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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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THE EUROPEAN UNION**

**Brussels, 24 October 2001 (31.10)
(OR. fr)**

**12276/1/01
REV 1**

RESTREINT

CRIMORG 102

NOTE

from : Presidency
to Multidisciplinary Group on Organised Crime
Subject : Preliminary draft Model Agreement on the basis of Articles 24 and 38 of the TEU
concerning international cooperation in criminal matters

INTRODUCTION

Objective

Further to the MDG's meeting on 12 and 13 July and 12 October, the Presidency submits this document to the MDG with a view to expediting the work, as instructed by the JHA/ECOFIN Council on 16 October.

The aim of this model agreement is firstly to provide a framework for the Presidency, assisted where necessary by the Commission, in cases where the use of Article 38 is envisaged vis-à-vis a specific country. The Presidency would then have to ask the Council for a mandate to negotiate with the country in question, setting out in greater detail the objectives of the negotiations, the provisions of the model agreement that it wished to use as a basis for the negotiations and, where necessary, other points to be specified in the agreement. The Presidency would report regularly to the Council on the progress of the negotiations. When negotiations ended, the draft agreement would be submitted to the Council in accordance with the procedure laid down in Article 24 of the TEU.

This model should be seen as a non-binding basis for future negotiations. It will of course have to be adjusted – with decisions taken on a case-by-case basis – in the light of the European Union's actual relations with the country concerned and the negotiations that are undertaken.

It is designed to be flexible. It is an "à la carte" model which must be adapted in the light of the Union's objectives in specific negotiations. A decision must be taken, on a case-by-case basis, whether the Union may enter into discussions with the country in question on bilateral obligations or whether, exceptionally, the Union should propose unilateral relations for particular situations.

Context

The European Council has noted on several occasions the importance of strengthening international cooperation to combat money laundering. Conclusion No 57 of the Tampere European Council states:

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

The communication entitled "The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium" brings together the existing political guidelines, initiatives and mandates, and its Recommendation 14(b) is devoted to the question of agreements with off-shore and on-shore financial centres and fiscal paradises:

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

Reference should also be made to the decisions taken by the joint ECOFIN/JHA Council on 17 October 2000, when it:

- stated that it intended to see the opening of **negotiations for agreements with non-cooperative countries** including on the basis of and in accordance with the procedures laid down in Articles 24 and 38 of the Treaty on European Union, and called on the Member States concerned to ensure that similar cooperation was initiated with the non-cooperative dependent and associated territories.

Legal basis: Articles 24 and 38 of the Treaty on European Union

The initiatives that have been examined take account of the new opportunities afforded by Article 38 TEU, which provides an excellent instrument for achieving the stated objectives. The initiatives invoke the possibility, established in that Article, of concluding the agreements referred to in Article 24 TEU on matters falling under Title VI "Police and judicial cooperation in criminal matters".

The EU has already resorted to the possibilities offered by Article 24 TEU in its relations with the Federal Republic of Yugoslavia (FRY). Moreover, the Council recently gave the Presidency a mandate, under Articles 24 and 38 TEU, to hold negotiations with Norway and Iceland so that the provisions of the EU Convention on Extradition of 1996 could apply to those two countries as well.

The Italian initiative

At the JHA Council meeting on 15 and 16 March 2001, the Italian delegation requested that the Presidency be mandated to open negotiations with non-cooperative jurisdictions with a view to concluding a cooperation agreement "in accordance with such criteria as to priority as may be decided on by the Member States, acting in concert".

[...]

**Model ¹ agreement between
the European Union and [name of the State to which the agreement applies] on the basis of
Articles 24 and 38 of the TEU concerning international cooperation in criminal matters**

The European Union,
of the one part,

and

[name of the State to which the agreement applies],

Considering that:

the relations and agreements existing in other areas, notably in matters of trade, development aid,
[other] should be supplemented;

the illegitimate use of certain financial facilities to conceal the proceeds of crime should be stopped;

in order to achieve this aim, international legal cooperation should be strengthened by means of
faster and more effective mutual assistance in criminal matters;

judicial investigations, proceedings and procedures should be facilitated in order to fight all types of
crime, and in particular organised crime, money laundering and economic and financial crime;

