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Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism [*]

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I – Introduction

1. Money laundering is not a new phenomenon – criminals have always tried to hide their bounty – but it is taking new forms. The proceeds of crime, particularly cash, must be laundered for reinvestment. This involves a series of complicated financial operations (deposit, withdrawals, bank transfers, etc.) which ultimately results in criminal money becoming "clean" and acceptable for legitimate business purposes.

2. The problem of money laundering, however, has grown dramatically in recent years, to keep pace with the magnitude of the funds involved and invested. Several billions of Euros are available for laundering every year. This laundered criminal money is recycled through normal businesses and thus may penetrate legitimate markets and corrupt entire economies.

3. Misuse of the financial system is not, however, limited to money laundering schemes designed to preserve and maximise proceeds from crimes which have been committed. As we now know, to our cost, the financial system is misused in similar ways to fund terrorist atrocities. In the wake of the terrible attacks on the United States of America on September 11, 2001, the international community rapidly recognised the important similarities between the processes involved in money laundering and in the financing of terrorism. The phenomenon of the financing of terrorism is also not new. Terrorist groups have always sought funds – in various ways – to support their actions. Traditionally, such activities were also illegal, eg. bank robberies, weapons and drug trafficking, etc. However, in recent years, a new phenomenon has grown: the carrying out of legitimate activities to finance terrorist actions. In this case, the phenomenon is the opposite of money laundering: the "clean" money collected through charities, legitimate commercial activities and so on, can be used to finance terrorist actions.

4. The Council of Europe was well ahead of its time in 1980 when it adopted the first international instrument against money laundering (Recommendation No. R(80)10 on measures against the transfer and the safekeeping of funds of criminal origin). In 1990, the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS 141 – hereinafter referred to as "the 1990 Convention") was approved by the Committee of Ministers and opened for signature in November of that year. It entered into force in September 1993. While the initial pace of ratification was relatively slow, recent years have witnessed a significant upsurge of activity. As of December 2004, 47 States had become parties to it, including one non-European State, ie. Australia.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

5. One of the major purposes of the 1990 Convention is to facilitate international cooperation in this area in a manner which complements existing Council of Europe instruments. The Select Committee of Experts which elaborated the text of the 1990 Convention was of the view that this goal could only be accomplished if steps were taken to minimise the significant differences of approach which then existed in the domestic legal systems of member States. Consequently Chapter II of the 1990 Convention addresses measures to be taken at the national level while the focus of Chapter III is on issues of international cooperation. As is noted in paragraph 10 of the Explanatory Report to the 1990 Convention: "the Convention seeks to provide a complete set of rules, covering all the stages of the procedure from the first investigations to the imposition and enforcement of confiscation sentences and to allow for flexible but effective mechanisms of international cooperation to the widest extent possible in order to deprive criminals of the instruments and fruits of their illegal activities". This Convention has left the general structure of the 1990 Convention untouched.

6. In the years since its conclusion, the 1990 Convention has come to be regarded as a key point of reference in anti-money laundering policy discussions, political declarations, and practical programmes of activity both in Europe and beyond.

7. Notwithstanding the recognition which the 1990 Convention has achieved there have been calls over the years for a process to be put in place to review its adequacy in the light of present-day requirements. In this regard it should be recalled that at the time of its elaboration the Select Committee of Experts which drafted the 1990 Convention was not in a position to draw upon a settled and developed body of domestic law and practice. International cooperation in this sphere was relatively unknown. Indeed, save for the limited scope provided by the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances, the area was a new one for the vast majority of members of the international community.

8. In the period of over ten years which has elapsed since the text of the 1990 Convention was adopted, valuable experience has been gained. The mutual evaluation procedures of the FATF and, more recently, the similar work undertaken by the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), have provided valuable insights into the problems which have arisen both in the domestic implementation of anti-money laundering measures, and in international cooperation. The remits of these two evaluative bodies have also today been extended also to cover assessment of the effectiveness of measures taken in jurisdictions to counter terrorist financing.

9. Further debate on this issue has also been stimulated by developments in other *fora*. Of relevance in this context was the adoption by the European Union, on 26 June 2001, of the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. This includes, *inter alia*, significant movement towards a harmonised implementation of certain critical provisions of the 1990 Convention concerning action at the domestic level (such as Articles 3 and 7) as well as embodying agreement on practices designed to enhance the effectiveness of international cooperation.

10. It should also be noted that the review and revision of other key reference texts in the fight against money laundering, which were adopted in the early and mid 1990s have been completed. In relation to the latter, it will be recalled that, following an extensive "stocktaking exercise", the FATF amended its package of 40 Recommendations in 2003. The previous 40 FATF Recommendations earlier had been supplemented by the Special Recommendations of the FATF on the Financing of Terrorism.

11. The European Union Council Directive of June 1991 on prevention of the use of the financial system for the purpose of money laundering was also substantially amended in December 2001. The Commission presented a proposal for a Third Money Laundering Directive and a Regulation on control of cash entering or leaving the Community. These proposals are in the process of being discussed in the European Parliament and the Council of the EU.

12. Other important initiatives that have taken place in recent years include the development and expansion of the Egmont Group of Financial Intelligence Units, the adoption of the United Nations Conventions against Transnational Organised Crime and Corruption and the Convention on the Suppression of the Financing of Terrorism as well as the emergence of international pressure through the imposition of counter-measures on "non-cooperative countries and territories", which were not in conformity with international standards.

13. Discussion within the Council of Europe started as early as 1998 on the advisability of drafting an updating Protocol to the 1990 Convention and on the scope of such an exercise should it be undertaken. Given differences of view among member States, a questionnaire-based enquiry was conducted on the subject in 2000. It emerged from this enquiry that a clear majority of States were in support of an early opening of negotiations on a protocol. The Reflection Group on the advisability of drawing up an additional protocol to the Convention on laundering, search, seizure and confiscation of the proceeds from crime (PC-S-ML) submitted its report to the CDPC at its 51st plenary session on 17-21 June 2002 and made specific suggestions as to the possible content of such a treaty.

14. The European Committee on crime problems (CDPC) entrusted at the end of 2003, the Committee of experts on the revision of the Convention on laundering, search, seizure and confiscation of the proceeds from crime (PC-RM) to draw up such a protocol.

15. These terms of reference were revised in March 2004 and read as follows:

> "On the basis of the final activity report on the advisability of drawing up an additional protocol to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) (doc. CDPC(2002)5), in particular, its Chapter III, Section 3 (recommendations) and bearing in mind recent developments and existing international instruments related to money laundering matters in the Council of Europe as well as in other international fora (e.g. Financial Action Task Force on Money Laundering, European Union, Egmont Group, United Nations), the Committee shall draw up an additional protocol to Convention ETS No. 141, in order to update and complement it as necessary.
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> Within the context of the negotiations of the draft Protocol, consideration should be given to the introduction of provisions concerning the prevention of money laundering and the financing of terrorism:
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> > a. as regards preventive measures, consideration should be given, for instance, to introducing a context-setting provision or provisions on measures of prevention to facilitate subsequent coverage of the treatment of the powers and duties of FIUs, particularly those dealing with the duty to control (identification and verification of the identity of clients, identification of beneficial owners, suspicious transactions' reports), the definition of FIUs and the principles of co-operation between them, as well as transparency of legal entities. Such provision or provisions, if introduced, should make appropriate reference to existing international standards and, particularly, a reference to the FATF recommendations on money laundering and terrorist financing either in the Preamble to the Protocol or as a self-standing provision;

b. as regards financing of terrorism, consideration should be given to introducing one or several provisions ensuring the application of the provisions of the 1990 Money Laundering Convention to the fight against the financing of terrorism and which, while giving added value, are in full conformity with internationally accepted standards, including the UN International Convention on the suppression of the financing of terrorism;

c. a mechanism should also be found to ensure that the Convention, as revised by the Protocol, could be adapted accordingly, should the internationally accepted standards referred to therein be changed."

16. The PC-RM developed a text which both adds to and modifies provisions of the 1990 Convention. Owing to the extent of the modifications envisaged and the enlargement of the scope of the treaty to include issues concerning the financing of terrorism, the drafters felt that this text should be a (self-standing) Convention, rather then a Protocol to 1990 Convention.

17. The PC-RM held 7 meetings from December 2003 to February 2005 and finalized this Convention, taking into account also Opinion N° 254(2005) of the Parliamentary Assembly of 28 January 2005. The CDPC approved this Convention on 11 March 2005 and transmitted it to the Committee of Ministers for adoption. The Committee of Ministers adopted this Convention on 3 May 2005.

18. From a methodological point of view, this Explanatory Report in places repeats, though sometimes with necessary amendments to avoid confusion as to which text (the 1990 Convention or this Convention) reference is being made, the paragraphs of the Explanatory Report of the 1990 Convention when the provisions are the same in this Convention.

II – General considerations

19. There is at present no single dedicated international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The existing legally binding international instruments provide for a range of specific measures which focus on law enforcement and international cooperation (e.g. criminalisation of money laundering, confiscation, provisional measures, international cooperation), but the preventative aspects are mostly left unregulated by international law or, at best, are addressed in somewhat general terms.

20. The 1990 Council of Europe Convention did not address a certain number of issues which, though closely related to its subject matter, were not considered as directly relevant to its original objective (e.g. measures related to the prevention of money laundering). Other issues have arisen since the adoption of the 1990 Convention or have grown substantially in importance (e.g. Financial Intelligence Units, asset-sharing and recovery).

21. Furthermore, the 1990 Convention needed to be modernised and updated: since the adoption of the Convention, money laundering techniques and anti-money laundering strategies have significantly evolved. For example, laundering techniques increasingly target the non-bank sector and use professional intermediaries to invest criminal proceeds in the legitimate economy. Many jurisdictions have set up Financial Intelligence Units to process suspicious or unusual transaction reports and thus trigger more laundering investigations. Those changes needed to be followed up by reassessing the Convention's focus, adjusting some of its requirements and supplementing it with additional provisions. In addition, some of these changes have already been or are currently being included in standards set by other international *fora* (EU, UN, FATF), which the new Convention cannot ignore. Rather, the text of the new Convention must be brought into line with these new developments to ensure mutual consistency with these standards and to make possible harmonised domestic responses in an appropriate legal format.

22. The 1990 Convention also needed to be comprehensive and user-friendly so as to enable practitioners to use a single instrument, both domestically and internationally, instead of a series of texts that regulate various aspects of money laundering-prevention and control, and related international co-operation. This would encourage its use; help practitioners to better understand and use the Convention's provisions; and also help to minimise fragmentation in domestic anti-laundering policies.

23. Owing to the efficiency shown in practice of anti-money laundering techniques to combat also the financing of terrorism, the 1990 Convention also needed to be expanded to be used in the fight against terrorism and its financing, while taking into account existing international instruments (eg. the 1999 UN Convention on the suppression of the financing of terrorism). The events of 11 September 2001 forced countries around the globe to take quick action to freeze terrorist funds and it appears that many of them had serious difficulties in coping with this requirement: some were unable to rapidly trace property or bank accounts; others had to stretch the limits of legality to respond to requests or provide the evidence requested. The world has realised that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is a key to successful preventive and repressive measures, and, ultimately, for disrupting their activities. Practice shows that Financial Intelligence Units often obtain access to such information more readily than other agencies and by exchanging such information with foreign counterparts they can speed up procedures of restraint, seizure or confiscation targeting terrorist or criminal assets.

24. The main reasons for including provisions concerning the financing of terrorism in this Convention are the following:

a. the clear link between the financing of terrorism and money laundering is internationally recognised, particularly in the context of the mandate of the FATF and its 40 + 9 Recommendations, the UN, the EU, the World Bank, the IMF and the mandate of MONEYVAL;

b. the tools which have proved effective to counter money laundering should be equally effective in combating the financing of terrorism;

c. the current co-operation between FIUs already covers, in practice, questions relating to the financing of terrorism;

d. as this Convention includes provisions on the role and functioning of FIUs, it would have been difficult to de-couple questions relating to the financing of terrorism;

e. information exchanged by FIUs is now used and may also be used in the future for the purposes of fighting the financing of terrorism.

25. This Convention therefore has a larger scope as compared to the 1990 Convention, as it covers laundering and confiscation, as the 1990 Convention, but also financing of terrorism. As to the latter, the Convention first stresses the necessity for States to take immediate steps to ratify and implement fully the 1999 UN Convention on the suppression of the financing of terrorism, thereby recognizing its fundamental value in defining an international legal framework to cut terrorists off from their funds. The reference to the UN Convention aims at stressing the crucial importance of this treaty in the global fight against the financing of terrorism. It recognises that the 1999 UN International Convention for the Suppression of the Financing of Terrorism provides, for the first time, an agreed global framework within which the international community can collaborate more effectively in seeking to fight the financing of terrorism.

26. Finally, the 1990 Convention needed to be improved in the parts concerning international co-operation, so as to ensure a corrective and extensive application by the Parties and in order to take into account the development of new investigative techniques adopted in other international *fora*, as those foreseen in the framework of the EU Protocol of 16 October 2001 to the Convention on mutual legal assistance in criminal matters.

27. This Convention therefore seeks to achieve all these objectives and will be complemented by a mechanism to ensure the proper implementation by Parties of its provisions.

28. The drafters of this Convention, like the Parliamentary Assembly in its Opinion 254(2005), underlined that the fight against money laundering and the financing of terrorism, should not have the effect of reducing the guarantees contained in the Convention on Human Rights and its Protocols.

III – Commentary to the Articles of the Convention

Chapter I – Use of terms

Article 1 – Use of terms [(1)]

29. Article 1 defines certain terms which form the basis of the mechanism of international co-operation provided for in the 1990 Convention and in this Convention and the scope of application of Chapter II. Following practice from other conventions elaborated within the framework of the Council of Europe, the number of terms requiring a definition has been limited to what is absolutely necessary for the correct application of the 1990 Convention and this Convention. Several of the definitions are drafted in a broad manner in order to ensure that particular features of national legislation are not excluded from the application of the 1990 Convention and this Convention.

