that Article 3 of the 1959 Convention applies. This allows Member States to apply formalities and procedures provided for in its domestic law (cf. Article 18, paragraph 7, of the 1990 Money Laundering Convention).

## **Article 7**

Article 7(1) and (2) reproduce the content of Articles 1 and 2 of the 1978 Additional Protocol to the 1959 Convention.

## **Article 7a**

This Article together with Article 7 on fiscal offences would, as between the Member States, replace Article 2(a) of the 1959 Convention.