¹ This model serves as a "check-list" for the Presidency before Coreper is requested to start negotiations with a particular country. The model is not binding but must be adapted on a case-by-case basis, depending on the country concerned and the Union's objectives.

there is also a need to provide for police and preventive cooperation measures, firstly between Financial Intelligence Units, and in particular measures to prevent money laundering and economic and financial crime;

consideration should also be given to making provision for technical assistance measures and, where appropriate, support measures,

HAVE AGREED AS FOLLOWS:

TITLE I
GENERAL PRINCIPLE OF COOPERATION

Article 1

1. The European Union undertakes to ensure that the Member States of the European Union cooperate with [name of the State to which the agreement applies] as far as possible and [the State to which the agreement applies] undertakes to cooperate as far as possible with the Member States of the European Union to prevent and combat criminal offences, in accordance with the provisions of this Agreement.

2. This Agreement establishes relations between each of the Member States, on the one hand, and [the State to which the agreement applies] on the other. It does not establish mutual relations between the Member States of the European Union.

TITLE II
DEFINITIONS

Article 2
Definitions

1. For the purposes of this Agreement:

- (a) "Contracting Parties" shall mean the European Union and [name of the State to which the agreement applies] ;
- (b) "State" shall mean [name of the State to which the agreement applies] and each of the Member States of the Union [...];
- (c) "Eurojust" refers to the unit mentioned in Decision [date of the Decision to be taken by the Council]; Eurojust acts in the framework of its objectives, powers and tasks, as defined in the instrument setting up Eurojust. This model Agreement does not have the purpose of creating new powers for Eurojust.

[...]

2. The provisions of this Agreement governing relations between the Member States and the third State or between the competent authorities of the Member States and the third State refer to the relations between each Member State, on the one hand, and the third State in question, on the other.

TITLE III
MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Chapter 1
General provisions

Article 3
General principle

1. The Contracting Parties shall undertake to ensure that the widest possible mutual assistance is granted between States, in accordance with the provisions of this Agreement, in any criminal investigation, proceedings or procedure concerning offences the suppression of which, at the time when the mutual assistance is requested, comes within the jurisdiction of the judicial authorities of the requesting State.

2. The Contracting Parties shall undertake to ensure that:
 - (a) mutual legal assistance shall also be granted in criminal investigations, proceedings or procedures referred to in paragraph 1 concerning acts or offences that may involve the responsibility of a legal person established in the territory of the State; and

 - (b) mutual legal assistance shall also be granted in proceedings brought by the administrative authorities in respect of acts that are punishable under the law of the requesting State as infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

Article 4

Scope

Alternative 1 (this alternative will be the most usual one in the negotiations, as the objective should normally be to achieve a broad scope).

1. This Agreement shall apply to judicial investigations, proceedings and procedures concerning [serious] criminal offences [that may give rise to extradition], in accordance with the law of the requesting State.

Alternative 2

[If it is not possible, in individual cases, to provide for broad cooperation, a list of offences, such as the one below, might be used:]

1. This Agreement shall apply to judicial investigations, proceedings and procedures concerning the following criminal offences:

- (a) "Participation in an organised criminal group" as defined in Article 5 of the United Nations Convention Against Transnational Organised Crime (2000);
- (b) "Drug trafficking" as defined in Article 3(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);
- (c) The acts referred to in Article 5 of the protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organised Crime (2000);
- (d) "Money laundering" as defined in Article 6 of the United Nations Convention against Transnational Organised Crime (2000);
- (e) "Corruption" as defined in Article 8 of the United Nations Convention against Transnational Organised Crime (2000);

- (f) "Fraud affecting the European Communities' financial interests" as defined in the Convention on the protection of the European Communities' financial interests (1995);
- (g) "Fiscal fraud", i.e. "a serious fraud consisting in an act committed by means of a systematic and organised use of fraudulent techniques with the intention of dissimulating facts or convincing the authorities about inaccurate facts and which relates to a significant amount of tax either in absolute terms or relative to the annual tax due";
- (h) The acts referred to in Articles 3, 4 and 5 of the Framework Decision of 29 May 2000 on the counterfeiting of the euro;
- (i) Terrorist acts;
- (j) Immigrant trafficking as defined by the Protocol to the United Nations Convention Against Transnational Organised Crime;
- (k) [Other types of offences to be defined during negotiations].