30. It was the opinion of the drafters of the 1990 Convention that the terminology used in it did not, as a rule, refer to a specific legal system or a particular law. Rather they intended to create an autonomous terminology which, in the light of the national laws involved, should be so interpreted as to ensure the most efficient and faithful application of the 1990 Convention. If, as an example, a foreign confiscation order referred to a "forfeiture" instead of a "confiscation", this should not prevent the authorities of the requested state from applying the 1990 Convention and this Convention. Likewise, if the "freezing" of a bank account has been requested, the requested state should not refuse to co-operate merely on the ground that the national law only provided for "seizure" in the case under question. The Committee that drafted the 1990 Convention recognised that national procedural laws could sometimes differ widely but the end result would often be the same despite formal differences. In addition, the Committee that drafted the 1990 Convention thought it wise that all definitions should, as far as possible, be in harmony with the aforementioned 1988 United Nations anti-drug trafficking Convention. This was justified since a number of cases that were to be dealt with under the 1990 Convention would concern drug offences.This has not been questioned by the drafters of the present Convention, as the main definitions adopted in the framework of the 1988 UN Convention against drug trafficking have been used in subsequent instruments (eg. UN Conventions against transnational organised crime and corruption).

(1) See Paragraphs 19-23 of the Explanatory Report to Convention 141.

31. The definition of "proceeds" was intended to be as broad as possible since the experts agreed that it was important to deprive the offender of any economic advantage from his criminal activity. By adopting a broad definition, this ultimate goal would be made possible. Also, the experts drafting the 1990 Convention felt that by adopting this approach they could avoid a discussion as to whether, for example, substitutes or indirectly derived proceeds would in principle be subject to international co-operation. If a Party could not, in a particular case, accept international co-operation because of the remote relationship between the confiscated property and the offence that Party could instead invoke Article 18, paragraph 4.b, of the 1990 Convention (now Article 28, paragraph 4.b) which provides for the possibility of refusing co-operation in such a case. This approach has also been confirmed by the drafters of this Convention. They have however considered it appropriate to deal specifically with substitution and derived proceeds in Article 5 of this Convention.

32. The committee drafting the 1990 Convention discussed whether the words "economic advantage" implied that the cost of making the profit (for instance the purchase price of narcotic drugs) should be deducted from the gross profit. It discovered that national legislation varied considerably on this point; there were even differences within the same legal system depending on the categories of offences. The experts also considered that differences in national legislation or legal practice in this respect between Parties should not be invoked as an obstacle to international co-operation. As regards drug offences, the experts agreed that the value of drugs initially purchased would always be subsumed within the definition of proceeds.

33. The committee drafting the 1990 Convention deliberately chose to speak of "criminal offences" to make it clear that the scope of application of the Convention is limited to criminal activity. It was therefore not necessary to define the term "offences".

34. The wording of the definition of "proceeds" does not rule out the inclusion of property and assets that may have been transferred to third parties. The definition of “proceeds” has been broadened so as to include any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. This definition is drawn from the definition of proceeds to be found in the UN Convention against transnational organised crime.

35. In the broad definition of property, the drafters of the 1990 Convention deleted the initially proposed terms "tangible or intangible" since it was found that those terms could be subsumed under the definition. They also considered adding the term "assets" but decided against it for the same reasons.

36. In respect of "instrumentalities", the experts drafting the 1990 Convention discussed whether instrumentalities that were used to facilitate the commission of an offence or intended to be used to commit an offence were covered by the definition. In respect of instrumentalities that were used in the preparatory acts leading to the commission of an offence or to hinder the detection of an offence, the experts agreed that such questions should be resolved according to the national law of the requested Party while taking account of the differences in national law and the need for efficient international co-operation. The term "instrumentalities" should, for the purposes of international co-operation, be interpreted as broadly as possible. Property which facilitates the commission of the offence, for instance, could in some cases be included in the definition.

37. The drafters of the 1990 Convention discussed whether it was necessary to include "objects of offences" under the scope of application of the Convention but decided against it. The terms "proceeds" and "instrumentalities" are sufficiently broadly defined to include objects of offences whenever necessary. The broad definition of "proceeds" could include in the scope of application, for instance, stolen property such as works of art or trading in endangered species [(1)]. However, it should be noted that, for the avoidance of any doubt on the issue as to whether laundered property, can be confiscated, upon conviction for an autonomous money laundering offence, as an instrumentality or as proceeds (given that in some legal systems it may be considered the object of such an offence), the drafters of this Convention added the words “laundered property”, in Article 3, paragraph 1 of this Convention

(see below for further explanation). However, it should be noted that “laundered properties” and “proceeds” are not necessarily identical in all legal systems and, to that extent, both may be subject to confiscation.

38. The committee drafting the 1990 Convention discussed whether it was necessary to define "confiscation" or "confiscation order" under the 1990 Convention. Such a definition exists in the 1988 United Nations Convention where "confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. The European Convention on the International Validity of Criminal Judgments defines a "European criminal judgment" as any final decision delivered by a criminal court of a contracting state as a result of criminal proceedings and a "sanction" as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment or in an *ordonnance pénale*.

39. The definition of "confiscation" was drafted in order to make it clear that, on the one hand, the 1990 Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the 1990 Convention and this Convention. For instance, the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term "court" has the same meaning as in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention.

40. The use of the word "confiscation" includes also, where applicable, "forfeiture".

41. Predicate offence" refers to the offence which is at the origin of a laundering offence, that is, the offence which generated the proceeds. The expression is found in Article 9, paragraphs 1, 2 and 4.

42. Article 1, sub-paragraph f, constitutes the first new part of this Convention, ie the definition of “Financial Intelligence Units (hereinafter referred to as “ FIUs”). At the beginning of the 1990s, States began to set up anti-money laundering systems placing specific suspicious or unusual transaction reporting duties on persons and/or institutions that are deemed vulnerable to money laundering. Since then, the experts noted that States have developed various types of disclosure receiving units and that various international institutions (such as the FATF, the EU, the UN, the Council of Europe, etc.) have encouraged States to create such units. Since the 1990 Convention was adopted, the Egmont Group, which brings together financial intelligence units which meet its requirements in a world wide network, came into being. The definition contained in the Convention has been drawn from the Egmont Group definition of FIUs, which itself developed the first internationally agreed definition of FIUs.

43. The definition of FIUs is linked to the requirement to set up an FIU contained in Article 12, paragraph 1. This provision requires Parties to set up one agency per territory or autonomous jurisdiction recognized by international boundaries, to serve as a disclosure receiving agency and as a contact point for information exchanges. It must operate in a jurisdiction that is covered by the law of that territory. The use of the phrase “central, national agency” carries with it no political designation or recognition of any kind. In federal systems, the use of the phrase “central, national agency” implies that only one government agency may be considered an FIU. Even if federal systems have multiple subdivisions, only one centralized agency serves as a contact point for information exchange.

44. The term “responsible for” indicates that the legal framework which establishes the FIU authorizes at a minimum the functions outlined in the definition.

45. The term “receiving” means that FIUs serve as a central reception point for receiving financial disclosures concerning money laundering and the financing of terrorism. This takes into account FIUs that have more than one office and FIUs that receive disclosures from different domestic agencies. This concept also distinguishes FIUs from law enforcement agencies with a general (overall) law enforcement mission.

46. The terms “(and, as permitted, requesting)” means that some, but not all, FIUs have the ability to seek additional information from financial institutions and other non financial institutions beyond the information in the disclosures which the FIUs receive from reporting entities. For this reason the language is in parenthesis.

47. The term “analyzing” involves an initial evaluation of the relevance of disclosures received from reporting agencies. Analysis of information reported to FIUs may occur at different stages and may take different forms. The analysis of disclosure leads to a decision as to which reports will be sent to law enforcement for investigation. In these cases, the distinction is thus drawn between the analytical stage and the investigative stage.

48. The term “disseminating” means that FIUs at a minimum must be able to share information from financial disclosures and the result of their analysis regarding money laundering and related crimes, as determined by national legislation, and the financing of terrorism, firstly with domestic authorities and, secondly, with other FIUs.

49. “Disclosure of financial information” refers to the materials that FIUs use and share with each other to detect and combat money laundering and the financing of terrorism.

50. “Concerning suspected proceeds of crime and potential financing of terrorism” refers to the fact that the first type of disclosure of financial information concerns the reporting of transactions that are suspected of being money laundering in accordance with FATF Recommendation 13 or of being intended to support terrorist activities. The term “potential” does not mean that less or weaker evidence of a crime is needed; it rather means that there are suspicions to believe that funds are going to be used to finance terrorism.

51. The terms “required by national legislation or regulation” encompass all other mandated types of reporting requirements required by law, whether involving currency, checks, wires or other transactions.

52. The final phrase “in order to combat money laundering and the financing of terrorism” cover the common purpose of every FIU.

53. Article 1, sub-paragraph g, defines the terms “freezing” or “seizure”. This definition has been drawn from the UN Conventions against transnational organised crime and corruption (Article 2.f) and appears also in Article 2 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

54. Article 1, sub-paragraph h of this Convention follows the definition of “financing of terrorism” which is contained in Article 2 of the 1999 UN Convention and which reads as follows:

> “1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
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> a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

2. a) In depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraph (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

c) Contributes to the commission of one or more offences as set forth in paragraph 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article."

55. The drafters of this Convention, while agreeing on the need to extend its application to the fight against the financing of terrorism, wished to base themselves on the text of the 1999 Convention, including the definition of the financing of terrorism as reproduced above, which has been agreed internationally. They also wished to recall in the Preamble the commitments of the international community resulting from relevant Security Council Resolutions, to implement rapidly and without restrictions this UN Convention and in particular to take the necessary measures to criminalise the financing of terrorism.

56. The prohibition contained in Article 2 of the 1999 UN Convention extends, among other things, to attempts to commit such offences as well as to their organisation. Importantly, however, "for an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, sub-paragraphs (a) or (b)".

Chapter II – Financing of terrorism

Article 2 – Application of the Convention to the financing of terrorism

57. This new Chapter constitutes an enlargement of the scope of application of the Convention to include questions relating to the financing of terrorism.

58. Paragraph 1 of this article 2 requires Parties to ensure the application of the provisions of the Convention concerning measures to be taken at a national level and at an international level, to the financing of terrorism. This includes, for instance, provisions concerning the prevention of the financing of terrorism, confiscation measures and international co-operation. These provisions apply therefore to both money laundering and the financing of terrorism.

59. Paragraph 2 of Article 2 more specifically requires Parties to ensure that they are able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide co-operation to this end to the widest possible extent. This paragraph, inspired by Article 8 of the 1999 Convention, has been inserted in order to adapt the conditions of application of this Convention, including its safeguards, to the specificities of the financing of terrorism which, in many cases, is not based on the use of criminally acquired funds, but rather on the use of licit funds for criminal purposes.

60. The main aim of this provision is to ensure that law enforcement authorities are able to use the instruments described in Chapters III and IV also in those cases where the property concerned is used as an instrumentality to commit a terrorist act or where it is the proceeds of such an offence.

Chapter III – Measures to be taken at a national level

Section 1 – General provisions

61. The wording of the articles in the chapter makes it clear that if States already possess the necessary measures, it is not necessary to take further legislative steps [(1)].

Article 3 – Confiscation measures [(2)]

62. Paragraph 1 was drafted because several States do not yet possess sufficiently broad and effective legal provisions in respect of confiscation. It seeks to create an effective scheme for confiscation. It should be seen as a positive obligation for states to enact legislation which would enable them to confiscate instrumentalities and proceeds. This would also enable states to co-operate in accordance with the terms of the Convention, see Article 15, paragraph 2.

63. The expression "property the value of which corresponds to such proceeds" refers to the obligation to introduce measures which enable Parties to execute value confiscation orders by satisfying the claims on any property, including such property which is legally acquired. Value confiscation is, of course, still based on an assessment of the value of illegally acquired proceeds. The expression is also found in the United Nations Convention(s).

(1) See Paragraph 24 of the Explanatory Report to Convention 141.
(2) See Paragraphs 25-27 of the Explanatory Report to Convention 141.

64. This Convention introduces also a new notion in paragraph 1, ie. “laundered property”. As there may be an overlap with the notions of proceeds and instrumentalities (already contained in this provision), each Party is free to choose the system which is more adapted, in so far as all the assets contained in this provision are susceptible to be confiscated.

65. As regards the reference to instrumentalities in paragraph 1 of this article, the drafters of this Convention made it clear that a Party may limit confiscation to instrumentalities which are specifically adapted for committing offences or may exclude confiscation which the value of the object in question is out of proportion to the gravity of the offence.

66. The committee which drafted the 1990 Convention discussed whether it was possible to define certain offences to which the Convention should always be applicable. The experts agreed then that Parties should not limit themselves to offences as defined by the United Nations Convention. The offences would include drug trafficking, terrorist offences, those committed by organised crime, violent crimes, offences involving the sexual exploitation of children and young persons, extortion, kidnapping, environmental offences, economic fraud, insider trading and other serious offences. Offences which generate huge profits could also be included in such a list. When drafting the 1990 Convention, the experts thought however that the scope of application of the Convention should in principle be made as wide as possible. For that purpose, the 1990 Convention created an obligation to introduce measures of confiscation in relation to all kinds of offences. At the same time, the drafters of the 1990 Convention felt that this approach required a possibility for States to restrict co-operation under the Convention to certain offences or categories of offences. The possibility of entering a reservation was therefore introduced in the 1990 Convention.

67. Paragraph 2 of Article 3 of the new Convention substantially limits this approach, by prohibiting Parties from making declarations that would have the effect of excluding the categories of offences listed in the Appendix, as well as money laundering. The drafters of this Convention pointed out the need for this provision to limit the extent to which declarations may be made with respect to the confiscation measures contained in paragraph 1 of this article. In doing so, this Convention takes into account all the various approaches.

68. This provision allows for an all-crimes approach to confiscation, as well as explicitly providing for an enumerated list of categories of offences approach and a threshold approach. The drafters of this Convention have added a list of categories of offences in the Appendix, which constitutes for the Parties a minimal list of offences to which confiscation must apply and which cannot be excluded by a declaration contained in paragraph 2. The list of categories of offences contained in the Appendix is identical to the one contained in the glossary to the revised FATF Recommendations of 20 June 2003.

69. When deciding on the range of categories of offences listed in the Appendix, see the comments under the Appendix below.

70. Paragraph 3 of Article 3 deals with the question of mandatory confiscation. It should be noted from the outset that this provision is not mandatory for Parties, which are therefore free to decide whether to implement it or not. The drafters of this Convention however intended to send a signal that mandatory confiscation for offences which are subject to the confiscation regime, may be advisable for particularly serious offences and for offences where there is no victim claiming to be compensated (such as drug trafficking), but also frauds with a large number of unknown victims.

