

PROTOCOL TO THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION

FULL REGULATORY IMPACT ASSESSMENT

ISSUE AND OBJECTIVE

This assessment estimates the costs and benefits of implementing the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed on 16th October 2001. The Convention, itself, was signed on 29th May 2000, and the provisions of the Protocol are annexed to, and form an integral part of that Convention.

The Protocol requires European Union Member States to:

1. locate and provide details of all bank accounts held by a natural or legal person who is the subject of an investigation into serious crime;
2. provide details of transactions on specified accounts and
3. monitor account activity in response to a request for mutual legal assistance.

Mutual Legal Assistance is the formal process by which states request and provide assistance in gathering evidence from one state to assist in criminal proceedings in another.

This assessment estimates the costs likely to be imposed on the banking sector across the United Kingdom as a result of the obligation to implement the provisions of the Protocol. It reflects the responses to the consultation exercise that took place in February 2002, the Partial Regulatory Impact Assessment (RIA) issued on 9th August 2002 and during the negotiation of the Protocol from July 2000 to October 2001. It also draws substantially on the Full RIA for the Proceeds of Crime Act, which received Royal Assent on 24th July 2002. The key conclusions from the relevant parts of that assessment are included where appropriate.

The Partial RIA was sent to **26 organisations** and was also placed on the Home Office website. **Two** replies were received from the Association of Chief Police Officers in Scotland and the British Bankers' Association. Both organisations were broadly supportive of its recommendations. As a result of the consultation exercise, the Government has not amended its proposals.

The necessary legislation to ratify the Protocol will be included in Part 1 Chapter 4 of the Crime (International Co-operation) Bill.

RISK ASSESSMENT

The RIA for the Proceeds of Crime Act summarised the risks of acquisitive crime to society. It is further recognised that crime does not respect national borders, and that there is a need for additional measures to assist in the fight against crime, in particular organised crime, money laundering and financial crime. This has been an ongoing priority of the European Union (EU).

In addition to improving the UK's domestic ability to tackle money laundering and benefit from crime, the Proceeds of Crime Act will enable the UK to assist other countries with their investigations. However, it will not enable or oblige other countries to assist the UK in return, as this will depend entirely on their own domestic arrangements and legislation.

Ratification of the Protocol will close that gap in relation to the other fourteen Member States of the EU, all of whom are under an obligation to ratify the agreement as a priority. It will create reciprocal obligations for Member States to assist each other in relation to investigations into money laundering, as well as into other forms of serious and organised crime specified in the Protocol.

The Government, in common with all EU governments, has agreed to urgently ratify the Protocol in recognition of its value in the fight against serious and organised crime, including the financing of terrorism. Failure to ratify the Protocol in the UK would breach an international agreement. Furthermore, it would damage the UK's ability to obtain mutual legal assistance. The UK would be unable to expect this type of assistance from other Member States, as the arrangements are reciprocal.

It is not possible to quantify this risk in monetary terms. However, the Proceeds of Crime Act recognised the serious problem posed as a result of the financial gain accruing to those involved in all types of serious criminal activity. It can be assumed that this problem is not exclusive to the UK, but is an EU-wide phenomenon, and that the same measures of assistance should be available across the Union to ensure that there are no loopholes to be exploited by criminals.

OPTIONS

The purpose of the Protocol is to extend the types of mutual legal assistance available and the circumstances in which it can be provided. The measures to be introduced include:

- a. Use for the investigation of certain additional offences of "customer information orders" (like those introduced by Part 8 of the Proceeds of Crime Act 2002 to investigate criminal proceeds), to establish whether a person who

- is the subject of an investigation into or prosecution of serious crime holds bank accounts in the UK;
- b. Provision of information on identified bank accounts
 - c. Use for the investigation of certain additional offences of “account monitoring orders” (like those introduced by Part 8 of the Proceeds of Crime Act 2002 to investigate criminal proceeds) to monitor transactions and account activity in identified accounts;
 - d. Additional safeguards to ensure that requests for mutual legal assistance under the Protocol are not revealed to the customer concerned;
 - e. Streamlined procedures for supplementary requests (to avoid the need to repeat all of the information in the original request);
 - f. Removal of some grounds for refusal of requests (already disappplied by the UK).

Those with potential regulatory impact are identified at a. and c.

Three options were identified.

Option 1: Rely on current legislation

Relying on existing legislation would only enable the UK to respond to requests for customer information and account monitoring orders if they were made as part of an investigation into money laundering or benefit from crime, under the powers introduced by the Proceeds of Crime Act 2002 once it comes into force.

