Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**Opinion 254 (2005)**[1]

# Draft Convention on laundering, the financing of terrorism, search, seizure and confiscation of the proceeds from crime

Parliamentary Assembly

1. The Parliamentary Assembly welcomes the draft convention on laundering, the financing of terrorism, search, seizure and confiscation of the proceeds from crime, which it considers to be an important, timely and valuable contribution to European efforts in this field. It supports the aim of the significant revisions to the earlier Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and, in particular, the application of the extended provisions to the especially serious matter of financing of terrorism.

2. Whilst the intent and purpose motivating the draft convention are to be encouraged, some of its provisions as currently expressed may be, or may result in measures which are inconsistent with fundamental rights, including the existing obligations of potential parties under the European Convention on Human Rights and its additional protocols. These provisions should therefore be revised with the aim of strengthening the convention by avoiding future obstacles to ratification or implementation, in accordance with the fundamental principle of the rule of law.

3. The Assembly therefore recommends that the Committee of Ministers make the following amendments to the draft convention :

*replace the title of the draft convention with the words "convention on laundering, search, seizure, confiscation of the proceeds from crime and the financing of terrorism" ;*

*in Article 1 ("Use of terms"), at the end of sub-paragraph c, add the sentence: "Such intent may be inferred from objective, factual circumstances." ;*

*in Article 2 ("Application of the Convention to the financing of terrorism"), paragraph 2, before the words "financing of terrorism", add the words "offence of", and after the words "to this end", add the words "to other Parties" ;*

*in Article 3 ("Confiscation measures"), at the end of paragraph 1, add the words "consistent with the principle of proportionality and with full respect for the rights of third parties" ;*

*in Article 3, paragraph 5, after the words "legal system", add the words "subject to appropriate procedural safeguards consistent with their obligations under the European Convention on Human Rights and its protocols" ;*

*in Article 7 ("Investigative powers and techniques"), paragraph 1, after the first sentence, add the new sentence: "Such measures must ensure respect for the principle of proportionality." ;*

*in Article 7, paragraph 2.a, after the word "bank" add the words "or non-banking financial institution"; in paragraph 2.b, delete the words "bank" and "banking"; and in paragraph 2.d, after the word "banks" add the words "or non-banking financial institutions", and replace the words "the bank customer" with the words "their customers" (English only) ;*

1. Assembly debate on 27 January 2005 (7th Sitting) (see Doc.10392, report of the Committee on Legal Affairs and Human Rights, rapporteur : Mr Bartumeu Cassany). Text adopted by the Assembly on 27 January 2005 (7th Sitting).

*in Article 8 (“Legal remedies”), change the title of the article to “Rights and remedies” and add a new paragraph 1 as follows: “Nothing in this Convention shall be construed in a manner which would violate or allow violations of the rights contained in the European Convention on Human Rights and those of its additional protocols by which a Party is bound.” ;*

*in Article 8, retain reference to Articles 6 and 7 ;*

*in Article 9 (“Laundering offences”), paragraph 3, replace all the words following the words “this Article” (including in the sub-paragraphs) with the words “where objective, factual circumstances indicate that the offender ought to have suspected that the property was proceeds”;*

*in Article 9, at the end of paragraph 5, add the sentence: “Each Party shall ensure that at any trial for money laundering, the prosecution is required to submit charges against a defendant relating to all categories of offence disclosed by its evidence, consistent with national provisions on joinder and severance of charges, or be prevented from bringing such charges at a later date”;*

*in Article 9, paragraph 6, replace the words “a predicate offence” with the words “amongst a proven series of predicate offences”; and at the end of the paragraph, replace the word “offence” with the words “of these offences generated the proceeds in question”;*

*in Article 10 (“Corporate liability”), after the words “liable for”, replace the word “the” with the words “a lack of due diligence in preventing or reporting”; replace the words “who has” by the words “by abusing”; and add the word “relevant” in sub-paragraph a before the word “power”, in sub-paragraph b before the word “decisions” and in sub-paragraph c before the word “control”;*

*in Article 10, delete paragraph 2;*

*if amendment xiv above is not adopted, in Article 10, in paragraph 2, after the words “liable where”, replace the word “the” with the words “a culpable”;*

*in Article 12 (“Measures to prevent money laundering”), in paragraph 2.a, replace the words “legal and natural persons which engage in activities which are particularly likely to be used for money-laundering purposes” with the words “designated non-financial businesses and professions as defined in Appendix II of this Convention”;*

and add the following Appendix II to the convention :

**Appendix "Appendix II**

'Designated non-financial businesses and professions' means, amongst others :

1. casinos (which also includes Internet casinos) ;
2. real estate agents ;
3. dealers in precious metals ;
4. dealers in precious stones ;
5. lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to 'internal' professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering ;
6. trust and company service providers refers to all persons or businesses that are not covered elsewhere under these recommendations, and which, as a business, provide any of the following services to third parties :

   *acting as a formation agent of legal persons ;*

   *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons ;*

   *providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement ;*

   *acting as (or arranging for another person to act as) a trustee of an express trust ;*

   *acting as (or arranging for another person to act as) a nominee shareholder for another person.'" ;*

xvii. in Article 12 ("Measures to prevent money laundering"), at the end of paragraph 2.a.ii, add the words "whilst respecting the principles of legal privilege and confidential lawyer-client relations" ;

xviii. in Article 27 ("Grounds for refusal"), add a new paragraph 1 as follows: "Co-operation under this chapter shall be refused where the action sought would result in violation of the rights protected by the European Convention on Human Rights and those of its additional protocols by which the Party may be bound." ;

xix. in Article 27, paragraph 1, add a new sub-paragraph a as follows: "where the requested Party has substantial grounds for believing that the request is made for the purpose of prosecuting a person for reasons of race, religion, nationality or political opinion, or that the situation of that person risks being prejudiced for one or more of those reasons" ;

xx. in Article 31 ("Recognition of foreign decisions"), add a new paragraph 2 as follows: "Recognition shall be refused if it emerges that the decision is the result of a flagrant denial of justice." ;

xxi. in Article 44 ("Damages"), add a new paragraph 1 as follows: "Each Party shall ensure that compensation is made available to persons whose property has been subject to measures of confiscation, freezing or seizure which subsequently transpire to have been unjustified." ;

xxii. in Article 47 ("Monitoring mechanism and settlement of disputes"), ensure that, whatever internal mechanisms the parties may establish, the eventual monitoring mechanism is ultimately singular, ensuring that all parties are subject to the same obligations ;

xxiii. in Article 51 ("Relationship to other conventions and agreements"), delete paragraph 4 ;

xxiv. if amendment xxiii above is not adopted, in Article 51, paragraph 4, after the words "shall apply Community and EU rules", add the words "in so far as these establish a more intensive co-operation than that established by this Convention, subject to the same safeguards" ;

xxv. in Article 52 ("Declarations and reservations"), delete paragraph 2 ;

xxvi. in Article 52, add a new sentence at the end of paragraph 3 as follows: "Any reservations made under the preceding paragraphs must be limited to a maximum duration of five years." ;

xxvii. in Appendix I, replace the word "terrorism" with the words "acts of terrorism" ;

xxviii. in Appendix I, after the word “fraud”, add the words “, including tax and benefit frauds”.