NOTE from: Presidency to: Permanent Representatives Committee
Subject: Action against money laundering – Preparation for the Joint ECOFIN/JHA Council on financial crime

1. In preparation for the Joint Council on 17 October 2000, the Presidency circulated a discussion paper (11380/00) on 19 September and the text of draft Council conclusions (11976/00) on 4 October. This draft was examined at a joint meeting of JHA counsellors and financial attachés on 5 October.

In 11976/00 REV 1 the Presidency has tried to cover all the amendments suggested at that meeting or since. It has already incorporated some of them into the draft conclusions. The others need to be discussed in Coreper because there are substantive options to be considered.

2. Comments on particular points raised by delegations

2.1. Procedures for implementing counter-measures against the non-cooperative countries and territories identified by the FATF (paragraphs B 1 and B 3 of the draft conclusions)
2.1.1. Which NCCT?  the Presidency's draft refers to the NCCT "as examined by the FATF" (i.e. 29 countries and territories) to show the determination of the Member States to put pressure on these countries and territories to carry out the reforms needed to bring them into line with international standards. The United Kingdom and Netherlands delegations suggest taking simply the 15 countries officially listed by the FATF in June.

2.1.2. Duration of dialogue with the NCCT

Many delegations found the one-year period proposed by the Presidency too short. However, at its meeting in Madrid the FATF confirmed that as regards timing, one year after publication of the first list of NCCT (i.e. June 2001) would be an appropriate point for the FATF to consider taking countermeasures.

2.1.3. Procedure for triggering countermeasures

The Presidency's proposal is that Member States undertake to implement, in concert and concomitantly, "countermeasures approved by the FATF upon the close of the dialogue period". Several delegations had reservations on this mechanism, regarding it as too "automatic". Nevertheless, given that all the Member States and the Commission are represented in the FATF, whose recommendations are accepted unanimously, consistency demands that the Union demonstrate genuine political will to implement countermeasures adopted if that should be necessary. The Union would also gain greatly in credibility in the eyes of the third countries belonging to the FATF.

2.1.4. Nature of the countermeasures

The Presidency's draft conclusions include all three categories of countermeasure confirmed by the FATF last week.

- The first two can be linked to Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (Articles 5, 6 and 7).
The third countermeasure, which is intended for use only in the most serious cases, was also agreed in principle by the FATF at its meeting in Madrid last week. As some delegations have asked, the Commission and the Council Legal Service could be asked to advise on a suitable legal basis for the implementation of this type of countermeasure. From the Presidency’s point of view, it could be Article 58(1)(b) of the Treaty which, by way of derogation from the principle of free movement of capital affirmed in Article 56, authorises the Member States to "take measures which are justified on grounds of public policy or public security".

2.2. Principle that banking secrecy cannot be invoked against legal authorities and its consequences
(paragraph B 5)

Some Member States have reservations about this reminder, and yet the principle that banking secrecy cannot be invoked already exists in the domestic legislation of every Member State. The aim here is solely to affirm it at European level.

Every possible advantage should be taken of this principle to ensure that "investigations of financial institutions … provide useful evidence, particularly for the purpose of identifying the final beneficiary of a transaction". This is taken from conclusion No 54 of the European Council in Tampere: "regardless of secrecy provisions applicable to banking … activity, judicial authorities … must be entitled… to receive information when such information is necessary to investigate money laundering". To put that conclusion into practice, a year on from the European Council, adoption of the Convention on the improvement of mutual assistance in criminal matters must be regarded as a priority. Any form of words which did not clearly reaffirm that priority, when a text is even now under discussion, would be interpreted as backing away from the political will to combat money laundering.

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1 Conditions or restrictions on financial transactions.