Such an approach would not enable us to ratify the Protocol, which requires that each state must be able to respond to requests concerning all of the crimes within its scope, not just those relating to money laundering and benefit from crime. Ministers have already agreed to ratify the Protocol and the UK is under an obligation to do so. Option 1 was therefore discounted by the Government at the first consultation stage because it would fail to meet this obligation.

Option 2: Legislate in accordance with a “minimalist” interpretation of the Protocol

Requests for lists of bank accounts made under Article 1 of the Protocol must meet certain conditions and contain specified information, and the expectation is that the request will generally be executed if these requirements are met. However, there is an optional safeguard in Article 1(5) that states may apply the same conditions for such requests as for a request for search and seizure.

Option 2 is to apply domestic conditions for search and seizure to requests made under Article 1 of the Protocol, making use of this optional provision.

Under the 1990 Act, the Secretary of State may, in response to a request for mutual legal assistance, make a direction for an application for a warrant to be made to a justice of the peace. On an application a justice of the peace has a

discretion whether or not to grant a warrant. Application of Article 1(5) in the UK would give the judicial authority a discretion whether or not to make the order following a lawful nomination from the Secretary of State.

Option 3: legislate in accordance with a “maximalist” interpretation of the Protocol

The third option was to not make use of the provision in Article 1(5) outlined above, but instead to execute all requests automatically without judicial involvement. The only grounds on which a request may be refused would be that it did not meet the requirements specified on the face of the Protocol, for example that the crime did not fall within one of the categories listed, or because it did not contain the additional information required, such as why the evidence was considered to be of substantial value. Assuming the request did meet the criteria specified in the text, there would be no further discretion regarding its execution.

BENEFITS

Option 1

This would have very limited benefit, and ratification of the Protocol would not be possible. Although it would not create any additional regulatory burden, neither would it improve the UK's existing ability to make or receive assistance. It might even hinder our ability to obtain assistance from the EU under the Proceeds of Crime Act, because other Member States would be under no obligation to respond to such requests and would be unlikely to look favourably on a request from a country not party to the Protocol.

Option 2

This would enable implementation of the Protocol, enabling the UK to meet its international obligations.

It would enable the UK to receive as well as provide assistance in identifying and monitoring bank accounts as part of investigations and prosecutions of serious crime, which will be of benefit to domestic law enforcement agencies. The courts that issue the requests would retain a level of judicial control over the process, ensuring that the facility is not used inappropriately.

It is not possible to quantify the circumstances when this option will enable provision of assistance where the Proceeds of Crime Act would not, and in practice the numbers requests might not be high. However, the arguments for having the facility to accept them centre on the need to be able to receive assistance.

Option 3

This would, as with option 2, enable ratification of the Protocol and enable the UK to request and provide assistance. It would go further than Option 2 and would enable the UK to respond to all requests from other Member States (provided the specified conditions were met), implementing the Protocol to the fullest extent possible. However, it would introduce a very different way to execute requests and would represent a fundamental change to the current system.

It is taken as a logical consequence that more requests would be executed under this option. However, it is difficult to quantify the occasions when requests would be executed which under Option 2 would have been rejected. Indeed this uncertainty is another reason not to introduce a fundamentally different system which might have relatively limited practical benefit in terms of the number of investigations it would assist.

COMPLIANCE COSTS FOR BUSINESS, CHARITIES AND VOLUNTARY ORGANISATIONS

Business sectors affected

Implementation of the Protocol will have cost implications for the banking industry within the UK. It only applies to banks, rather than financial institutions in general.

Compliance costs

The compliance costs associated with implementing measures a - c were considered in detail as part of the extensive consultation process on the Proceeds of Crime Act, and unit costs were revised following comments on the partial RIA at consultation stage and draft full RIA when the draft Bill was published. The explanations for the eventual estimates are provided below under the sections on "additional costs".

The Protocol is introducing identical measures for a wider range of offences, and the unit costs to industry will be the same as those identified as a result of that consultation exercise. The administrative arrangements necessary to obtain this information will already be in place.

Customer Information Orders

The RIA for the Proceeds of Crime Act estimated that the UK would receive 500 overseas requests for customer information orders per annum. It was acknowledged that this was an estimate, because it is impossible to accurately gauge how extensively a completely new provision will be used. This figure covered both EU and non-EU requests. It is difficult to calculate how many of these will be EU requests, but it is estimated that the EU will make up 50% to

70% of that total (250-350 per annum), based on current mutual legal assistance volume.

Once it enters into force, EU requests are likely to use the Protocol as the grounds for the request, because other Member States will be aware of the Protocol rather than the Proceeds of Crime Act, and it will create reciprocal obligations for all states.