71. Paragraph 4 of Article 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. The definition of the notion of serious offence for the purpose of the implementation of this provision is left to the internal law of the Parties. This possibility is however subordinate to the fact that it is compatible with the internal law of the Party concerned. The conclusion of the Party on this issue shall not be challenged in the course of the monitoring procedure. It should also be noted in this context that Article 53, paragraph 4 of this Convention provides for the possibility to make a declaration concerning the provision of Article 3, paragraph 4.

72. This provision also cannot be interpreted as an obligation to introduce the reversal of the burden of proof in a criminal prosecution to find the defendant guilty of an offence. In the case of *Phillips v. the United Kingdom* of 5 July 2001, the European Court of Human Rights "considers that, in addition to being specifically mentioned in Article 6 § 2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 (see, *mutatis mutandis*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68). This right is not, however, absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28)". In the Phillips case the statutory assumption was not applied in order to facilitate finding the defendant guilty of a drug trafficking offence, but to enable the court to assess the amount at which a confiscation order should be properly fixed after a drug trafficking conviction. The European Court of Human Rights held that the use of statutory assumptions with proper safeguards (which it found to be in place) in such circumstances did not violate the ECHR or Protocol No. 1 to it.

Article 4 – Investigative and provisional measures

73. This provision is intended to minimize the risk of assets being dissipated, thereby ensuring that a later confiscation request is not frustrated.

74. To this end, Article 4 requires Parties to be able to identify, trace, freeze or seize rapidly property which is liable to confiscation pursuant to Article 3.

Article 5 – Freezing, seizure or confiscation

75. This provision exists in other international legal instruments and more particularly, Article 12 of the UN Convention against transnational organised crime.

76. This provision underlines in particular the need to apply such measures also to proceeds which have been intermingled with property acquired from legitimate sources or which has been otherwise transformed or converted.

Article 6 – Management of frozen or seized property

77. This provision aims at ensuring that seized assets and instrumentalities are properly managed and preserved.

78. Parties remain free to determine the best way of ensuring an adequate management of the assets and systems exist already in the national laws of many States. For instance, the setting up of a national body in charge of this may constitute an appropriate way of implementing this provision.

Article 7 – Special investigative powers and techniques [(1)]

79. Article 7, paragraph 1, is the same as Article 4, paragraph 1 of the 1990 Convention and has the same object in mind as Articles 3 and 4. Bank secrecy should not constitute an obstacle to domestic criminal investigations or the taking of provisional measures in the member states of the Council of Europe, in particular when the lifting of bank secrecy is ordered by a judge, a grand jury, an investigating judge or a prosecutor. The sentence should, for the purposes of international co-operation, be read in conjunction with Article 28, paragraph 7.

80. Paragraph 2 of this article is new as compared to the 1990 Convention. The additions made to the provision on special investigative powers and techniques, aim at ensuring at a national level a consistency with the relevant provisions (Articles 17-19 of this Convention) contained in the international co-operation part on requests for information on bank accounts, requests for information on banking transactions and requests for the monitoring of banking transactions.

81. Some jurisdictions are already in a position to use such special investigative powers and techniques nationally on the basis of their national legislation. However, the drafters of this Convention included these paragraphs in the text to ensure that all Parties will be in a position to do nationally, what they may be requested to do internationally. For EU States such an obligation exists in the area of international co-operation on the basis of Articles 1 to 3 of the Protocol of 16 October 2001 to the EU Convention on mutual legal assistance in criminal matters of 29 May 2000.

82. Paragraph 2 was drafted to make it mandatory on States to adopt at a national level, procedures enabling them, in the conditions foreseen in such procedures, to identify accounts held by specified beneficiaries and to obtain information on specified accounts. In this context, Paragraph 2a requires the tracing of any accounts that may be held by specified beneficiaries and it indirectly requires States to have procedures in place that enable them to trace any such accounts. While this provision obliges States to have procedures in place to comply with this obligation, the paragraph leaves it free States to decide how to comply with this obligation and does not impose an obligation on States to create, for instance, a *centralised bank accounts register*. Paragraphs 2b and 2c, on the other hand, require the obtaining of information and the monitoring of accounts that have already been identified. The wording is also intended to afford to the Contracting Parties a broad level of discretion as to how best to satisfy the requirements of these sub-paragraphs.

83. The committee drafting this Convention discussed whether it would be appropriate to extend the obligations under Article 7 to include also *accounts* in non-bank financial institutions. A number of experts held that financial services are extended by a number of other institutions which do not provide banking services but still provide for the maintenance of certain types of accounts (e.g. securities accounts) and undertake transactions on such accounts for their customers and could therefore be used for money laundering. Experts agreed that the application of the obligations under this article, which are mandatory for accounts held by banks, should, at national level, remain optional for non-bank financial institutions (NBFIs). The interpretation of this term, the financial activity and the accounts to be covered remain within the domestic law of the Party.

84. The measures to be taken under paragraph 2 of Article 7 will also enable effect to be given to the provisions of the corresponding Articles in Section 2 of Chapter IV of the Convention.

(1) See Paragraph 30 of the Explanatory Report to Convention 141.

85. Paragraph 3 of the Article largely corresponds to paragraph 2 of Article 4 of the 1990 Convention. It was drafted to make States aware of new investigative techniques which are common practice in some states but which are not yet implemented in other states. The paragraph imposes an obligation on States at least to consider the introduction of new techniques which in some states, while safeguarding fundamental human rights, have proved successful in combating serious crime. Such techniques could then also be used for the purposes of international cooperation. In such cases, Articles 15.3 and 16 would, for instance, apply. The enumeration of the techniques is not exhaustive.

86. Observation is an investigative technique, employed by the law enforcement agencies, consisting in covertly watching the movements of persons, without hearing them.

87. Interception of telecommunications, as defined in the Convention on cybercrime (ETS No. 185), usually refers to traditional telecommunications networks. These networks can include cable infrastructures, whether wire or optical cable, as well as inter-connections with wireless networks, including mobile telephone systems and microwave transmission systems. Today, mobile communications are facilitated also by a system of special satellite networks. Computer networks may also consist of an independent fixed cable infrastructure, but are more frequently operated as a virtual network by connections made through telecommunication infrastructures, thus permitting the creation of computer networks or linkages of networks that are global in nature. The distinction between telecommunications and computer communications, and the distinctiveness between their infrastructures, is blurring with the convergence of telecommunication and information technologies.

88. Access to computer systems is addressed in the Convention on cybercrime (ETS No. 185). The Cybercrime Convention defines two means of access to computer systems by law enforcement authorities: real-time collection of traffic data and the real-time interception of content data associated with specified communications transmitted by a computer system.

89. Production orders instruct individuals to produce specific records, documents or other items of property in their possession. Failure to comply with such an order may result in an order for search and seizure. The order might require that records or documents be produced in a specific form, as when the order concerns computer-generated material (see also the Convention on cybercrime) [(4)].

90. The procedural powers contained in the Convention on cybercrime are particularly relevant in this context. Indeed, the powers and procedures established in accordance with the Convention on cybercrime are to be applied to: (i) criminal offences established by the Convention on cybercrime; (ii) other criminal offences (including money laundering and the financing of terrorism) committed by means of a computer system; and (iii) the collection of evidence in electronic form of a criminal offence (including money laundering and the financing of terrorism). This ensures that evidence in electronic form of any criminal offence can be obtained or collected by means of the powers and procedures set out in the Convention on cybercrime. It ensures an equivalent or parallel capability for the obtaining or collection of computer data as exists under traditional powers and procedures for non-electronic data.

Article 8 – Legal remedies

91. This provision remained almost unchanged as compared to the 1990 Convention. Interested parties are basically all persons who claim that their rights with respect to property subject to provisional measures and confiscation are unjustifiably affected. These claims should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt. As long as no final confiscation order has been made against him or her, the accused may also qualify as an interested party. The legal provisions required by this article should guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that

such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed [(1)].

92. This article does not bestow upon private citizens any right beyond those normally permitted by the domestic law of the Party. In any case, minimum rights of the defence are safeguarded by the Convention for the Protection of Human Rights and Fundamental Freedoms [(1)].

Article 9 – Laundering offence [(2)]

93. The first paragraph of the article is based on the 1988 United Nations Convention. However, the wording differs slightly from that convention in respect of the element of "participation" which is found in the 1988 United Nations Convention, and also as regards the predicate offences to which the proceeds relate. Participation has not been included in paragraph 1, sub-paragraphs a, b and c, of the article since, because of the different approach taken by the committee, it appeared to be redundant. The 1990 Convention and this Convention are not limited to proceeds from drug offences. The experts drafting the 1990 Convention considered that it was not necessary to provide that States could not limit the scope of application *vis-à-vis* the 1988 United Nations Convention, which had become a universally recognised instrument in the fight against drugs.

94. The first part of paragraph 1 establishes an obligation to criminalise laundering. The second part makes this obligation in respect of certain categories of laundering offences dependent on the constitutional principles and the basic concepts of the legal system of the ratifying State. To the extent that criminalisation of the act is not contrary to such principles or concepts, the State is under an obligation to criminalise the acts which are described in the paragraph. A further explanation of what is meant by basic concepts of the legal system is found in the explanatory report in respect of Article 28, paragraph 1.a.

95. The provision of paragraph 2, with the exception of paragraph 2.*c,* is not found in the 1988 United Nations Convention. Paragraph 2.*b* takes into account that in some states the person who committed the predicate offence will not, according to basic principles of domestic penal law, commit a further offence when laundering the proceeds. On the other hand, in other states laws to such effect have already been enacted.

96. The rest of this provision is new as compared with the 1990 Convention.

97. Paragraph 3 of this article concerns the *mens rea*. The evaluation process has shown that proving the mental element of a money laundering offence can be very difficult, as the courts often require (or are thought to require) a high level of knowledge as to the origin of the proceeds by the alleged launderers. The addition of this paragraph in this Convention will enable Parties also to establish a criminal offence where the offender (a) suspected that the property was proceeds and/or (b) ought to have assumed that the property was proceeds. Paragraph 3.a provides for a lesser subjective mental element and could cover a person who gives the origin of the proceeds some thought (it is sufficient that he/she suspects the property was proceeds) but has not firm knowledge that the property is proceeds. Paragraph 3.b suggests the criminalisation of negligent behaviour where the court objectively weights the evidence and determines whether the offender should have assumed the property was proceeds, whether or not he/she gave any thought to the matter.

(1) See Paragraph 31 of the Explanatory Report to Convention 141.
(2) See Paragraph 32 of the Explanatory Report to Convention 141.

98. Paragraph 3 criminalises acts other than those designated in the 1988 United Nations Convention. Paragraph 3 is optional. It follows that the fact that a Party decides not to adopt it in its internal law cannot be raised or criticised during the monitoring process envisaged by the Convention.

99. As regards the possibility of reservation to the predicate offences of money laundering contained in paragraph 4 of this article, the drafters of this Convention took into account Recommendation 1 of the FATF which provides that "whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences", as these categories of offences are contained in the Appendix of this Convention, which reproduces textually the glossary appended to the FATF Recommendations. In doing so, they indicated the need to take into account all the various approaches. More particularly the drafters stressed that this provision should allow for an all crimes approach, as well as for an enumerated list of offences and threshold approaches. In any event, the categories of offences contained in the Appendix to this Convention have to be considered as predicate offences for the purposes of money laundering and therefore cannot be excluded from the scope of application of the money laundering offence through a declaration provided by this provision. When deciding on the range of offences to be covered as predicate offences under each of the categories listed in the Appendix, see the comments under the Appendix below.

100. Paragraph 5 addresses another major practical problem in money laundering prosecutions exposed in evaluations in several countries – the perceived need for a conviction for the underlying predicate offence as a basis for a money laundering prosecution. This Convention now requires the Parties to ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering. The drafters of this Convention considered that, by clarifying this in paragraph 5, it should then be possible, in a money laundering prosecution, for the predicate offence (whether domestic or foreign) to be established on the basis of circumstantial or other evidence. This was considered by the drafters to be important as the perceived need for such a conviction frequently inhibited the prosecution of money laundering as an autonomous offence – particularly laundering by third parties on behalf of others.

101. Paragraph 6 concerns the question of proof of the predicate offence in a money laundering prosecution. To facilitate prosecution, the drafters of this Convention pointed out the importance for prosecutors not to have to prove in a money laundering prosecution all the factual elements of the specific particularised predicate offence, if the proof of the illicit origin of the property could be gathered from any circumstance. By specifying that this paragraph applies to convictions for money laundering "under this article", the drafters of this Convention wished to indicate that this provision is to be seen in the context of the definition of money laundering as contained in Article 9 and in particular its paragraph 1, which refers to "intentional" behaviours. Therefore, Parties may implement Article 9.6 by requiring that the author of the money laundering offence knew that the assets came from a predicate offence, without it being necessary to prove which specific predicate offence applied.

102. Paragraph 7 aims at ensuring that a procedure against money laundering may be started even if the predicate offence has been committed abroad. Each Party keeps however the possibility to require that the offence corresponds to a predicate offence of money laundering in its internal law. This provision is drawn from FATF Recommendation 1.

Article 10 – Corporate liability

103. Article 10 deals with the liability of legal persons. It is a fact that legal persons are often involved in money laundering and financing of terrorism offences, especially in business transactions, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the size of corporations and the complexity of organizational structures, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a money laundering offence. Legal persons thus sometimes escape their liability due to their collective decision-

making process. On the other hand, money laundering and financing of terrorism practices often continue after the arrest of individual members of management, because the company as such is not deterred by individual sanctions.

104. The international trend at present seems to support the general recognition of corporate liability, even in countries, which are applying the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent developments.

105. Paragraph 1 does not stipulate the type of liability it requires for legal persons. Therefore this provision does not impose an obligation on States to establish that legal persons will be held criminally liable for the offences mentioned therein. It should be made clear however that by virtue of this provision Contracting Parties undertake to establish some form of liability for legal persons engaging in money laundering practices, liability that could be criminal, administrative or civil in nature. Thus, criminal and non-criminal –administrative, civil- sanctions are suitable, provided that they are "effective, proportionate and dissuasive" as specified by paragraph 4 of this article. Legal persons shall be held liable if three conditions are met. The first is that a money laundering or a financing of terrorism offence must have been committed. The second condition is that the offence must have been committed for the benefit or on behalf of the legal person. The third condition, which serves to limit the scope of this form of liability, requires the involvement of "any person who has a leading position". The leading position can be assumed to exist in the three situations described –a power of representation or an authority to take decisions or to exercise control- which demonstrate that such a physical person is legally able to engage the liability of the legal person.

