

NOTE

THE INTERNATIONAL ATTACK ON MONEY LAUNDERING: EUROPEAN INITIATIVES

I. INTRODUCTION

Drug trafficking is an international problem of devastating proportions.¹ After years of failed efforts to curb either supply or demand, international drug enforcement authorities have determined that the best way to cripple the \$300 billion drug industry is to attack the drug traffickers' profit motive.² Without the ability to transfer and disguise their enormous gains, drug cartels could operate only at a small fraction of current levels.³ In order to restrict this illicit activity, the international commu-

1. *Summit Economic Declaration*, Kyodo News Service, ¶ 52 (July 17, 1989) (issued by the Group of Seven ("G-7") which consists of Canada, France, Germany, the United Kingdom, Italy, Japan and the United States). According to research recently released by the G-7's Financial Action Task Force ("Task Force"), the drug trade reaps an estimated \$122 billion a year from the sale of heroin, cocaine and cannabis in the United States and Western Europe alone. Financial Action Task Force on Money Laundering Report ("Task Force Report"), Annex on Assessment of Narcotics-Related Money Laundering at ¶ 67 ("Assessment Annex") (February 7, 1990) (on file with author). As much as \$85 billion of that sum represents the profits from drug trafficking (excluding the costs of acquiring the drugs, the precursor chemicals, packaging, transportation, legal fees and other "costs of corruption"). Task Force Report at Part I(A) note 1. The Task Force estimates that \$232,115 per minute is laundered through the world's financial institutions. Assessment Annex at ¶ 67. By comparison, the United Nations and the U.S. Congress estimate that worldwide money laundering is a \$300 billion a year business. *Id.* at ¶ 10; Robert Graham, *Tackling the Cocaine Menace*, Financial Times 17 (April 9, 1990).

Unless otherwise indicated, all monetary values are stated in United States dollars.

2. The United States commits approximately 60 percent of its drug enforcement budget to interdiction and policing and 30 percent toward curbing demand. The European Community similarly commits more resources towards combatting supply. Graham, *Tackling the Cocaine Menace* at 17 (cited in note 1). Three rationales underlie this conviction.

[First,] the best deterrent and punishment is to confiscate [the criminals'] incentive. A second rationale is that, while the higher-level and more powerful criminals rarely come into contact with the illicit goods . . . they do come into contact with the proceeds from the sale of those goods. That contact often provides a "paper trail," or other evidence, which constitutes the only connection with a violation of the law. A third rationale is that confiscating the proceeds of criminal activities is a good way to make law enforcement pay for itself.

Ethan Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 *Inter-Am L Rev* 33, 34 (1986).

3. James D. Harmon, Jr., *United States Money Laundering Laws: International Implications*, 9 *NY L Sch J Intl & Comp L* 1, 2 (1988).

nity is bearing down on the sophisticated practice of financial alchemy known as money laundering.

Money laundering is "the process by which one conceals the existence, illegal source or illegal application of income and then disguises that income in such a way as to make it appear legitimate."⁴ In order to disassociate criminals from their illicit proceeds, money launderers seek out and exploit legal barriers that interfere with the exchange of financial information between law enforcement authorities in different countries.⁵ Two of the most widely recognized impediments are bank secrecy laws, which prevent bankers from revealing data concerning their customers' accounts, and blocking statutes, which frustrate a foreign state's discovery efforts and its attempts to exercise jurisdiction.⁶

Significant variation in national money laundering legislation also facilitates money laundering.⁷ Practice varies with regard to the type of financial institutions states monitor, the activities they consider to be suspect and the sort of information they require to be reported. Such discrepancies hamper coordinated investigations between states and create opportunities for money launderers to exploit. As a result, money launderers can create or expand an existing market for their dirty dollars by investing in states which enact lenient monitoring measures or no measures at all. The prospect of the considerable revenues that this investment might generate is an incentive to provide a safe haven for money launderers. As a consequence, more responsible states are likely to suffer.