The RIA for the Proceeds of Crime Act has already calculated the costs for requests relating to investigations in to money laundering and benefit from crime. The Government therefore does not anticipate any additional regulatory burden or cost in relation to requests involving those crimes.

Additional costs associated with customer information requests under the Protocol

Option 1 would create no additional costs, because the only requests executed would be those already included in the calculations for the Proceeds of Crime Act.

Options 2 and 3 enable ratification of the Protocol and the UK will receive requests in relation to a broader range of crimes than those covered by the Proceeds of Crime Act. There will be an additional regulatory burden associated with these requests. A wide range of serious crimes is envisaged in the Protocol. However, it is very difficult to quantify the occasions when this facility will be used. It is only in certain circumstances that a list of bank accounts held by an individual would be of substantial value to the investigation. The most obvious, notably money laundering, would be largely covered by the Proceeds of Crime Act already, but an example of a non money-laundering offence was outlined in the discussion of Option 1 above.

The unit cost of customer information orders under the Protocol will be the same as those identified for orders under the Proceeds of Crime Act. This was estimated to be £250 per order per institution, although this is likely to fall with increasing computerisation of records and processes and it is probable that cost will vary between banks, depending on the level of computerisation and the number of accounts held. The initial assessment for that Act was £50, but this was revised upwards following the first consultation exercise in recognition of the use of manual records in some banks.

In response to a request made under the Protocol, and in contrast to the Proceeds of Crime Act, the UK will only be under an obligation to direct the orders at banks, not all financial institutions (although legislation will be sufficiently flexible to financial institutions to be included if required), so the potential number of institutions targeted by an individual order will be significantly lower, with the maximum number of targets being around 550.

Although there is, as with the Proceeds of Crime Act, the potential for all banks to be targeted, the Government estimates that a customer information order made on the basis of the Protocol will on average be directed at 100 institutions, and in many circumstances this number will be far fewer. It is anticipated that evidence which points an overseas investigator to the notion that an account might exist in the UK (for example papers uncovered as a result of a search) is likely also to point to the bank itself, enabling the request to be narrowed and costs reduced.

On the basis of the current volume of mutual legal assistance requests and the estimates made in the Proceeds of Crime Bill RIA, the Government estimates that the number of additional serious crime requests (over and above those made under the Proceeds of Crime Act) will be 50 - 150 per annum, depending on the option chosen.

Using these estimates, the approximate cost to industry will be:

Lower: £250 (unit cost) x 100 (average number of institutions) x 50 (number of requests per annum) = £1,250,000.

Higher: £250 (unit cost) x 100 (average number of institutions) x 150 (number of requests per annum) = £3,750,000.

It is not feasible to state that the lower figure represents the cost of adopting option 2, and the higher the cost of adopting option 3. However, it is assumed that option 2 will result in a lower compliance cost because of the power of the judicial authority to consider each case, and option 3 will result in a higher compliance cost, because without any discretion regarding execution, all requests will be executed almost automatically.

Account monitoring orders

The RIA for the Proceeds of Crime Bill estimated that 150 overseas requests for account monitoring orders would be received per annum. In line with the estimates for Customer Information Orders, it is estimated that around 50% - 70% (75 - 105) of these will be from EU countries. The Government therefore does not anticipate any additional regulatory burden or cost in relation to account monitoring requests involving money laundering or benefit from crime.

Additional costs associated with account monitoring requests under the Protocol

Option 1 would create no additional costs. Options 2 and 3 have cost implications, but the Protocol allows discretion when deciding whether to execute Article 3 requests so the automatic execution outlined in Option 3 would represent over regulation in relation to account monitoring. Although there is no explicit restriction on the type or seriousness of crime that such requests must relate to, it will be possible to consider issues such as proportionality when making the decision. Requests for account monitoring orders must identify the

account, so they will only be directed at a particular bank. The costs are therefore very significantly lower than for customer information orders.

It is difficult to assess how many additional requests, outside the scope of the Proceeds of Crime Act, will be received. It is estimated that many requests for the particulars of a specified bank account (already possible under existing law and covered by Article 2 of the Protocol) will be accompanied by a request for a monitoring order. We estimate that the UK currently executes approximately 100 EU requests for particulars of specified bank accounts per year. In addition, a certain proportion of customer information requests might be followed up by requests for an identified account to be monitored.

Whilst recognising the difficulties in estimating demand for an investigative procedure that is not currently available to foreign investigators, the Government estimates that in addition to the requests already covered in the costings for the Proceeds of Crime Act, an additional 50 to 75 EU requests might be received.