106. Paragraph 2 expressly mentions the Contracting Parties' obligation to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the money laundering offences. It aims at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person. A similar provision also exists in Article 3 of the Second Protocol to the European Union Convention on the Protection of the financial interest of the European Community of 19 June 1997. As with paragraph 1, it does not impose an obligation to establish criminal liability in such cases but some form of liability to be decided by the Contracting Party itself.

107. Paragraph 3 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

108. Paragraph 4 requires that legal persons be subject to "effective, proportionate and dissuasive" sanctions, which can be penal, administrative or civil in nature. This paragraph compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable for a money laundering offence.

109. It is obvious that the obligation to make money laundering and financing of terrorism offences punishable would lose much of its effect if it was not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It cannot, of course, be the aim of this Convention to give detailed provisions regarding the sanctions to be linked to the different offences mentioned in the Convention. On this point the Parties inevitably need the discretionary power to create a system of offences and sanctions that is in coherence with their existing national legal systems.

Article 11 – Previous decisions

110. Money laundering and the financing of terrorism are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a harsher penalty where someone has previous convictions.

111. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the Single *Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the *Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, European Union member States must recognise, under the conditions of their national law, as establishing habitual criminality final decisions handed down in another member state for counterfeiting of currency.

112. The fact remains that there is no harmonised notion at an international level of recidivism and that certain legislations do not contain such a notion. In addition, the fact that foreign judgments are not brought to the attention of judges constitutes an additional complication. Accordingly, Article 11 provides for the possibility to take into account final decisions taken by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts – like convictions by the domestic courts – will result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take convictions into account.

113. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30) of 20 April 1959, a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.>

Section 2 – Financial Intelligence Units (FIUs)

114. The drafters of this Convention have been in favour of including relevant related preventive standards in the Convention with a "focused approach", particularly within the context of the elaboration of the role and functioning of FIUs. Indeed, as there was broad consensus on the need to include the role and functioning of FIUs in the Convention, their essential preventive role cannot be ignored and should be strengthened.

Article 12 – Financial Intelligence Units (FIUs)

115. This article introduces the concept of FIUs and recognizes their crucial role in the prevention of money laundering and the financing of terrorism. Paragraph 1 introduces a mandatory obligation for signatory States to establish an FIU on the basis of the definition in the Convention which adopts the definition of the Egmont Group. FIUs should be provided with adequate financial, human and technical resources, whilst ensuring that staff are of high integrity.

116. Paragraph 2 has been drafted by drawing on the definition of an FIU. Committee experts drafting this Convention discussed the functions of an FIU and agreed that the timely access to financial, administrative and law enforcement information is of paramount importance for an FIU to effectively discharge its functions. Although the paragraph is drafted in mandatory terms, yet it leaves it at the discretion of signatory Parties as to the methodology used to access such data either directly or indirectly. Experts drafting this Convention also discussed and agreed that FIUs, law enforcement and supervisory and other authorities that have a responsibility in combating money laundering have mechanisms in place that enable them to co-operate and co-ordinate with each other domestically.

Article 13 – Measures to prevent money laundering

117. As regards the prevention of money laundering and the financing of terrorism, the drafters of this Convention considered it necessary to ensure conformity of the provisions included in this instrument with those adopted by other international bodies. In that respect, they wished explicitly, in paragraph 1, to refer to the revised Recommendations of the FATF, which are integrated in the Council of Europe *acquis* through MONEYVAL.

118. Paragraphs 2 and 3 of this provision detail the fundamental principles which guide the prevention of money laundering and the financing of terrorism, in conformity with agreed international standards and more particularly the FATF Recommendations (identification and verification of the identity of customers, identification of the ultimate beneficial owner, obligation to report suspicious transactions, record keeping, training of personnel and internal audit, monitoring of anti-money laundering measures, detection of significant physical cross border transportation of cash).

119. For the determination of the "legal and natural persons which engage in activities which are particularly likely to be used for money laundering purposes", the intention of the drafters of this Convention is that it covers at least the financial institutions and the non-financial professions contained in the FATF Recommendations 5 and 12 and, as regards the latter, in the framework of the activities mentioned in these two FATF Recommendations. In addition, the list and provisions contained in relevant EU Directives concerning this issue should be considered by EU States.

120. Moreover, the expression "subject to safeguards" in paragraph 2.a.ii primarily means that it is in respect of the independent legal professions, that the restriction "resulting from professional secrecy or legal professional privilege" contained in FATF Recommendation 16 (and its Explanatory Note) is relevant. Paragraph 2.b was inserted to require Parties to ensure that the fact that a suspicious report or other information has been transmitted to the FIU or that an investigation is being or may be carried out is not disclosed to the persons involved or, as appropriate, to third parties according to domestic law. The paragraph imposes this obligation on legal and natural persons whose activities are particularly likely to be used for money laundering purposes. The obligation should also be extended to all directors, officers and employees of the aforementioned legal and natural persons as applicable. Such prohibition on 'tipping off' should not however be construed or interpreted in a way that it may hinder the necessary exchange of information between relevant authorities for the proper analysis or investigation to proceed.

121. Finally, as far as paragraph 3 is concerned, to the extent that the Contracting Party is the European Community or a member of a customs union, "border" should be understood as meaning the external border of the Community or of that member. In that respect, the borders between EU States or between Contracting Parties constituting a customs union shall not be concerned by the Convention. The obligation under paragraph 3 can either be met by a declaration or a disclosure system as defined in the Interpretative Note to FATF Special Recommendation 9.

Article 14 – Postponement of domestic suspicious transactions

122. This provision requires Parties to take measures to permit urgent action to be taken by FIUs or, if appropriate, other competent authorities or bodies, including the persons referred to under Article 13 above, in order to postpone a domestic suspicious transaction. The duration of such measures shall be determined by national law. Parties are free to permit those obliged to make the suspicious transaction report to carry out the transaction in urgent cases before the suspicious transaction report is transmitted. The term "where there is a suspicion" should not be understood as requiring the responsible authority to suspend or withhold consent to a transaction going ahead, if the authority does not find it appropriate. It should also be added that the measures of postponement only makes sense when the disclosures are made in a timely manner, so the general principle of *a priori* reporting (ie. before executing the financial operation) to enable FIUs, or if appropriate, other competent authorities or bodies, to take immediate action, if necessary, should be emphasised.

Chapter IV – International co-operation

Section 1 – Principles of international co-operation

Article 15 – General principles and measures for international co-operation [(1)]

123. Paragraph 1 of this introductory article was drafted by the drafters of the 1990 to indicate the scope and the aims of the international co-operation which is detailed in the following sections. Those sections should, in principle, exclusively define the scope of international co-operation, but Section 1 will affect the interpretation of the other sections. Where co-operation concerns investigations or proceedings which aim at confiscation, Parties should co-operate with each other to the widest extent possible, including on the basis of relevant national and international legislation. Co-operation under this Convention covers both legal and natural persons.

124. Paragraph 2 of this provision should also be considered in connection with the obligation provided for under Article 23. If a state has only the system of value confiscation of proceeds, it would be necessary for it to take legislative measures which would enable it to grant a request from a state which applies property confiscation. The converse would be true, since the two systems are equal under the 1990 Convention and this Convention.

125. So-called "fishing expeditions" (general and not determined investigations which are carried out sometimes even without the existence of a suspicion that an offence has been committed) lie outside the scope of application of the 1990 Convention and this Convention. If the requesting Party has no indication of where the property might be found, the requested Party is not obliged to search, for instance, all banks in a country (see Article 37, paragraph 1, sub-paragraph e.ii).

126. The drafters of this Convention decided to add two new paragraphs to this article, so as to ensure smooth co-operation concerning investigative assistance and provisional measures with a view to confiscation. Paragraph 3 of this article provides that the requested Party must respect the formalities and the procedures contained in the request of the requesting Party, even if the formalities or procedures are unfamiliar to the requested Party. This obligation rests with the requested Party providing that these formalities or procedures are not contrary to the fundamental principles of the law of the requested Party. In addition, in accordance with paragraph 4, requests to identify, trace, seize or freeze proceeds or instrumentalities shall receive the same priority as national requests. In the light of these additions, the drafters of this Convention agreed to delete the provision on the execution of requests.

(1) See Paragraph 35 of the Explanatory Report to Convention 141.

Section 2 – Investigative assistance

Article 16 – Obligation to assist [1]

127. As regards the obligation to assist, the drafters of this Convention kept the same provision as in the 1990 Convention.

128. This article should be interpreted in a broad manner since the committee drafting the 1990 referred to the "widest possible measure of assistance". Such assistance could relate to criminal proceedings, but it could also be proceedings for the purpose of confiscation which are related to a criminal activity.

129. The latter part of the paragraph should only be seen as giving examples of assistance and does not limit its application. For example, if monitoring or telephone tapping orders may be made under the law of the requested Party, they should also be granted in international co-operation.

130. The article relates to "identification and tracing" of property. In that respect, the wording should also be interpreted broadly so that, for instance, notifications relating to investigations as well as evaluation of property are included in the scope of application. To the extent that the scope of application of the 1990 Convention and the European Convention on Mutual Assistance in Criminal Matters converge, Parties should, if no reasons to the contrary exist, endeavour to use the latter convention.

131. The words "other property liable to confiscation" have been added to make it clear that investigative assistance should also be rendered when the requesting Party applies value confiscation and the assistance relates to property which might be of licit origin. The assistance also includes seizure for evidentiary purposes.

132. The wording of this provision does not exclude the possibility of the investigative assistance referred to in this paragraph also being rendered to authorities other than judicial ones, such as police or customs authorities, in so far as such assistance does not involve coercive action (see Article 34, paragraph 5).

133. The primary purpose of the provisions of Chapter IV is that Parties should co-operate with each other to the widest extent possible for the purpose of investigations and criminal proceedings aiming at the confiscation of instrumentalities and proceeds. However, the fact that the provisions of requests for bank information in Articles 17-19 does not prohibit Parties from co-operating for the same purposes under applicable instruments that more generally deal with mutual legal assistance in criminal matters (see also Article 52.1 and 53.3).

Article 17 – Requests for information on bank accounts

134. This provision, as well as Articles 18 and 19, is largely drawn from EU Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union. The text of the Explanatory report of the said Protocol has been approved by the Council of the EU on 14 October 2002. The provisions of Articles 17 – 19 offer the possibility to the Parties to extend their application to Non-Bank Financial Institutions (NBFIs). For explanation on this issue, reference should be made to Article 7 above. Moreover, when it comes to NBFIs, the implementation of this extension may be subject to reciprocity. Reference to the principle of reciprocity is made as a matter of abundance of clarity. Indeed, while is some countries such a principle is contained in the national law (including constitutional law), in others it is implicit.

(1) See Paragraph 36 of the Explanatory Report to Convention 141.

135. This article obliges Parties, upon request in concrete cases, to trace bank accounts that are located in its territory, and thereby indirectly obliges the Parties to have in place the means of complying with such requests.

136. Paragraph 1 does not oblige the Parties to set up a centralised register of bank accounts, but leaves it to each Party to decide how to comply with the provision in an efficient way. If the requested Party 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, subject to paragraph 2, all its details. 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. 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.

137. Paragraph 2 clarifies that the obligation to supply information only applies to the extent that the information is available to the bank keeping the account. Accordingly, this Convention does not place any new obligations on Parties or banks to retain information relating to bank accounts.

138. The text in paragraph 3 was included bearing in mind the amount of work that the execution of requests for information may involve. It places certain obligations on the requesting Party. 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 Party 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 Party or Parties it should send the request (second indent).

139. Paragraph 3 implies that the requesting Party may not use this measure as a means to "fish" information (see comment under Article 15 above) from just any – or all – Parties but that it must direct the request to a Party which is likely to be able to provide the requested information. 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 Party should target its request and try to limit it to certain types of bank accounts only and/or accounts kept by certain banks only. This will enable the requested Party to restrict the execution of the request accordingly. However, the provision does not allow the requested Party to question whether the requested information is likely to be of substantial value for the purpose of the criminal investigation concerned pursuant to the first indent of the paragraph.

140. According to the third indent, the requesting Party shall also provide the requested Party 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.

141. Paragraph 4 provides that Parties may equate requests under paragraph 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 Parties 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.

142. Paragraph 5 of this article contains a reservation possibility to limit the scope of application of this provision only to the categories of offences listed in the Appendix. When deciding on the range of offences to be covered as offences under each of the categories listed in the Appendix, see the comments under the Appendix below.

Article 18 – Requests for information on banking transactions

143. Article 18 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.

144. There is a link between Article 17 and Article 18 in that the requesting Party may have obtained the details of the account by means of the measure provided for in Article 17 and subsequently 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 Party by any other means or channels.

145. As regards the reference to “banks”, Parties, in the context of the application of this provision, may also extend co-operation also to information which is held non-bank financial institutions. Banks do not have to change their retention policies on the basis of this article.

146. Paragraph 1 does not – unlike Article 17 – 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 a person the subject of a criminal investigation, being a measure of mutual legal assistance in criminal matters, it applies necessarily to judicial procedures concerning criminal offences. The absence of a reference to a person that is the subject of a criminal investigation clarifies that Parties are obliged to assist also in respect of accounts held by third persons, persons who are not themselves the 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 Party in the request.

147. 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 Party 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 Party, 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 Party with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the requesting Party to proceed with a request for assistance in respect of that account. This will enable the requesting Party 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 Party will take into account its obligations under the 1981 European Convention for the protection of individuals with regard to automatic processing of personal data.

148. As paragraphs 2 and 4 correspond to Article 17, paragraphs 2 and 4, the comments above will apply, *mutatis mutandis*, to this paragraph.

Article 19 – Requests for the monitoring of banking transactions

149. This article provides a new measure and, this being the case, it is discretionary in nature. The Article is worded in a different manner to the two previous provisions and leaves it to each Party to decide if and under what conditions the assistance may be given in a specific case.

150. Paragraph 1 only obliges Parties to set up a mechanism whereby they are able, upon request, to monitor any banking operations that take place in the future on a specified bank account during a specified period.

151. As far as paragraph 3 is concerned, the requested Party may apply conditions, including penalty thresholds and dual criminality, which would have to be observed in a similar domestic case.

152. Paragraph 4 states that the practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and the requested Party. This gives the requested Party full control of the conditions under which the monitoring shall take place and allows the requesting and requested Party to agree, for example, on monitoring on a day-by-day basis or that monitoring on a weekly basis is sufficient having regard to the circumstances of the case. It is left to the requested Party to decide if real-time monitoring can be provided or not.