The international community recognizes this predicament and is striving to resolve it through cooperative means.⁸ Since 1988 several permanent multinational organizations have promulgated comprehensive

4. *Id.* at 8-9 (citing to *President's Commission on Organized Crime, Interim Report to the President and the Attorney General, The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* 7 (1984)).

5. Task Force Report at Part III(C) Rec 11, Part III(D) Rec 30 (cited in note 1).

6. Unlike bank secrecy laws which are enacted to protect the client's privacy interests, blocking statutes are retaliatory in nature and are enacted specifically to frustrate a foreign nation's discovery efforts and exertion of jurisdiction. See Restatement (Third) of Foreign Relations Law § 442, note 4 (ALI, 1987).

7. Task Force Report at Part III(A) Rec 3 (cited in note 1). An exhaustive study of instances of money laundering demonstrates that money launderers conduct their activities at an international level to take advantage of differences between national jurisdictions. *Id.* at Part III(D) Rec 30.

8. *Summit Economic Declaration*, Kyodo News Service, ¶ 52 (cited in note 1); "Existing domestic laws in many countries, and the international enforcement regime established under prior multilateral treaty arrangements, have proven unequal to the task of controlling, much less suppressing, this vicious trade." David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 *Denver J Intl L & Policy* 387, 388 (1990); "Given the worldwide integration of financial markets, domestic efforts alone are not sufficient to combat money laundering and other criminal activities." FDIC Letter BL-1-89 (January 27, 1989), text reprinted in CCH Federal Banking Reports ¶ 87,562 (Letter from FDIC Director to CEOs of Insured State Nonmember Banks).

plans exclusively directed at combatting money laundering. Each plan either encourages or demands full implementation by their party states.

This note discusses five proposals which the national legislatures in Europe are most likely to consider.⁹ Europe is a model study for several reasons. First, a recent European Community ("E.C.") Council directive liberated capital movements on July 1, 1990, making the E.C. banking market the most open in the world.¹⁰ This liberal market will be very attractive to money launderers.¹¹ Second, the fall of communism in Eastern Europe has opened new avenues for drug traffickers to gain access to Western Europe. Border controls that previously were guarded strictly in Eastern Europe have been relaxed, allowing an influx of drugs from Southwest Asia.¹² Third, the principal hurdle which proposed money laundering legislation faces is bank secrecy, a concept which originated in Europe centuries ago and is still firmly entrenched there.¹³ Finally, efforts to combat money laundering in Europe recently have become increasingly

9. United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, UN Doc E/CONF. 82/15, reprinted in 28 ILM 493 (1989) ("UN Convention"); Task Force Report (cited in note 1); Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering, CCH Federal Banking Law Reports ¶ 11,785 ("Basle Statement"); Council Directive On Prevention of Use of the Financial System for the Purpose of Money Laundering, OJ Eur Comm No C 106/6 (1990) ("Proposed EC Directive"); Council of Europe Convention On Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("Council of Europe Convention") (reprinted in 30 ILM 148 (1991)).

10. Council Directive 88/361/EEC, OJ Eur Comm No L 178/5 (1988). As of February 1990 most E.C. member states had committed to lift their remaining restrictions on capital movement by July 1, 1990. *EC Toughens Stance on Money Laundering*, Reuter Library Report (February 12, 1990) (NEXIS, Intl file). European Community Commissioner Leon Brittan, Vice President of the European Commission, recognized that this directive, adopted in December 1989, ensured that the E.C. banking market would be the most open in the world. Clare Dobie, *EC Package on Laundering Soon*, *The Independent* 21 (January 12, 1990).

11. "The freedom to move capital around Europe and to open bank accounts in other countries may, if not checked, enable drug smugglers and other organized criminals or terrorists to move funds around and escape detection." *Money Laundering Measures Approved*, Financial Regulation Report (March 1990) (NEXIS, Intl file); "There is no doubt that the Colombians are looking at 1992 and Western Europe." Tom Mashberg, *Evolution in Europe; Drugs in Europe: Signs of a Spreading Plague*, *New York Times* 1:21 (November 18, 1990) (quoting an unnamed US Drug Enforcement Administration official).