The RIA for the Proceeds of Crime Act assumed a unit cost of £250 per order. The account must already be identified so there is no need for any investigative work. The cost covers the administrative cost of setting up the monitoring arrangement and manning it for the agreed period.

Using these estimates, the approximate additional cost to industry above that imposed by requests under the Proceeds of Crime Act will be:

Lower: £250 (unit cost) x 50 (number of requests per annum) = £12,500.

Higher: £250 (unit cost) x 75 (number of requests per annum) = £18,750.

These figures do not represent the alternative cost of option 2 and 3, but rather an estimate of the lower and upper parameters for the estimated number of requests executed. As noted above, option 3 would represent over regulation and is therefore discounted in relation to these requests.

CONSULTATION WITH SMALL BUSINESS: "THE LITMUS TEST"

The British Bankers' Association, which represents 251 banks in the UK, estimates that 99 of its members are "small" or "micro" businesses according to DTI definitions based on the number of UK employees (up to 50). The Small Business Service has been consulted and does not object to the function of the measure. It proposes setting a limit for the amount of time spent per bank per search, and this could be considered in more depth when guidelines are produced.

RESULTS OF CONSULTATION

During the negotiation of the Protocol, consultation took place with other government departments, the police, the courts, the devolved administrations,

the Financial Services Authority, the British Bankers' Association and the Building Societies Association. Concern was expressed about the level of obligation and the potential burden this could create. We hope that the recommendation made in this assessment addresses those concerns. It is further noted that the proposed regulation does not address the risk that criminals may provide false information to banks, or that they may find new ways to conceal funds.

COMPETITION ASSESSMENT

We have carried out a competition filter (attached at annex A) and are of the view that this regulation does not have a negative impact on competition.

SUMMARY AND RECOMMENDATION

Option 2 is the recommended option.

Option 1 would not enable the UK to ratify the Protocol that has been formally adopted by the Council of the European Union and signed by the UK.

Option 3 would be gold plating as it interprets the requirements of the Protocol rigorously. It would enable almost automatic acceptance of EU requests. This would benefit other EU countries in terms of assisting with their investigations. But as other Member States are free to choose the more limited interpretation (as in option 2) the UK would not necessarily gain the same service in return. This option would also create the greatest regulatory burden on the banking sector.

Option 2 is the recommended option and enables the UK to ratify the Protocol, whilst retaining some safeguards. It will be based on a system that is comparable with other procedures for authorising foreign requests and would enable the UK to expect a similar treatment from other EU countries. This approach represents a balance between doing nothing and going further than strictly necessary, which might also be further than other states intend to go.

The organisations responding to the consultation agreed that Option 2 was the preferred option. By proceeding with this option the Government will be able to make legislative provision to enable requests within the scope of the Protocol to be executed, whilst retaining certain judicial and procedural safeguards. Part 1 Chapter 4 of the Crime (International Co-operation) Bill includes provisions which reflect this conclusion.

The total costs of regulation are estimated to range between £1,262,500 and £3,768,750.

ENFORCEMENT, SANCTIONS, MONITORING AND REVIEW

Customer information orders and account monitoring orders will be issued by the court in response to a request made by a police officer following a direction by the Secretary of State.

The Crime (International Co-operation) Bill includes provisions requiring all requests for assistance made under Articles 1 and 3 of the Protocol to be sent via the Secretary of State (in contrast to new provisions for some direct transmission of other mutual legal assistance requests). This will ensure that the number of these types of request received, the time taken to execute them and the ease with which the information may be obtained can be monitored, so that any problems can be identified and procedures reviewed in the light of experience of operation of the new system (both under the Protocol and the Proceeds of Crime Act).

It is anticipated that enforcement costs will fall in large part to the National Criminal Intelligence Service (NCIS), which will be involved in the execution of these types of requests.

It is considered that this will be sufficient for enforcing and monitoring the effectiveness of the procedures.

DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Bob Ainsworth
Parliamentary Under-Secretary of State
Home Office

Date:

Annex A: Competition Filter

The competition filter	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No*
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No*
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No*
Q4: Would the costs of the regulation affect some firms substantially more than others?	No [#]
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential firms that existing firms do not have to meet?	No [#]
Q7: Would the regulation lead to higher ongoing costs for new or potential firms that existing firms do not have to meet?	No [#]
Q8: Is the market characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of firms to choose the price, quality, range or location of their products?	No

*Information provided by the Monetary and Financial Statistics Division of the Bank of England, based on their statistical definition of an UK bank

[#] Regulations will apply equally to all firms meeting this definition, whether new or existing