Article 20 – Spontaneous information

153. The drafters of this Convention have kept this provision unchanged from the 1990 Convention.

154. This article introduced a novelty (in 1990) in the field of legal assistance in criminal matters: a possibility for Parties to forward without prior request information about investigations or proceedings, which might become relevant in relation to co-operation under the 1990 Convention. Such information must of course not be transmitted if it might harm or endanger investigations or proceedings in the sending Party. As regards confidentiality, see Article 43, paragraph 3 [(1)].

Section 3 – Provisional measures

Article 21 – Obligation to take provisional measures [(2)]

155. The drafters of this Convention have kept this provision unchanged from compared to the 1990 Convention.

156. Paragraph 1 of the article concerns cases where a confiscation order has not yet been rendered by the requesting Party but where proceedings have been instituted. The experts drafting the 1990 Convention agreed that, in respect of this paragraph, an obligation to take the provisional measures exists, subject of course to the provisions on grounds for refusal and postponement. Freezing and seizing are only examples of provisional measures. They do not refer to any specific legal instrument as defined by national law. The words "to prevent any dealing in, transfer or disposal..." indicate the aim of the provisional measures. The wording "which, at a later stage, may be the subject of a request... or which might be such as to satisfy the request" makes it clear that both systems of confiscation are subject to the provision. Any property, including legally acquired property, in cases of value confiscation is envisaged. Of course, such property should be made subject to provisional measures only in cases where this is explicitly requested by the requesting Party.

157. Paragraph 2 deals with the case where a Party has already received a request for confiscation pursuant to Article 23. The requested Party shall then, when requested, take the necessary provisional measures so hat the request for confiscation can be executed. The requesting Party should indicate necessary provisional measures in accordance with Article 37, paragraph 3, sub-paragraph a.iv. Since the words "pursuant to Article 23" are used, it follows that both systems of international cooperation apply.

(1) See Paragraph 38 of the Explanatory Report to Convention 141.
(2) See Paragraphs 39 and 40 of the Explanatory Report to Convention 141.

158. The "measures" under paragraph 2 of the article are the same as those mentioned in the previous paragraph. As to the term "property", the same considerations apply as to paragraph 1 of the article.

Article 22 – Execution of provisional measures

159. The drafters of this Convention agreed to add a new paragraph 1 in this provision, to ensure smooth co-operation between the Parties. Although this provision may seem to be an expression of good practice, the experts felt it necessary to include it anyway, to ensure an update of the information available to the requested Party, for the execution of provisional measures which may have sometimes a certain duration.

160. The national law of the requested Party governs when the provisional measures may or must be lifted. Paragraph 2 of the article institutes an obligation for the requested Party to give the requesting Party an opportunity to present its reasons in favour of continuing the provisional measure. This could be done either directly to the court, for example, as an intervention *amicus curiae*, if permitted by national law, or as a notification through official channels. Unless the requesting Party has had the opportunity of presenting its views, the provisional measure may not be lifted if special reasons do not exist. Such reasons may be that the property concerned has been the subject of a bankruptcy, in which case the property comes into the custody of the receiver, or that the measure must automatically be lifted because an event has or has not occurred. In the latter case, the requesting State will know in advance that the measure might be lifted since the requested State is obliged to inform it of the provisions of the national law. Reference is made to Article 41, paragraph 1.e, which obliges the requested Party to inform the requesting Party about such provisions of its domestic law as would automatically lead to the lifting of the provisional measure. Such laws could for instance require that a provisional measure be lifted if a prosecutor has not applied for a renewal of the measure within a specified time-limit [(1)].

Section 4 – Confiscation

Article 23 – Obligation to confiscate [(2)]

161. The first four paragraphs of this provision of the 1990 Convention have been left unchanged by the drafters of this Convention. Article 23, paragraph 1, describes the two forms of international cooperation regarding confiscation. Paragraph 1.a concerns the enforcement of an order made by a judicial authority in the requesting state; paragraph 1.b creates an obligation for a state to institute confiscation proceedings in accordance with the domestic law of the requested Party, if requested to do so, and to execute an order pursuant to such proceedings. This dual scheme of international co-operation follows the 1988 United Nations Convention, Article 5, paragraph 4.

162. From the wording of the article, it follows that the request must concern instrumentalities or proceeds from offences. In respect of value confiscation, see the commentary on Article 23, paragraph 3.

163. It also follows from the article that the request concerns a confiscation which by its very nature is criminal and thus excludes a request which is not connected with an offence, for example administrative confiscation. However, the decision of a court to confiscate need not be taken by a court of criminal jurisdiction following criminal proceedings.

(1) See Paragraph 42 of the Explanatory Report to Convention 141.
(2) See Paragraphs 43-49 of the Explanatory Report to Convention 141.

164. The Explanatory Report to the 1990 Convention stated that any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called" *in rem* proceedings") are referred to in the text of the 1990 Convention and of this Convention as "proceedings for the purpose of confiscation".

165. However, the drafters of this Convention included a new paragraph 5 in Article 23 to ensure that Parties co-operate, to the widest possible extent under their domestic law, for the execution of measures leading to confiscation, which are not criminal sanctions in so far as the measures are ordered by a judicial authority in relation to a criminal offence and that it was established that the property constitutes proceeds or other property in the meaning of Article 5. Therefore, the main difference between the 1990 Convention and this Convention on this particular issue, is that this Convention has made it clear in the body of the text of the treaty that co-operation concerning the execution of measures leading to confiscation, which are not criminal sanctions, has to be provided to the widest extent possible.

166. Paragraph 1.a speaks of "courts" whereas paragraph 1.b refers to "competent authorities". This means that a limit is set to the scope of application of the 1990 Convention and this Convention. The term "competent authorities" in paragraph 1.b may include authorities responsible for prosecution, who in their turn are to bring the case before their judicial authorities (courts). It has not been considered necessary to restrict the 1990 Convention and this Convention with respect to the procedure under Article 23, paragraph 1.b, since such confiscation entirely follows national law.

167. The obligation to co-operate for the purpose of confiscation under Article 23, paragraph 1, is fulfilled when the requested Party acts in accordance with at least one of the two methods of co-operation specified in the paragraph. The requested Party has the possibility, in general or in relation to a specific case, of excluding the use of one of the two methods. However, the simultaneous use of both methods is admissible. Nothing in the 1990 Convention and this Convention prevents Parties from providing for the possibility of applying both systems under their law. Exceptional cases may occur when a state requests co-operation under paragraph 1.a in respect of a certain type of property and under paragraph 1.*b* for some other property, irrespective of the fact that the underlying offence might be the same. This may be the case where property has been substituted, where third party interests are involved or where the request concerns indirectly derived proceeds or intermingled property (licitly acquired property intermingled with illicitly acquired property). Moreover, the competent authorities of the requested Party should in such a case ensure that the scope of a confiscation order to be obtained does not go beyond the objectives specified in the request of the requesting Party.

168. If a State requests co-operation under paragraph 1.a, nothing prevents the requested State from granting co-operation under paragraph 1.b instead, since the choice of the form of co-operation rests with the requested Party. In such cases, the foreign order of confiscation might serve as proof or presumption, depending on the legal practices under the domestic law of the requested Party. Article 24, paragraph 2, is however still valid in such cases.

169. The way paragraph 1.b is drafted implies an obligation for the requested State always to submit the request to its competent authorities for the purpose of obtaining an order of confiscation. The question arises as to whether the government of the requested State has to submit the request in a case where it intends to invoke one of the grounds for refusal under Article 28. This was not, however, the intention of the experts drafting the 1990 Convention. An obligation to submit the request to the competent authorities should only exist if the competent authority of the requested Party, after a summary test, considers that there are no immediate obstacles to granting the request. This does not prevent the competent authority, if it subsequently finds obstacles, from deciding not to pursue the matter, provided of course that the conditions of this Convention are met.

170. Paragraph 2 is modelled on Article 2 of the European Convention on the Transfer of Proceedings in Criminal Matters. If the requested state already has competence under its own law to institute confiscation proceedings, the provisions of the paragraph are superfluous. If, however, no such jurisdiction exists, the necessary competence follows, on the basis of this paragraph, directly from the request of the requesting Party made under paragraph 1. Such jurisdiction need not have been expressly established by the domestic law of the requested Party. It goes without saying that this paragraph can only be applicable to the procedure envisaged in paragraph 1.b.

171. It follows necessarily that the requested Party has competence to render investigative assistance and to take provisional measures also in cases where it may be foreseen that assistance under Article 23 will be rendered in accordance with paragraph 1.Articles 16 and 21 contain an obligation to take measures without making a distinction between the two systems of international co-operation.

172. The application of the procedure under paragraph 1.b presupposes that the requested state, at least for international cases, is equipped to undertake proceedings for the purposes of confiscation (independently of the trial of the offender).

173. The committee that prepared the 1990 Convention drafted paragraph 3 of the article in order to make it clear that value confiscation, consisting of a requirement to pay a sum of money to the state corresponding to the value of the proceeds, is covered by the Convention. The requested Party, acting under paragraph 1, sub-paragraph a or b, will ask for payment of the sum due and, if payment is not obtained, then realise the claim on any property available. The wording "any property available" shows that the claim might be realised on either legally or illegally acquired property. It also indicates that property which is in the possession of third parties, such as ostensible persons or in cases where a so-called *Actio Pauliana* might be invoked under national law, is affected. The expression "if payment is not obtained" also includes part-payments.

174. According to this paragraph, Parties must, for purposes of international co-operation in the confiscation of proceeds, be able to apply both the system of property confiscation and the system of value confiscation. This is made clear by Article 15, paragraph 2.a. It may imply that Parties which have only a system of property confiscation in domestic cases have to introduce legislation providing for a system of value confiscation of proceeds, including the taking of provisional measures on any realisable property, in order to be able to comply with requests to that effect from value confiscation countries. On the other hand, Parties which have only a system of value confiscation of proceeds in domestic cases must introduce legislation providing for a system of property confiscation of proceeds in order to be able to comply with requests to that effect from property confiscation countries.

175. Paragraph 4 plays only a subsidiary role in that, failing agreement, paragraph 1 of the article applies. If a request for confiscation of a specific property has been made, a country which applies value confiscation must also enforce the decision on that particular property.

176. In the 1990 Convention it was made clear that the Parties may choose whatever legislative approach to confiscation they wish, including the civil *in rem* route. The term "civil *in rem* actions" is used in the Explanatory Report to the 1990 Convention for illustrative purposes and there is no suggestion that the Convention only covers this sort of civil confiscation action.

177. Moreover, the measures under Article 23 may be used to provide compensation or restitution for an injured party or a rightful owner.

Article 24 – Execution of confiscation [(1)]

178. The drafters of this Convention kept this provision unchanged from the 1990 Convention.

179. Article 24, paragraph 1, states the fundamental rule that, once the authorities of a State have accepted a request for enforcement or a request under Article 23, paragraph 1.b, everything relating to the request must be done in accordance with that State's law and through its authorities. This rule of *lex fori* is normally interpreted to the effect that the law of the forum governs matters of procedure, mode of confiscation proceedings, matters relating to evidence and also limitation of actions based on time bars (see, however, Article 28, paragraph 4.e). In the case of remedies in respect of cases relating to Article 23, paragraph 1.a, a special rule is provided in Article 24, paragraph 5, which preserves the right to deal with applications for review of confiscation orders, originally issued by the requesting Party, for that Party alone.

180. As one of the consequences of the interpretation of paragraph 1, the experts drafting the 1990 Convention agreed that, if the law of the requested Party requires notification of a confiscation order and such notification was not given, the requested Party would not be in a position to execute the order since the execution is governed by the law of the requested Party. In addition, the paragraph covers possible interventions by the requested Party which might lead to the mitigation of confiscation orders which have already been issued.

181. The question of limitation of actions is particularly complicated in respect of confiscation. Some countries may not provide for any rules in this respect, whereas others may have provided for a set of rules relating to the original offence, the service of summons, the enforcement of the confiscation order, etc. In the view of the experts, such limitations, where they exist, should always be interpreted under the law of the requested State in conformity with what is provided under Article 16. If a confiscation order is statute-barred under the law of the requesting State, this would normally mean that it is not enforceable in the requested Party. Confiscation may then be refused under Article 28. There should therefore be no room for doubt. Under Article 37, paragraph 3.a.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal. In addition, the requesting Party is obliged to inform the requested Party of any development by reason of which the confiscation order ceases to be wholly or partially enforceable (see Article 41, paragraph 2.a).

182. Paragraph 2 was inspired by Article 42 of the European Convention on the International Validity of Criminal Judgments. Similar wording is found also in Article 11, paragraph 1.a, of the Convention on the Transfer of Sentenced Persons. The experts drafting the 1990 Convention considered this provision to be of crucial importance in the field of co-operation in penal matters, but provided a possibility of making a reservation in paragraph 3 to assure a sufficient degree of flexibility to the 1990 Convention and of this Convention. Such possibility is however limited only to those few states which, for constitutional or similar reasons, would otherwise have had difficulties in ratifying the 1990 Convention and this Convention.

183. Without prejudice to the principle of review of a confiscation order provided for in Article 24, paragraph 5, the following could be stated in order to clarify the meaning of paragraph 2.

(1) See Paragraphs 50-54 of the Explanatory Report to Convention 141.

184. Paragraph 2 is in principle only applicable to a request for enforcement of a confiscation order under Article 23, paragraph 1a. If, for instance, the requested state chooses to initiate its own proceedings under Article 23, paragraph 1.b, despite the fact that an enforceable confiscation order by the requesting state exists, the present paragraph applies equally to those proceedings. The purpose of the paragraph is that, if a factual situation has already been tried by the competent authorities of one state, then the competent authorities should not once again try those facts. It should place confidence in the foreign authorities' decision. Regarding the additional protection provided for innocent third parties, see also Article 32.

185. It is another matter if a party invokes new facts which, since they occurred later, were not tried by the authorities of the requesting Party (*factum superveniens*) or facts that existed but, for a valid reason (for example they were not known), were not brought before the authorities of the requesting Party. In such cases, the authorities of the requested Party are, of course, free to decide on such facts [(13)], or may refer them back to the requesting Party for consideration.

186. The requested State is bound by the "findings as to the facts". It is not immediately apparent what may constitute facts and what may constitute legal consequences of such facts. An example would be the case where the courts of the requesting State have found a person guilty of illegal trafficking of 100 kg of cocaine. In consequence, property equal to the proceeds of trafficking 100 kg was confiscated. The offender cannot, in such a case, in proceedings before the authorities of the requested State argue that he had only trafficked 10 kg since the authorities of the requested State are bound by the findings of the authorities of the requesting State.

