

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

PARTIAL REGULATORY IMPACT ASSESSMENT

ISSUE AND OBJECTIVE

1. 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.
2. 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 consultations that took place in February 2002 and during the negotiation of the Protocol from July 2000 to October 2001. It also draws substantially on the Full Regulatory Impact Assessment 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.
3. The Protocol requires European Union Member States to:
 - i. 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;
 - ii. provide details of transactions on specified accounts and
 - iii. monitor account activity in response to a request for mutual legal assistance.
4. 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.

RISK ASSESSMENT

5. The Regulatory Impact Assessment 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).
6. 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.

7. Implementation of the Protocol will close that gap in relation to other fourteen Member States of the EU, all of whom are under an equal 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.
8. The Government, in common with all EU governments, has agreed to urgently implement the Protocol in recognition of its value in the fight against serious and organised crime, including the financing of terrorism. Failure to implement the Protocol in the UK would breach an international agreement. Furthermore, failure to implement 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.
9. 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

10. 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 include:
 - a. Use for the investigation of certain offences of customer information orders (as 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 (already done in response to a mutual legal assistance request, by the use of production orders issued following a nomination under section 4 of the Criminal Justice (International Co-operation) Act 1990);
 - c. Use for the investigation of certain offences of account monitoring orders (as 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 disapplied by the UK).
11. Those with potential regulatory impact are identified at a. and c. These, as well as measures d. and e. will require revised guidance to be issued to prosecutors, courts etc as well as the UK Central Authority for mutual legal assistance (UKCA) but the cost of this is considered negligible. Mutual legal assistance guidance is already provided and is updated and revised regularly.
12. Three options have been identified:
- i. Rely on the current regulations
 - ii. Legislate in accordance with a "minimalist" interpretation of the requirements of the Protocol.
 - iii. Legislate in accordance with a "maximalist" interpretation of the requirements of the Protocol.

Option 1

13. Mutual legal assistance is governed by statute: the Criminal Justice (International Co-operation) Act 1990 ("the 1990 Act"). This enables the UK to make and receive requests for assistance in obtaining evidence for use in criminal investigations or proceedings. In addition, the Proceeds of Crime Act introduces provisions to enable a court to issue orders ("customer information orders") to financial institutions to provide details of any accounts held by a person in the context of an overseas investigation into money laundering or benefit from crime. It also introduces provisions to enable the court to issue orders to a particular bank to monitor transactions in a specified account ("account monitoring orders").
14. Relying on this 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.
15. 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. It is difficult to envisage a scenario where it would be necessary to trace and/ or monitor accounts where money laundering or proceeds of crime was not a factor, and it is thought that many, if not most requests will be covered already. However, it is possible that requests will be received where tracing accounts was important to the investigation, yet the crime in question, whilst meeting the protocol criteria, did not fit the scope of the Proceeds of Crime Act. For example, if a murder suspect was believed to have fled to the UK, and a search of his

home recovered evidence of an account in an UK bank (e.g. a logo on an envelope addressed to him), the investigators in that country may ask the UK to establish whether the suspect held any account with that bank and if so, whether and where he was accessing it, with a view to locating him. The Proceeds of Crime Act would not enable the UK to respond, because the crime in question, whilst serious, would not meet its criteria.

16. Ministers have already agreed to implement the Protocol and the UK is under an obligation to do so. Option 1 has therefore been discounted because it would fail to meet this obligation.