2. For the purposes of applying this Article, it shall be sufficient for the judicial authority of the requesting State to certify in writing that it is investigating, prosecuting or has begun criminal proceedings concerning an offence covered by paragraph 1.

Chapter 2

Mutual assistance measures

Article 5

Measures involved in mutual assistance

Under this Agreement mutual assistance may be requested for the following purposes in particular:

- (a) Obtaining the evidence of witnesses;
- (b) Sending and service of procedural documents;
- (c) Carrying out searches and restraints, including as regards data-processing systems and computerised data;
- (d) Examining articles and visiting the scene;
- (e) Supplying information, articles to be produced in evidence and experts' assessments;
- (f) Supplying originals or certified copies; documents, including in computerised form; and relevant files, including administrative, banking, financial or commercial documents and company documents, in whatever medium they are presented;
- (g) Identifying or locating the proceeds of crime, property, instruments or other articles in order to obtain items of evidence;
- (h) Facilitating the voluntary appearance of persons in the State which is requesting mutual assistance.

Article 6

Request for information on bank accounts

1. A request for mutual assistance may be made by a State or sent by Eurojust, for the purpose of determining whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the requested State and, if so, provide all the details of the identified accounts.
2. The information shall also, if requested, include accounts for which the person that is the subject of the proceedings has powers of attorney.

3. The authority issuing the request shall in the request:
- (a) state why it considers that the requested information is likely to be of substantial value for the purpose of the investigation into the offence;
 - (b) state on what grounds it presumes that banks in the other State hold the account and, to the extent available, which banks may be involved;
 - (c) include any information available which may facilitate the execution of the request.
4. A request for mutual assistance may also be made by a State or sent by Eurojust for the purpose of obtaining particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including particulars of any sending or recipient account.
5. Any request shall indicate why the requested information is considered relevant for the purpose of the investigation into the offence.
6. The requested State may not invoke banking secrecy as a ground for refusing the mutual assistance provided for in this Agreement.

[For the record: the question of whether specific guarantees need to be included for the Member States of the Union will have to be decided case-by-case.]

Article 7

Videoconferencing

1. If a person who is in the territory of the requested State has to be heard as a witness or expert by a competent authority of the requesting State, an application may be made for his hearing to take place by videoconference.

2. Requests for a hearing by videoconference shall contain the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

Article 8

Joint investigations ¹

The central authority of the requested State and the central authority of the requesting State, or Eurojust in accordance with the provisions governing its activities, may decide by mutual consent to set up joint investigation teams to carry out criminal investigations in the territory of one or other of the States setting up the team.

Article 9

Restitution

At the request of the requesting State and without prejudice to the rights of bona fide third parties, the requested State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

Article 10

Spontaneous exchange of information

The competent authorities of the Parties, as well as Eurojust in accordance with the provisions governing its activities, may exchange information, without a request to that effect, relating to criminal offences referred to in Article 4 of this Agreement, if they believe that such information could help them to undertake or to conclude criminal investigations or proceedings.

¹ Scrutiny reservation by the French delegation.

Chapter 3
Conditions of mutual assistance

Article 11
Grounds for refusal

1. Mutual assistance may be refused if [...]:

1° – the execution of the request is likely to undermine the sovereignty, security, public policy or other essential interests of the requested State; or

2° – if the mutual assistance concerns a political offence or is linked to a political offence.

Reasons must be given for any refusal of mutual assistance.

2. [...] A request for mutual assistance may not be rejected solely on the ground that the offence is regarded as also relating to fiscal matters.

[For the record: additional guarantees could be necessary.]

Article 12
Dual criminality ¹

1. Where the request for mutual assistance does not relate to enforcement measures, [...] the absence of dual criminality may not be invoked as a ground for refusing to accede to it.

¹ Scrutiny reservations by A and DK.

2. [...] The execution of a request for mutual assistance may not be made conditional on the offence concerning which mutual assistance is requested also being punishable under the national law of the requested State, if the behaviour constituting the offence for which mutual assistance is requested is characterised as a criminal offence by their own law, whether or not the domestic law places the offence in the same category of offences and whether or not it designates it by the same terminology as the law of the requesting State.

Alternative

[If the judicial authority of the requesting State has certified, in accordance with Article 3, that it is investigating an offence covered by Article 3, the requested State shall undertake not to invoke the absence of dual criminality as a ground for refusing to accede to a request for mutual assistance from the requesting State.]