12. Paul Majendie, *U.S. Says Open East Europe Could Let In More Drugs, Terrorists*, Reuter Library Report (June 14, 1990) (NEXIS, Intl file) (quoting US Attorney General Richard Thornburg at the June 14, 1990 EC Ministers Meeting in Dublin). According to a U.S. Drug Enforcement Administration official, Latin American drug cartels have initiated an effort to ship cocaine to Europe now that the U.S. market for crack appears to be saturated. The cartels consider Eastern Europe as "virgin territory" for cocaine. Mashberg, *Drugs in Europe* at 21 (cited in note 11).

13. "The individual right to privacy . . . has perhaps greater significance in the countries of the European continent than elsewhere, because Europeans have been involved in a century-long struggle against the aggressions of authoritarian regimes. . . . It is an undeniable fact that in Europe the secrecy duty has been an essential component of the banker/client relationship for centuries." Werner de Capitani, *Banking Secrecy Today*, 10 U Pa J Intl Bus L 57, 58 (1988).

zealous. European organizations have proffered more international initiatives than their counterparts in other regions.¹⁴

An analysis of the strengths and inconsistencies of the five European proposals reveals an unfortunate and ironic situation. Although motivated by a recognized need to develop a uniform approach to combat money laundering, these multinational organizations have produced plans that vary in many material respects. Consequently, by complying with any one of these well-conceived proposals, legislatures throughout Europe would still contribute to a legal regime that is highly conducive to money laundering. Lawmakers should appreciate the importance of a unified front when attacking the global money laundering menace and should strive to reconcile the discrepancies illustrated in this note.

II. THE EUROPEAN PROPOSALS

Most Western European nations participate actively in at least five international organizations which address the subject of money laundering.¹⁵ All five issued formal plans designed to encourage the adoption of uniform money laundering legislation by their member states. These proposals will be introduced in this section and then compared in the analysis which follows.

A. U.N. Convention

The seminal agreement, the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("U.N. Convention"), was signed in Vienna in 1988 after five years of negotiations among 108 nations.¹⁶ The U.N. Convention is recognized as "one of the most detailed and far-reaching instruments ever adopted in the field of international law, and if widely adopted and effectively implemented, will be a major force in harmonizing national laws and enforcement actions

14. Similar initiatives have been launched in the Western Hemisphere by the Caribbean Financial Task Force and the Organization of American States ("OAS"). Last April, the OAS proposed a Declaration and Program of Action Ixatapa which is expected to prompt regulatory and legislative action against money laundering in at least 20 countries in the near future. *Deadline Looms for 'Final' Kerry Amendment Report*, Money Laundering Alert 7 (October 1990) (NEXIS, MLA file).

15. This note will not address the World Ministerial Drug Summit convened by the United Kingdom, April 9-12, 1990. The six-point plan proposed by this organization focused exclusively on demand reduction. Peter Archer, *Task Force To Boost Battle Against Drugs*, Press Association Newfile (April 9, 1990) (NEXIS, Intl file).

16. *Vienna Conference adopts world-wide convention against illicit drug traffic*, UN Chronicle 83 (March 1989); UN Convention (cited in note 9); see also Fred Strasser, *Crime Has No Borders, So Countries Close Ranks*, Nat'l L J 1, 40-41 (October 30, 1989). The European Community and every member state except for Ireland, Greece, and Portugal participated in and signed this convention. *UN Drugs, Laundering Convention Now World Law*, Money Laundering Alert 7 (November 1990) (NEXIS, MLA file).

around the world.”¹⁷ As of December 31, 1990, thirty-two nations, including East Germany, France, Italy and Spain, had ratified, acceded to, or approved it.¹⁸