187. Legal consequence, on the other hand, is not binding upon the requested State. If, for instance, mental deficiency does not constitute a ground for non-confiscation in the requesting state, the requested state might still examine the confiscation order and take into account the mental deficiency. The requested State may even examine whether the facts relating to the mental deficiency, as stated in the decision by the court in the requesting state, amount to mental deficiency under the law of the requested State.

188. If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defence in the requested but not in the requesting State, the requested State would in some circumstances be in a position to refuse enforcement if it finds such a fact to be present. Such refusal would then be based on Article 28, paragraph 1.f. Thus, it may be necessary for the court or authority in the requested State to conduct a supplementary investigation into facts not determined by the decision in the requesting state. However, the court of the requested State is not allowed to proceed to the hearing of new evidence in respect of facts contained in the decision of the requesting State, unless such evidence was not produced for valid reasons, for instance because the evidence was not known.

189. It follows from the above that the court of the requested State cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the decision of the requesting State.

190. The rate of exchange in paragraph 4 refers to the official middle rate of exchange. Paragraph 5 is inspired by Article 10, paragraph 2, of the Validity Convention. Since the requesting State took the decision to confiscate, it seems logical that it should also have the right to review its decision. This implies of course a review of the conviction as well as the judicial decision on the basis of which the confiscation was made. The term "review" also covers extraordinary proceedings which in some States may result in a new examination of the legal aspects of a case and not only of the facts.

191. When elaborating the text of Article 24, the committee that drafted the 1990 Convention discussed whether it was necessary to draft a ground for refusal in respect of the case where the confiscation order had been the subject of amnesty or pardon. This question, which is of little significance, might be covered by other grounds for refusal and needed not be treated expressly in the 1990 Convention. Under Article 41, paragraph 2.a, the requesting Party is obliged to inform the requested Party of any decision by reason of which the confiscation ceases to be enforceable.

Article 25 – Confiscated property

192. The basic idea behind this new provision (which is inspired by Article 14 of the UN Convention against transnational organized crime) in paragraph 1 is that proceeds from the confiscation of illegally obtained profits or assets in a criminal case in the requesting State remain in the hands of a Party to the extent that those proceeds are found in that Party. It is up to that Party to decide whether it is willing to transfer (all or part of) those proceeds to another Party. Paragraph 1 provides that it shall dispose of them in conformity with its internal law and its administrative procedures.

193. This approach, which is reflected also in Article 15 of the 1990 Convention, provided a basis, but left the further implementation entirely up to the Parties. However, the drafters of this Convention considered that an agreement in this field may have advantages. After all, sharing of confiscated property often concerns large sums and an agreement will also provide a more solid basis than the conclusion of an *ad hoc* arrangement.

194. It seems logical that if provisions in a convention are deemed necessary, such a provision should also relate to the method of distribution of the confiscated property. Therefore, the drafters of this Convention gave a first indication in paragraph 2 of Article 25, which provides that priority consideration should be given to returning the confiscated property to the requesting Party, in order to compensate victims or return the property to the legitimate owner.

195. Paragraph 3 provides for the possibility of Parties to conclude agreements or arrangements to share confiscated properties with other Parties when the request is made in accordance with Articles 23 and 24 of this Convention.

Article 26 – Right of enforcement and maximum amount of confiscation

196. Paragraph 1 of this article states the general principle that the requesting State maintains its right to enforce the confiscation, whereas paragraph 2 seeks to avoid adverse effects of a value confiscation which is enforced simultaneously in two or more States, including the requesting State. This solution departs from the one adopted in Article 11 of the Validity Convention [(1)].

Article 27 – Imprisonment by default

197. In some States it is possible to imprison persons who have not complied with an order of confiscation of a sum of money or where the confiscated property is out of reach of the law enforcement agencies of the State. Also, other measures restricting the liberty of the affected person exist in some States. Imprisonment or such measures may in other States have been declared unconstitutional [(2)].

(1) See Paragraph 56 of the Explanatory Report to Convention 141.
(2) See Paragraph 57 of the Explanatory Report to Convention 141.

Section 5 – Refusal and postponement of co-operation

Article 28 – Grounds for refusal [(1)]

198. The drafters of this Convention have left this provision basically unchanged from the 1990 Convention. There are however three notable modifications: (i) the fiscal and political offence exception cannot now be invoked for the offence of financing of terrorism as defined in this Convention (Article 28(1)(d and e)), (ii) a refusal to assist under this Convention cannot be made on the basis that the person subject to the request is at the same time identified as responsible for money laundering and for the predicate offence (Article 28(8)(c)) and (iii) the condition of dual criminality has to be examined with respect to the act which is at the basis of the offence, regardless of whether both Parties place the offence within the same category of offences or denominate the offence by the same terminology (Article 28(1)g).

199. In order to set up an efficient but at the same time flexible system, the committee that drafted the 1990 Convention chose not to elaborate a system of conditions coupled with mandatory grounds for refusal. It considered instead that the 1990 Convention should provide for a system which would, to the fullest extent possible, place states wishing to co-operate in a position to do so. No grounds for refusal are therefore mandatory in the relationship between States. However, this does not exclude states from providing that some of the grounds for refusal will be mandatory at the domestic level. This is especially true for the two first grounds listed in paragraph 1, subparagraphs a and b.

200. There are two sides to Article 28. On the one hand, the requested State may always claim that a ground for refusal exists and the requesting state will usually not be in a position to contest that assessment. On the other hand, the requested State may not claim any other grounds for refusal than those enumerated in the article. If no grounds for refusal exist or if it is not possible to postpone action in accordance with Article 29, the requested State is bound to comply with the request for cooperation. Moreover, the requested Party is obliged to consider, before refusing co-operation, whether the request may be granted partially or subject to conditions.

201. It goes without saying that the requested State is not obliged to invoke a ground for refusal even if it has the power to do so. On the contrary, several of the grounds for refusal are drafted in such a way that it will be a matter of discretion for the competent authorities of the requested State to decide whether to refuse co-operation.

202. Paragraph 1 is valid for all kinds of international co-operation under Chapter III of the 1990 Convention and Chapter IV of this Convention. Paragraphs 2 and 3 concern only measures involving coercive action, whereas paragraph 4 only concerns confiscation. Paragraphs 5 and 6 concern proceedings *in absentia*, paragraph 7 contains a special rule for bank secrecy and paragraph 8 limits the possibility of invoking the ground for refusal in paragraph 1.a in two particular situations.

203. The ground for refusal contained in paragraph 1, sub-paragraph a, is also found in Article 11, paragraph j, of the European Convention on the Transfer of Proceedings in Criminal Matters and Article 6, paragraph a, of the European Convention on the International Validity of Criminal Judgments. As stated in the explanatory reports to those conventions, it is impossible to conceive of an obligation to enforce a foreign judgment (the Validity Convention) or to make prosecution compulsory (the Transfer Convention) if it contravenes the constitutional or other fundamental laws of the requested State. Observance of these fundamental principles underlying domestic legislation constitutes for each state an overriding obligation which it may not evade. It is therefore the duty of the organs of the requested state

(1) See Paragraphs 58-77 of the Explanatory Report to Convention 141.

to see that this condition is fulfilled in practice. This ground for refusal takes account of particular cases of incompatibility by means of a reference to the distinctive characteristics of each State's legislation, for it is impossible, in general regulations, to enumerate individual cases.

204. The committee of experts that drafted the 1990 Convention on several occasions discussed possible cases when this ground might come into play. During these discussions, the following examples were mentioned:

a) where the proceedings on which the request are based do not meet basic procedural requirements for the protection of human rights such as the ones contained in Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

b) where there are serious reasons for believing that the life of a person would be endangered;

c) where in particular cases it is forbidden under the domestic law of the requested Party to confiscate certain types of property;

d) cases of exorbitant jurisdictional claims asserted by the requesting Party;

e) where the confiscation order is determined on the basis of an assumption that certain property represents proceeds, whereas the burden of proof as to its legitimate origin was incumbent upon the convicted person, and such a determination would, under the law of the requested Party, be contrary to the fundamental principles of its legal system. It follows from this that, if a State recognises this principle in respect of one category of offence, it cannot apply this ground for refusal for another category of offences;

f) where interests of the requested State's own nationals could be jeopardised. One example is when a request for enforcement concerns property which is already subject to a restraint order for the benefit of a privileged creditor in a bankruptcy or concerns property which is subject to litigation in a fiscal matter. Such priority problems should be solved according to the requested state's own legislation.

205. The scope of application of sub-paragraph a is limited by Article 28, paragraphs 5 and 6.

206. The ground for refusal in sub-paragraph b is also found in Article 2, paragraph b, of the European Convention on Mutual Assistance in Criminal Matters. It is however slightly reworded in the present Convention to indicate that the criterion is judged objectively.

207. The phrase "essential interests" refers to the interests of the state, not of individuals. Economic interests may, however, be covered by this concept.

208. Sub-paragraph c is intended to cover three different cases of grounds for refusal. This is why the committee drafting the 1990 Convention deliberately chose the general term "importance". The first concerns cases when there is an apparent disproportion between the action sought and the offence to which it relates. If, for example, a State is requested to confiscate a large sum of money when the offence to which it relates is of a minor nature, international co-operation could in most cases be refused on the basis of the principle of proportionality. In addition, if the costs of confiscation outweigh the law enforcement benefit at which the confiscation action is directed, the requested Party may refuse co-operation, unless an agreement to share costs is reached.

209. The second case relates to requests where the sum in itself is minor. It is clear that the often expensive system of international co-operation should not be burdened with such requests.

210. The third case concerns offences which are inherently minor (see Recommendation No. R (87) 18 on the simplification of criminal justice). The system of international co-operation provided under the 1990 Convention and this Convention should not be used for such cases.

211. Where the request gives rise to extraordinary costs, Article 44 will apply. It is clear that the present paragraph can be applied if no such agreement as is envisaged under Article 44 can be reached.

212. The committee drafting the 1990 Convention agreed that the terms "political" and "fiscal" should be interpreted in conformity with other European penal law conventions elaborated under the auspices of the Council of Europe. The experts agreed that no offence defined as a drug offence or a laundering offence under the 1988 United Nations Convention should be considered a political or fiscal offence.

213. The Convention makes it clear that the fiscal offence exception may no longer be invoked in respect of co-operation concerning the financing of terrorism.

214. Moreover, the drafters of this Convention considered that the financing of terrorism can never be considered a political (sub-paragraph e) offence, thereby justifying refusal of co-operation under this Convention. By referring to the notion of the financing of terrorism, as defined in the Convention, the drafters wanted to recall the definition of the financing of terrorism as contained in the 1999 UN Convention and through that Articles 14 and 15 of the 1999 UN Convention. Since the scope of application of this Convention, as defined in the terms of reference of the expert committee drafting it, is restricted to crimes having a financial element, the grounds of refusal in this article relate to the financing of terrorism. Co-operation in respect of specific criminal offences related to terrorism is covered by other relevant instruments.

215. The principle of *ne bis in idem* is generally recognised in domestic cases. It also plays an important role in cases with a foreign element, but its application may vary from country to country. Sub-paragraph f refers only to the principle as such without defining its content. The principle and its limits must be interpreted in the light of the domestic law of the requested Party.

216. *Ne bis in idem* will usually be interpreted in relation to the facts in a specific case. If, in a given case, other facts were involved than the ones relied upon in the request, it would be possible to postpone co-operation on the basis of Article 29.

217. The ground for refusal contained in sub-paragraph g indicates the requirement of double criminality. It is not, however, a requirement which is valid for all kinds of assistance under the 1990 Convention and this Convention. In respect of assistance under Section 2, the requirement is only valid when coercive action is implied [(16)]. The provision also states that where dual criminality is required for co-operation under this chapter, that requirement shall be deemed to be satisfied regardless of whether both Parties place the offence within the same category of offences or denominate the offence by the same terminology, provided that both Parties criminalise the conduct underlying the offence. This provision follows textually the second sentence of FATF Recommendation 37 which relates to activities covered by the FATF mandate.

218. In the field of international co-operation in criminal matters, the principle of double criminality may be *in abstracto* or *in concreto*. It was agreed, for the purpose of requests under Section 4 of Chapter III of the 1990 Convention and of Chapter IV of this Convention, to consider the principle *in concreto*, as in the case of the Validity Convention and the European Convention on the Transfer of Proceedings in Criminal Matters. In cases where double criminality is required for assistance to be afforded under Articles 16 and 22, it is sufficient to consider the principle *in abstracto*. For requests under Articles 21 and 22, it may depend on whether the request is one covered by paragraph 1 of Article 21, or by paragraph 2 of that article. For requests under Article 21, paragraph 2, double criminality *in concreto* would be necessary.

219. This condition is fulfilled if an offence which is punishable in a given State would have been punishable if committed in the jurisdiction of the requested State and if the perpetrator of that offence had been liable to a sanction under the legislation of the requested State.

220. This rule means that the *nomen juris* need not necessarily be identical, since the laws of two or more states cannot be expected to coincide to the extent that certain facts should invariably be considered as constituting the same offence. Besides, the general character of the wording of the clause indicates that such identity is not, in fact, necessary, which implies that differences in the legal classification of an offence are unimportant where the condition considered here is concerned. The requirement of double criminality should thus be applied flexibly to ensure that co-operation under the 1990 Convention and this Convention stresses substance over form. The technical title of the offence or the penalty carried by that offence should not be a basis for refusal if the actions criminalised in both states are approximately the same or seek to redress the same injury.

221. It is for the authorities of the requested State to establish whether or not there is double criminality *in concreto*. Article 38 gives the requested state the possibility of asking for additional information if the information supplied is not sufficient to deal with the request.

222. When coercive action is sought, the requesting State might not be in a position to give a full account of the facts on which the request is based simply because that state does not yet possess information in respect of all relevant elements. This implies that the requested State must consider such a request liberally in respect of the requirement of double criminality.

223. "Coercive action" must be defined by the requested Party. It is in the interest of that Party that the requirement of double criminality is upheld.

224. Paragraph 2 concerns only provisional measures and investigative assistance involving coercive action. The paragraph should be read in conjunction with Article 15, paragraph 3. It affords to the requested Party the possibility of refusing co-operation if the measure could not be taken under its law if the case had been a purely domestic one. By mentioning a "similar" domestic case, it becomes clear that not all objective elements need to be the same. The requested Party must also take account of the urgency of the measures requested. It will be obliged sometimes to consider a request liberally in respect of the requirement in this paragraph.