Chapter 4

Mutual assistance procedure

Article 13

Central authority

1. The States shall designate a central authority or, if a federal constitutional order so requires, central authorities which shall be responsible for and have the power of receiving and arranging for the execution of requests for mutual assistance issued by another Party or from Eurojust. This central authority shall also be responsible for the sending of requests for mutual assistance addressed to another Party or to Eurojust.
2. The central authorities, with the addresses and telephone numbers of contact points, are listed in the Annex to this Agreement.
3. In accordance with the provisions governing its activities, Eurojust may receive requests for mutual assistance with a view to transmitting them.

Article 14

Transmission of requests for mutual assistance

1. Requests for mutual assistance and exchanges of information referred to in this Agreement shall be transmitted in writing or by any other means of producing a written document, in an official language of the requested State.
2. A request for mutual assistance shall contain the following information:
 - (a) The name of the authority issuing the request.
 - (b) The object and nature of the judicial investigation, proceedings or procedure to which the request relates, together with the name and capacities of the authority which is responsible for it;
 - (c) A summary of the relevant facts, except in the case of requests relating to the service of judicial documents;
 - (d) A description of the assistance required;
 - (e) If possible, the identity of the person concerned;
 - (f) The purpose for which the evidence, information or measures are requested;
 - (g) Any details concerning bank account(s), or name of the bank or of the financial institution concerned;
 - (h) The certificate referred to in Article 4(2).
3. The requesting State may require that the requested State maintain secrecy concerning the request and its contents, insofar as is necessary for executing it.

Article 15

Execution of requests for mutual assistance

1. Any request for mutual assistance shall be executed in accordance with the procedures specified in the request, provided that these formalities and procedures are not contrary to the fundamental principles of the requested State.
2. Any request shall be executed within the shortest possible time.
3. If the request cannot be executed in accordance with the procedures or time limits specified therein, the requested State shall promptly inform the requesting State and indicate the conditions under which and time limits within which it should be possible to execute the request.
- [4. The requested State/[name of the State to which the agreement applies] shall execute requests for mutual assistance within the maximum period [of one month] [of three months], or within the period expressly referred to in the assistance request.]¹

[...]

Article 16

Costs

1. Ordinary costs incurred as a result of executing a request shall be borne by the requested State.
- [...]
2. Expenses of a substantial or extraordinary nature incurred in executing a mutual assistance request from one of the European Union Member States shall be borne by the requesting Member State.

¹ To be determined case by case.

3. Matters relating to apportionment of the costs referred to in the preceding paragraphs shall be decided between the Member State of the European Union concerned and [name of the State to which the agreement applies] in accordance with the procedure in Article 24.

Chapter 4

Cooperation for the purpose of confiscation

Article 17¹

Confiscation and provisional measures

1. The Contracting Parties undertake to ensure that judicial cooperation pursuant to this Agreement is also accorded for the purposes of:

- 1° – confiscation of the proceeds of crimes referred to in Article 3 of this Agreement and of instrumentalities and assets equivalent in value to the proceeds of such crimes;
- 2° – confiscation of all or part of the assets into which such proceeds have been transformed or converted;
- 3° – confiscation of assets legitimately acquired with which such proceeds have been intermingled, up to the assessed value of the intermingled proceeds;
- 4° – confiscation of income or other benefits derived from the actions referred to in points 1 to 3 above;
- 5° – identification, tracing, freezing or seizure of items referred to in points 1 to 4 above for the purpose of possible confiscation and the prevention of any transaction, transfer or disposal involving those items.

2. The States shall, on request, cooperate with each other to the widest extent possible for the purpose of investigations or proceedings relating to confiscation as referred to in paragraph 1.

¹ Scrutiny reservations by D and DK.

3. The provisions of the other Chapters of this Title shall apply to this Chapter mutatis mutandis.

[For the record: additional guarantees might be necessary.]

Article 18¹

Disposal of confiscated items

The State which confiscates items at the request of another State shall give consideration²:

- 1° – as a priority, to paying the value of the items confiscated to the Party which requested confiscation so that it can give compensation to the victims of the crime or return such items to their rightful owners;
- 2° – to sharing with the Party which requested confiscation the items or funds derived from their sale.