Option 2

17. Under the Protocol, requests for lists of bank accounts must meet certain conditions and contain specified information, and the expectation is that the request will generally be executed if these requirements are met. There is an optional safeguard that a Member State may apply the same conditions for such requests as it would for a request for search and seizure.
18. Option 2 is to make use of this safeguard. It would not be possible to refuse a request because it did not relate to money laundering or benefit from crime, but it would be possible to apply the same procedures as would be required for an application for a search warrant.
19. Under Section 7(3) of the 1990 Act, no application for a warrant may be made to a justice of the peace except in pursuance of a direction given by the Secretary of State. There is no obligation on the Secretary of State to issue such a direction although he will generally do so where regulated by an international mutual assistance agreement. On an application a justice of the peace has a discretion whether or not to grant a warrant. This option will follow the same procedure, giving the judicial authority a discretion whether or not to make the order following a lawful nomination from the Secretary of State.
20. The text of the Protocol is open to interpretation. In Article 1 it creates an obligation to respond to requests. The option to apply the same conditions as would be applied to a request to search and seizure potentially conflicts with this provision. Option 2 is a flexible interpretation of the two provisions, based on an understanding that in general, the provision of assistance will not be jeopardised, but an element of judicial control will be possible.

Option 3

21. This option represents a more rigorous interpretation of the requirement to provide the requested information, and does not make use of the optional safeguard outlined above. 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 discretion on the part of either the Secretary of State or the court regarding its execution.

BENEFITS

Option 1

22. 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 and 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

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

24. 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.

25. The courts that issue the requests would retain a level of judicial control over the process, ensuring that the facility is not used inappropriately. Under this option, requests could be refused on discretionary grounds by the Secretary of State.

26. 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 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

27. This would, as with option 2, enable implementation 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.

28. 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

29. 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

30. 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".

31. 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

32. 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 assumption, 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.

33. Once it enters into force, EU requests are likely to cite 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 signatories.

34. The Regulatory Impact Assessment 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 orders under the Protocol

35. 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.
36. 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 listed 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.
37. 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.
38. 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, so the potential number of institutions targeted by an individual order will be significantly lower, with the maximum number of targets being around 550.
39. 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.

40. 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 (excluding money laundering and benefit from crime, which are already covered) will be 50 - 150 per annum, depending on the option chosen.

41. 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) = £2,500,000.

42. 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

43. The Regulatory Impact Assessment 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 orders under the Protocol

44. Option 1 would create no additional costs. Options 2 and 3 have cost implications, but the Protocol allows discretion when deciding whether to execute these 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.

45. 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.

46. 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.

47. 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.

48. Using these estimates, the approximate cost to industry 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.

49. 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"

50. 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

51. 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

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

SUMMARY AND RECOMMENDATION

53. The options are relatively limited because the Protocol has been formally adopted by the Council of the European Union and signed by the UK. Option 1 would not create any additional costs, but neither would it bring any benefits. It would not enable the UK to ratify the Protocol.
54. It is therefore recommended that the relevant provisions are implemented in legislation.
55. Option 3, which interprets the requirements of the Protocol most rigorously, would enable almost automatic acceptance of EU requests, providing only that the conditions specified in the instrument were met. This would be of benefit to other EU countries in terms of assisting with their investigations. However, it would not necessarily mean that the UK would gain the same service in return, because other Member States will be free to choose the more limited interpretation (as outlined in option 2). Option 3 would also create the greatest regulatory burden on the banking sector.
56. Option 2 would enable the UK to ratify the Protocol, whilst retaining safeguards such as judicial oversight of authorisation of requests. Whilst not going so far as Option 3, the risk that some requests might be refused is outweighed by the benefits that this approach will bring. 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 to extend the existing arrangements, which would hinder our own ability to obtain assistance, and going further than appears strictly necessary, which might in any event be further than other states intend to go.
57. It is recommended that Option 2 be adopted, to make legislative provision to enable requests within the scope of the Protocol to be executed, whilst retaining certain judicial and procedural safeguards.
58. The total costs of regulation are estimated to range between £1,262,500 and £2,518,750.

ENFORCEMENT, SANCTIONS, MONITORING AND REVIEW

59. Customer information orders and account monitoring orders will be issued by the court in response to a request made by an appropriate police officer. It is considered that this will be sufficient for enforcing and monitoring the effectiveness of the Regulation.