225. During the elaboration of the 1990 Convention, the experts drafting the 1990 Convention discussed whether it was necessary to draft similar grounds for refusal for these measures to the ones contained in Article 28, paragraph 4, sub-paragraphs a to c. The drafters of the 1990 agreed however that the wording of Article 28, paragraph 2, would also cover such situations.

226. Paragraph 3 provides for the possibility of refusing co-operation where a Party requests another Party to take measures which would not have been permitted under the law of the requesting Party. Not all the experts drafting the 1990 Convention considered that it was necessary to draft a ground for refusal for this situation. The latter part of the paragraph refers to the competence of the authorities in the requesting Party. The experts drafting the 1990 Convention thought that a request for measures involving coercive action should always be

authorised by a judicial authority, including public prosecutors, competent in criminal matters. This would exclude administrative courts or judges or courts competent in civil cases only.

227. With regard to Article 28, paragraph 4, sub-paragraph a, the expression "type of offence" is meant to cover cases where confiscation is not at all provided for in respect of a certain offence in the requested Party. The sub-paragraph applies to the categories of offences which are excluded from the scope of application of Article 3, paragraph 1, pursuant to a declaration under Article 3, paragraph 2.

228. Sub-paragraph b refers to laws other than those relating to fundamental principles of the legal system (paragraph 1.a of Article 28). When a request for confiscation relates to a case that, had it been a domestic case, would not result in a confiscation because of those laws, the requested Party should have the possibility of refusing cooperation.

229. The committee drafting the 1990 Convention discussed the interaction between this paragraph and the obligation under Article 23, paragraph 3. In this connection, the drafters of the 1990 Convention agreed, on the one hand, that the paragraph will apply only when a request emanates from States which apply property confiscation or when it concerns a request from a value confiscation country to a value confiscation country and, on the other hand, if, at the stage of realising the claim, there is no relationship between an offence and the property, which can be the case in the system of value confiscation, that that alone is no ground for refusal since the expression "advantage that might be qualified as proceeds" refers to the assessment stage. Another way of expressing this would be to state that co-operation may be refused when the assessment of the proceeds made by the requesting Party would run counter to the principles of the domestic law of the requested Party, because of the remote relationship between the offence and the proceeds.

230. Drafters of the 1990 Convention from States which mainly use the system of value confiscation expressed misgivings, during the elaboration of this provision in 1990, that it might be misinterpreted in a way which would exclude the application of value confiscation orders. In order to remedy this, the beginning of the sub-paragraph was added to make it clear that the application of the provision should be without prejudice to the value confiscation system. Experts drafting the 1990 Convention were also reminded of the general principle embodied in the 1990 Convention and in this Convention that the two systems were equal under the 1990 Convention and this Convention.

231. The committee that drafted the 1990 Convention also concluded that, where the confiscation is not at all based on an assessment of proceeds but only of the capital of the convicted person, such cases were outside the scope of application of the 1990 Convention and this Convention. It was noted that, besides confiscation of instrumentalities, Articles 3 and 4 refer to confiscation procedures essentially based on an assessment of the existence and quantity of illicit proceeds. This is valid both for property confiscation (when the property assessed as proceeds is usually also the object of the enforcement of the confiscation) and for value confiscation (where the confiscation order may ultimately be satisfied by realising the claim on property which does not constitute proceeds, but where in any case the "value" to be confiscated is determined by assessing the proceeds from offences).

232. Sub-paragraph c need not be commented on in great detail. In respect of the enforcement of a foreign confiscation order (Article 23, paragraph 1.a), it is obvious that the requested Party must make an assessment as if the confiscation had been a similar national case. In cases where confiscation procedures are initiated in accordance with Article 23, paragraph 1.b, the requested Party may wish to recognise any acts performed by the requesting Party which may have had the effect of interrupting running periods of time-limitations under its law [(16)].

233. Sub-paragraph d was discussed at great length by the experts drafting the 1990 Convention. It is probable that most requests for co-operation under Chapter IV, Section 4, will concern cases where a previous conviction exists already. However, it is also possible in some States to confiscate proceeds without a formal conviction of the offender, sometimes because the offender is a fugitive or because he is deceased. In certain other States, the legislation makes it possible to take into account, when confiscating, offences other than the one which is adjudicated without a formal charge being made. The latter possibility concerns in particular certain states' drug legislation. The experts drafting the 1990 Convention agreed that international co-operation should not be excluded in such cases, provided however that a decision of a judicial nature exists or that a statement to the effect that an offence has or several offences have been committed is included in such a decision. The expression "decision of a judicial nature" is meant to exclude purely administrative decisions. Decisions by administrative courts are however included. The statements referred to in this article do not concern decisions of a provisional nature.

234. Sub-paragraph e describes the case where confiscation is not possible because of the rules relating to the enforceability of a decision or because the decision might not be final. Although in most cases a decision is enforceable if it is final, recourse to an extraordinary remedy may preclude enforcement. On the other hand, an enforceable decision may not be final, for instance in cases where the decision has been rendered *in absentia*. The lodging of an opposition or appeal against such a decision may have an interruptive effect as to its enforceability, but need not affect the part of the decision which may already have been enforced, nor necessarily imply the lifting of any seizure of realisable property. Thus, enforceability cannot be completely identified with finality and for this reason it was held essential to differentiate between the two possibilities. Under Article 37, paragraph 3.a.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal.

235. Sub-paragraph f concerns *in absentia* proceedings. The paragraph is inspired by the Second Additional Protocol to the European Convention on Extradition. The committee drafting the 1990 Convention had in mind, when drafting the provision, Resolution (75) 11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused as well as Article 6 of the ECHR.

236. Paragraphs 5 and 6 were drafted to limit the possibility of criminals escaping justice by simply refusing to answer the summons to appear in court. Paragraph 6 is, however, not compulsory. It is a matter for the authorities of the requested state to assess the fact that the decision was taken *in absentia* and the weight of the circumstances mentioned in the paragraph in the light of the domestic law of the requested Party.

237. Paragraph 7 deals with bank secrecy in the framework of international co-operation. As regards the national level, see Article 7, paragraph 1, and the explanatory report on that article.

238. In most states, the lifting of bank secrecy requires the decision of a judge, an investigating judge, a prosecutor or a grand jury. The experts drafting the 1990 Convention considered it natural that a Party may require that international cooperation should be limited to instances where the decision to lift bank secrecy had been ordered or authorised by such authority.

239. Under the 1988 United Nations Convention, bank secrecy may never be invoked to refuse co-operation in respect of proceeds from drug or laundering offences. The 1990 Convention and this Convention are not intended to restrict international co-operation for such offences.

240. Paragraph 8.a of this article implies that co-operation under this Chapter shall include co-operation in relation to legal persons.

241. As noted earlier (in paragraph 198), sub-paragraph c of paragraph 8 is new as compared with the 1990 Convention and prevents refusal to co-operate internationally on the grounds that, on the basis of the internal law of the requesting Party, the subject is the author of both the predicate offence and the money laundering offence. The underlying assumption that self or own funds laundering is not only permissible but essential in money laundering criminalization was controversial in 1990 and some jurisdictions state that such a form of criminalization remains contrary to the fundamental principles of their domestic law.

242. Nonetheless, in the years since 1990, there has been a steady growth in the number of jurisdictions which have elected to subject own funds laundering to criminal sanctions. It has also become common place for mutual evaluation reports by MONEYVAL to call for consideration to be given to the introduction of such an offence when none presently exists. Notwithstanding this trend, the continuing diversity of practice has given rise to concerns that the absence of double criminality in such circumstances can have an adverse impact on the availability of international co-operation.

243. In order to address this problem, this Convention retains the possibility for States not to apply own funds laundering in domestic money laundering criminalization, but requires them not to invoke this element to refuse any co-operation under this Convention.

244. This provision does not however affect the right of a Party to refer to the ground for refusal set forth in Article 28.1.a.

Article 29 – Postponement

245. This provision is unchanged from the 1990 Convention. A decision to postpone will usually indicate a time-limit. The requested Party may therefore postpone action on a request several times. According to Article 30, the requested Party must also consider whether the request may be granted partially or subject to conditions before taking a decision to postpone. It is normal that any such decision be taken in consultation with the requesting Party. If the requested Party decides to postpone action, Articles 40 and 41, paragraph 1.*c*, will apply [(1)].

Article 30 – Partial or conditional granting of a request [(2)]

246. This provision is also unchanged from the 1990 Convention. Reference is made to the commentary under Article 29 above. The words "where appropriate" indicate that consultation should be the rule; immediate decisions should be the exception unless they are purely based on questions of law, because it is usually appropriate to seek consultations with the Party that requests international co-operation. The 1990 Convention and this Convention do not prescribe any form for such consultations. They may also be informal, via a simple telephone call for instance between the competent authorities.

247. Conditions can be laid down either by the central authorities of the requested Party or, where applicable, by any other authority which decides upon the request. Such conditions may for instance concern the rights of third parties or they may require that a question of ownership of a certain property be resolved before a final decision as to the disposal of the property is taken.

248. The paragraph also covers partial refusal which could take the form of admitting only confiscation of certain property or enforcing only part of the sum of a value confiscation order

(1) See Paragraph 78 of the Explanatory Report to Convention 141.
(2) See Paragraph 79 of the Explanatory Report to Convention 141.

Section 6 – Notification and protection of third parties' rights

Article 31 – Notification of documents [1]

249. This provision is unchanged from the 1990 Convention. This article has been drafted on the basis of the Hague Convention on the serving of legal documents in civil or commercial matters but differs slightly from that convention. Notification requirements are in particular relevant to rights of third parties. The article has therefore been placed in this section to stress this fact.

250. As to the relationship between this article and other conventions, see Article 52.

251. The Convention provides the legal basis, if such does not exist on the basis of other instruments, for international co-operation in the fulfilment of notification requirements. Among the notifications that might be required, depending on domestic law, can be mentioned a court order to seize property, the execution of such an order, seizure of property in which third party rights are vested, seizure of registered property, etc. The type of judicial documents that might be served must always be determined under the national law.

252. In cases where it is important to act quickly or in respect of notifications of judicial documents which are of a less important nature, the law of the notifying State might permit the sending of such documents directly or the use of direct, official channels. Provided that a Party to the 1990 Convention or to this Convention does not object to this procedure, by entering a reservation under Article 31, paragraph 2, States should have the possibility of using such direct means of communication.

253. In respect of the indication of legal remedies, the experts drafting the 1990 Convention agreed that it is sufficient to indicate the court of the sending State to which the person served has direct access and the time-limits, if any, within which such court has to be accessed. It should also be indicated whether this has to be done by the person himself or whether he may be represented by a lawyer for this purpose. No indication of further possibilities of appeal is necessary.

Article 32 – Recognition of foreign decisions [2]

254. This provision is unchanged from the 1990 Convention. Article 32 describes how third party rights should be considered under the 1990 Convention and this Convention. Practice has shown that criminals often use ostensible "buyers" to acquire property. Relatives, wives, children or friends might be used as decoys. Nevertheless, the third parties might be persons who have a legitimate claim on property which has been subject to a confiscation order or a seizure. Article 9 obliges the Parties to this Convention to protect the rights of third parties.

255. By third party the committee that drafted the 1990 Convention understood any person affected by the enforcement of a confiscation order or involved in confiscation proceedings under Article 23, paragraph 1.b, but who is not the offender. This could also include, depending on national law, persons against whom the confiscation order could be directed. See also the commentary under Article 8.

(1) See Paragraph 80 of the Explanatory Report to Convention 141.
(2) See Paragraph 81 of the Explanatory Report to Convention 141.

256. The rights of third parties could either have been considered in the requesting state or not considered in that state. In the latter case, the affected third party will always have the right to put forward his claim in the requested state according to its law. In fact, this could often happen since, in some states such as the United Kingdom, third party rights are safeguarded at the stage of the execution of the confiscation order and not at the stage of decision. A consequence of this is that States cannot in this case invoke any of the grounds for refusal, such as Article 28, paragraph 1.a, on the grounds that third party rights had not been examined [(20)].

257. In the case where third party rights had already been dealt with in the requesting state, the 1990 Convention and this Convention are based on the principle that the foreign decision should be recognised. However, when any of the situations enumerated in paragraph 2 exist, recognition may be refused. In particular, when the third parties did not have adequate opportunity to assert their rights, recognition may be refused. This does not however mean that the request for co-operation must be refused. It might be appropriate to remedy the situation in the requested Party, in which case refusal does not seem necessary. Article 30 could also be used in so far as the requested Party may make co-operation conditional on the protection of the rights of third parties.

258. It follows that Article 24, paragraph 2, does not concern the adjudication of rights in respect of third parties. The present article deals exclusively with the rights of third parties. Nothing in the 1990 Convention and in this Convention shall be construed as prejudicing the rights of *bona fide* third parties.

Section 7 – Procedural and other general rules [(1)]

259. Most of the provisions of this Section are unchanged as compared to the 1990 Convention and their content is evident and need no further comments. The following should however be explained.

260. Article 33 gives the Parties a right to designate several central authorities where necessary. This possibility should be used restrictively so as not to create unnecessary confusion and to promote close cooperation between states. Even if not expressly stated in the 1990 Convention and in this Convention, the Parties should, depending on internal organisational matters, have the right to change central authorities when appropriate. The powers of the central authorities are determined by national law.

261. Article 34 describes the communication channels. Normally, the central authority should be used. The application of paragraph 2 is optional. However, the judicial authority is obliged to send a copy of the request to its own central authority which must forward it to the central authority of the requested Party. For the purposes of the 1990 Convention and of this Convention, the term "judicial authority" also includes public prosecutors. Requests or communications referred to in paragraph 5 of the article are mostly intended for simple requests for information, for instance information from a land register.

262. The drafters of this Convention added a new paragraph 6 to this provision in this Convention. It aims at speeding up communications between the authorities of the Parties to render more effective international co-operation under this Convention.

263. Article 35 permits an evolution if techniques change. The term "telecommunications" should therefore be interpreted broadly. Paragraph 1 of Article 35 has been re-drafted in this Convention as compared to the 1990 Convention, to open the way to the use of electronic telecommunications in the transmission of requests and other communications.

(1) For the whole of this Section, see paragraphs 82 to 92 of the Explanatory Report to Convention 141.