TITLE IV

POLICE COOPERATION

Article 19

Police cooperation

The Contracting Parties shall undertake to ensure that the States' police forces assist each other, with due regard for their national legislation and within the limits of their powers, in preventing and investigating the crimes referred to in Article 4 of this Agreement.

¹ Scrutiny reservation by D which wanted the wording used in Article 15 of Convention 141. A wanted a reference to national law.

² The different language versions will be aligned on the French version.

Article 20

Exchange of information

1. The Contracting Parties shall undertake to ensure that the States' police forces communicate on request, with due regard for national legislation and within the limits of their powers, information for the purpose of prevention, investigation and law enforcement in respect of the crimes covered by Article 4 of this Agreement, unless, under the national law of the requested State, the request is a matter for the judicial authorities only.
2. The preceding paragraph shall not prevent a State from communicating to another State, without being asked and with due regard for its national law, any information which may be useful to the latter, particularly in the interests of safeguarding public order and protecting victims.

TITLE V

COOPERATION FOR THE PURPOSES OF PREVENTION¹

Article 21²

Cooperation for the purposes of prevention

The Contracting Parties undertake to ensure that States cooperate:

- (a) through exchange of information and mutual consultation to prevent the crimes referred to in Article 4 of this Agreement;

¹ Proposal by the Presidency in response to a comment by the Commission representative.

² Scrutiny reservation by the Commission regarding the legal basis of this Article.

- (b) in particular through their financial intelligence units, to prevent their financial systems being used for the purpose of money laundering. Cooperation will include technical [...] assistance to establish standards for combating money laundering equivalent to those adopted by the European Union and the Financial Action Task Force on Money Laundering (FATF);
- (c) through their financial intelligence units, in receiving disclosures of financial information for the purpose of combating money laundering, in accordance with their national powers;
- (d) with due regard for their national law, to exchange, spontaneously or upon request, any information that may be relevant to the processing or analysis of information or to investigation of financial transactions related to money laundering.

TITLE VI
FINAL PROVISIONS ¹

Article 22
Data protection

1. In applying the preceding Titles, the State to which the personal data have been communicated shall take the necessary measures to guarantee [...] appropriate personal data protection taking into account the application of the principles of the Council of Europe Convention of 28 January 1981.
2. Personal data communicated under this Agreement may be used by the State to which they have been communicated:

¹ Several proposals by the Presidency in response to comments made on the occasion of the meeting.

- (a) only for the purpose of proceedings to which this Agreement applies or for preventing an immediate and serious threat to public security;
- (b) for any other purpose, only with the prior consent of the communicating State.

3. This Article shall also apply to personal data not communicated but obtained otherwise under this Agreement.

4. In the circumstances of the particular case, the communicating State may require the other State to give information on the use made of the data.

[For the record: a system for checking data protection should be used before allowing personal data to be communicated.]

Article 23

European Union support

The European Union/The Member States of the Union ¹ shall make available to [name of the State to which the agreement applies] technical assistance, legal, police and linguistic training for judges, law enforcement agencies and bodies referred to in Article 21 and, where appropriate, any other means necessary for full implementation of this Agreement, taking into account the number of mutual assistance requests sent by the European Union Member States or through Eurojust to [name of the State to which the agreement applies]. Such assistance shall be subject to the internal rules of the European Union and its duration and the practical details relating to it shall be laid down in an Annex to this Agreement.

¹ It must be determined on a case-by-case basis whether one of the Member States can supply particular assistance and if such assistance should be provided for by this Agreement.

Article 24
Conciliation procedure

The Contracting Parties, through the States' central authorities, [...] shall agree on action to be taken on any matter covered by this Agreement.

Article 25
Reservations

No reservations may be entered in respect of this Agreement.

Article 26
Other Agreements

[For the record: relationship between the Agreement and other Agreements binding on the States.]

Article 27
Entry into force

1. The Secretary-General of the Council of the European Union shall be the depository of this Agreement.
2. This Agreement shall enter into force on the first day of the second month following the date on which the depository has notified the Contracting Parties of the receipt of the instruments in which they state their consent to be bound by it. In its instrument, the European Union will indicate the territorial scope of the Agreement as far as it is concerned.
3. This Agreement is concluded for an indefinite period. [For the record: possible suspension or denunciation clause for the Agreement.]