264. In the event of urgency, States might prefer to make the first contact by telephone. Requests for co-operation must however in any case be confirmed in writing. States should pay attention to the security aspects of using public networks, for instance by protecting the communication through encryption. It should be possible to send a copy of the certificate by telefax but confirm such certification by sending the original at a later stage.

265. Article 37 States the important rules pertaining to the contents of the request for co-operation. If the rules are not strictly followed, it is clear that international co-operation will be difficult. In particular, it is absolutely necessary that the requesting Party follow conscientiously the provisions of paragraph 1, sub-paragraphs c and e. In particular, with regard to banks, it is necessary to indicate in detail the relevant branch office and its address. It is however not the intention of the committee that the article should be interpreted as implying a requirement on a requesting Party to furnish *prima facie* evidence.

266. Paragraph 1.f refers to Article 15, paragraph 3.

267. Paragraph 2 requires an indication of a maximum amount for which recovery is sought. It concerns, in particular, requests for provisional measures with a view to the eventual enforcement of value confiscation orders.

268. Paragraph 3, sub-paragraph a.iii, may in particular be relevant to the enforcement of a value confiscation order which has already been partly enforced. It may also be relevant when requests for enforcement are made in several states or when the requesting state seeks to execute part of the order.

269. Paragraph 3, sub-paragraph a.iv, might in some states amount to a request for the taking of provisional measures.

270. Paragraph 3.b is of a general nature. In order to fully understand its implications in a specific case, the Parties should read this paragraph in conjunction with the preceding paragraphs of the article.

271. Article 38 makes it possible for a Party to ask for additional information. It may do so but, at the same time, it may take necessary provisional measures if the request for co-operation would cease to have any purpose if the provisional measures were not taken.

272. Article 39 seeks to avoid any adverse effects of requests concerning the same property or person. It may happen, particularly when the system of value confiscation is used, that the same property is subject to confiscation. In cases concerning requests for confiscation, Article 39 obliges the requested Party to consider consulting the other Parties.

273. Article 41, paragraph 1.a, requires the requested Party to promptly inform the requesting Party of the action initiated. Such obligation to inform concerns in particular cases where a Party undertakes measures which might continue for some time and where the requesting Party has a legitimate interest in being kept informed that action is taken and of its continued results, for instance in respect of telephone tapping, monitoring orders, etc. Paragraph 1.b might include communications relating to events affecting the final result of the co-operation. Paragraph 2 deals with the obligation for the requesting Party to inform the requested Party of any development by reason of which any action under the Convention is not justified, for instance a decision by the requesting Party on amnesty or pardon. When such an event occurs, the requested Party is obliged to discontinue the procedures. This is usually the case under the law of the requested Party (see Article 24, paragraph 1). The requesting Party always has the possibility of withdrawing its request for co-operation.

274. Article 42 indicates the rule of speciality which is contained in several other European conventions. The committee drafting the 1990 Convention did not wish, however, to make the rule compulsory in all the cases to which the 1990 Convention applied. It provided therefore, in paragraph 1, for the possibility that the requested Party may make the execution of a

request dependent upon the rule of speciality. Certain Parties would always use this possibility. The experts drafting the 1990 Convention provided therefore, in paragraph 2, for the possibility of declaring that the rule of speciality would always be applied in relation to other Parties to the 1990 Convention and this Convention.

275. Article 43 deals with confidentiality both in the requesting Party and the requested Party. It is important that national law be adapted so that, for instance, financial institutions are not able to warn their clients that criminal investigations or proceedings are being carried out. Disclosure of such facts is a criminal offence in certain states. The degree of confidentiality in international co-operation coincides with the degree of confidentiality in national cases. The term "confidential" might have different legal connotations under the law of some states.

276. Article 44 refers only to "costs" of the action sought. The experts drafting the 1990 Convention discussed whether Article 44 should also refer to "expenses", but decided against it.

277. Article 45, paragraph 1, requires Parties, in principle, to enter into consultations in the case of any liability for damages. Such consultations shall be without prejudice to any obligation of a Party to promptly pay the damages due to the injured person pursuant to a judicial decision to that effect. Consultations are however not always necessary when a question has arisen on how such damages should be paid. If a Party decides to pay damages to a victim because of an error made by that Party, no obligation to consult the other Party exists.

278. If another Party might have an interest in a case, it is normal that that Party should have an opportunity to be able to take care of its interests. The Party against whom legal action has been taken should therefore, whenever possible, endeavour to inform the other Party of the matter.

Chapter V – Co-operation between FIUs and prevention

Article 46 – Co-operation between FIUs

279. This provision is a new element in this Convention, as it includes in the text new provisions concerning FIUs and their role in preventing and combating money laundering and the financing of terrorism. The purpose of FIUs co-operation in the context of this Convention is therefore to combat both money laundering and the financing of terrorism.

280. The drafters of this Convention underlined that the provision concerning FIUs was different from the ones concerning mutual legal assistance. They therefore noted that the grounds for refusal only apply to mutual legal assistance requests and do not apply to the provision concerning FIU co-operation.

281. The provisions contained in Article 46 are largely drawn from the Council Decision of 17 October 2000 concerning arrangements for co-operation between FIUs of the (EU) member States in respect of exchanging information.

282. Paragraph 1 obliges each Party to ensure that its FIU is able to co-operate in the collection and analysis of information on a fact which might be an indication of money laundering. The obligation to co-operate extends to co-operation between FIUs of different Parties to the Convention. The national powers of the FIU also relate to the definition in the domestic law of the offences in relation to which the FIU has the competence to assemble, analyse or, where applicable, investigate information on the national level. Therefore, the extent of co-operation that can be afforded to the FIU of another Party will be subject to such definition. The term “investigation” used in this provision needs to be distinguished from the common activity of collecting intelligence and the analysis function performed by the FIUs (both police and non-police type).

283. Paragraph 2 introduces the possibility for States to forward or exchange information without any prior request, whilst recognising that such exchange of information, even if upon request, can be either in accordance with the Convention or in accordance with the provisions of memoranda of understanding. To this end, the requested FIU should be able to exercise its full authority as if it had received a disclosure. An FIU should at least exchange the kinds of information it has the competence to assemble, analyse or, where applicable, investigate on the national level. This refers to any information the FIU has access to under its own authority, ie without having to address the court for authorisation. This paragraph is to be construed in conjunction with paragraph 5 of this Article (see the explanations below).

284. The committee of experts discussed problems that arise in the exchange of information between different types of FIUs. A situation should be avoided whereby FIUs are only allowed to co-operate with counterpart units of a similar internal status, as has been the case in the past. Paragraph 3 has been drafted with the scope that such limitations are removed thus broadening the possibility of international co-operation between all types of FIUs.

285. From the wording of Paragraph 4 it follows that the requesting FIU must facilitate the exchange of information by the submission of a brief statement of relevant facts already known to it whilst specifying how the information sought will be used. The last sentence of the paragraph on the use of requested information should be read in conjunction with Paragraph 8 which allows the transmitting FIU to impose restrictions and conditions on the use of information.

286. Relevant information under paragraph 5 includes accessible financial information and requested law enforcement data according to national law. The wording of paragraph 5 indicates that the information must be available or accessible to the FIU under its own authority. Moreover, although there are different types of FIUs, FIUs co-operation cannot circumvent mutual legal assistance.

287. Paragraph 6 provides for instances where the requested FIU may refuse to divulge information, including cases when divulging can jeopardize sovereignty or other essential interests of the requested Party. In carrying out requests under this article, the requested Party, however, must appropriately explain the grounds for refusal to the requesting FIU, who cannot challenge the refusal.

288. Paragraph 7 limits the use of information or documents exchanged under the Convention for the purposes laid down in Paragraph 1. Paragraph 7, however, when read in conjunction with Paragraph 8 does not exclude the use of information for purposes other than those stipulated in Paragraph 1. It follows, from this reading that such other use is subject to the consent of the transmitting FIU. The indication of the intended use of the information sought should enable the requested FIU to determine whether the request complies with its domestic law.

289. Paragraph 8 has been drafted with the objective of broadening the use of transmitted information beyond the purposes stipulated under paragraph 1 as required under paragraph 7. However, in doing so, paragraph 8 provides for the transmitting FIU to impose restrictions and conditions on such use. Subject to the provisions of paragraph 9, therefore, the transmitting FIU may refuse to give its consent for the use of information for purposes other than those stipulated in paragraph 1. In this context, it is also important to underline the need for feedback on the use of, or in relation to, information by requesting FIUs to requested FIUs.

290. Paragraph 9 further establishes the specific use of transmitted information or documents for criminal investigation or prosecution for the purposes laid down in paragraph 1. The scope of broadening the use of transmitted information and documents subject to the consent of the transmitting Party, is to facilitate further assistance in criminal investigations. In subjecting such use to the consent of the transmitting Party, the paragraph, therefore, limits the refusal of consent to such use to restrictions under national law or the conditions specified in

paragraph 6. It follows, therefore, that unless one of these two elements is present, the transmitting Party cannot refuse consent and, if it does, it must appropriately explain the grounds for a refusal.

291. The scope of Paragraph 10 is to ensure the protection of information submitted under the Convention from being accessed by an unauthorised body. It follows, from paragraph 7, therefore, that access to this information by other authorities, agencies or departments is subject to the consent of the transmitting FIU.

292. Paragraph 11 ensures that information submitted are duly protected in conformity with the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data (ETS N° 108).

293. Paragraph 12 seeks to ensure that adequate feedback is provided on the use of the information transmitted and the result which came out of such a transmission. Such a provision has a broader meaning and includes, for instance, also information and feedback as to whether a case went to court and the result of the court procedure.

294. Paragraph 13 requires Parties to facilitate co-operation, to indicate the unit which is an FIU within the meaning of this provision. Notification has to be made to the Secretary General of the Council of Europe in accordance with Article 56.e.

Article 47 – International co-operation for postponement of transactions

295. This provision requires measures to be put in place to permit urgent action to be initiated by a FIU at the request of a foreign FIU to postpone a suspicious transaction. The term “initiated” means that the requested FIU is the point of contact for the foreign requesting FIU and that the authority making the decision on postponement may not be the FIU itself. The postponement is carried out if the requested FIU (or indeed the competent authority making the decision on postponement) is satisfied that the transaction in question is indeed related to money laundering or the financing of terrorism and it would have suspended the transaction had it been reported to it domestically. This provision, while reserving to the requested authority a degree of discretion, contains clear criteria which should guide the requested authority in taking a decision on the request. These criteria are to be found in particular in paragraph 2 of this provision.

Chapter VI – Monitoring mechanism

Article 48 – Monitoring mechanism

296. This Convention, contrary to the 1990 Convention, contains a provision monitoring the proper implementation of the Convention by the Parties, which certainly constitutes an important added-value of this new instrument.

297. In order to ensure equality between the Parties in the monitoring process, the latter will be carried out by a Conference of the Parties (COP) which will adopt its own Rules of Procedure, which will have to ensure such equality in the monitoring decision-making process (paragraph 5). Moreover, in order to ensure added-value of the monitoring procedure under this Convention and avoid any overlap with existing monitoring systems (such as MONEYVAL or FATF), while at the same time taking advantage of them, the monitoring procedure will cover the areas dealt with in this Convention which are not also covered by other evaluation mechanisms and will make use of the public summaries available of the FATF and MONEYVAL.

298. Owing to the fact that this is an opened Convention and that States which are not covered either by the FATF or by MONEYVAL may become Parties to this Convention, the COP may, consistent with the object and scope of the Convention, deem public summaries from other FSRBs or IFIs as being the functional equivalent of public summaries for the purpose of this Convention (paragraph 2).

299. Paragraph 3 allows the COP, if it needs further information, to liaise with the Party concerned taking advantage, if so requested by the COP, of the procedure and mechanism of MONEYVAL. After the report to the COP, the latter may decide on a more in-depth assessment of the Party concerned, including by country visits by an evaluation team. Paragraph 3 makes it clear that country visits should be carried out only in exceptional cases when really necessary and should not be carried out as a matter of routine.

300. Paragraph 4 contains a settlement of disputes provision which was already contained in the 1990 Convention, while paragraph 5 requires the Secretary General of the Council of Europe to convene the COP within 1 year from the entry into force of the Convention.

Chapter VII – Final clauses

301. With some exceptions, the provisions contained in this chapter are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

302. Articles 49 and 50 have been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons, which allow for signature, before the convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of this Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible.

303. As regards the relationship between this Convention and the 1990 Convention, in order to avoid legal *lacunae* for the (numerous) Parties to the 1990 Convention, the drafters of this Convention provided for a provision which enables Parties to the 1990 Convention to ratify the new Convention, while at the same time remaining bound by the 1990 Convention. As a consequence, for those Parties which ratify this Convention, this new treaty will apply in their mutual relationship (even if they are both Parties to the 1990 Convention). In the relationship between a Party to this Convention (which is also a Party to the 1990 Convention) and a Party to the 1990 Convention, the latter will apply (including any reservation which has been made).

304. Non-member States of the Council of Europe which have not participated in the elaboration of this Convention and which so request, could be invited rather to accede to this new Convention which is intended to review and update the 1990 Convention.

305. In addition, this Convention – contrary to the 1990 Convention - is opened to the signature of the European Community.

306. In conformity with Article 30 of the 1969 Vienna Convention on the Law of Treaties, Article 52 is intended to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention. Article 52, paragraph 4, relates to the mutual relations between the Parties to the Convention which are members of the European Union. In relation to paragraph 4 of Article 52, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

> "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of the Convention.

307. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community.

308. Article 53 contains provisions for Parties to make declarations and reservations in respect of specific articles, or declare the manner in which certain articles will apply.

309. Article 54 contains a simplified amendment procedure, in order to take into account the fact that Article 13 of the Convention refers to existing international standards (eg. the FATF recommendations) which may evolve with time and that this Convention contains an Appendix with a list of categories of offences which is textually taken from the Glossary to the FATF Recommendations which may also evolve with time. The drafters of this Convention therefore wanted to develop a simplified amendment procedure to ensure that the Convention follows the times and evolution of international law and standards in the area of counter money laundering and the financing of terrorism.

310. The Convention contains an Appendix containing a list of categories of offences to which reference is made to in articles 3.2, 9.4 and 17.5, and which is textually taken from the Glossary to the FATF Recommendations. When deciding on the range of offences to be covered in each of the categories contained in the Appendix, each Party may decide, in accordance with its domestic law, how it will define these offences and the nature of any particular elements of these offences that make them serious offences.