This convention addresses drug trafficking in general and focuses particularly on drug-money laundering. It creates an obligation to criminalize money laundering and provides the foundation for international cooperation in enforcement. Signatory states may rely on the U.N. Convention to obtain admissible evidence to be used in investigations of and prosecutions against money launderers.¹⁹ The convention also may be used to extradite money launderers²⁰ and to confiscate their assets.²¹

B. Basle Statement

In December 1988, the Basle Supervisor's Committee²² issued a Statement of Principles on Money Laundering Practices (“Basle Statement”).²³ Recognizing that the legal powers, roles and responsibilities for dealing with money laundering vary widely among bank supervisory authorities, committee members agreed to a five-point plan directed at establishing an ethical code of conduct for central bank supervisors to implement and monitor. Although the plan is not itself a legally binding document, there are various formulas that make its principles obligatory.²⁴

C. Task Force Report

At its 1989 economic summit in Paris, the Group of Seven (“G-7”) formally recognized the threat of money laundering to the world's bank-

17. Stewart, 18 *Denver J Intl L & Policy* at 388 (cited in note 8).

18. *Nations Which Have Ratified, Acceded To, or Approved the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs*, Money Laundering Alert 8 (January 1991) (NEXIS, MLA file). The convention went into effect in November 1990 after Spain became the twentieth nation to ratify it. Marianne Lavelle, Claudia MacLachlan and Fred Strasser, *U.N. Again; International Cooperation Increases on Drugs*, *Natl L J* 5, 33 (September 10, 1990).

19. UN Convention at Art 7 (cited in note 9). Also see notes 147-161 and accompanying text.

20. *Id* at Art 6. Also see notes 137-144 and accompanying text.

21. *Id* at Art 5. Also see notes 162-177 and accompanying text.

22. The Basle Supervisor's Committee was established in 1974 to strengthen supervision of international banking activity among banks in the major industrialized countries and includes representatives of the Central Banks and Bank Supervisory Agencies from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Switzerland, Sweden, the United Kingdom and the United States. CCH Federal Banking Law Reports ¶ 87,562 note 1. [Editor's note: The Supervisor's Committee uses “Basle” in its official correspondence with CCH. “Basel” is the spelling most often used in English, but the author chose to follow the Committee's choice.]

23. Basle Statement (cited in note 9).

24. This obligation arises from: (1) formal agreements among banks committing them to comply (Austria, Italy and Switzerland); (2) formal indications by bank regulators that failure to comply could lead to administrative sanctions (France and the United Kingdom); and (3) legally binding texts with references to these principles (Luxembourg). Task Force Report at Part II(A)(b) (cited in note 1).

ing and financial system.²⁵ It created a Financial Action Task Force ("Task Force") comprised of summit participants and other interested parties to evaluate contemporary anti-money laundering measures and to propose additional preventative efforts.²⁶ The Task Force issued a final report on April 19, 1990, which included forty recommendations directed at stopping money laundering ("Task Force Report"). United States Deputy Treasury Secretary John E. Robson, who headed the U.S. delegation, hailed the report as "the single most comprehensive, significant and forceful international declaration on money laundering to date."²⁷ Although the report has no legal effect, the research and resources committed to its formulation should have a pronounced influence on legislators. The Task Force reconvened last year to assess and facilitate the implementation of the recommendations and to modify them where appropriate.²⁸

D. Proposed European Community Directive

The Council of the European Community is expected to finalize a directive On Prevention of Use of the Financial System for the Purpose of Money Laundering ("Proposed E.C. Directive") in June 1991.²⁹ This directive, to be enacted pursuant to Articles 57 and 100a of the Treaty of Rome, will bind the twelve E.C. member states.³⁰ Implementation should involve legislative enactments in most member states, even in those where money laundering is already illegal.³¹ The states must enact domestic leg-

25. The Group of Seven expressed its concern in the Summit Economic Declaration in Paris on July 17, 1989. See *Summit Economic Declaration* (cited in note 1).

26. The Task Force was composed of the G-7 nations plus Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden and Switzerland. These nations hold the charters of more than 80 percent of the world's 500 largest banks. *G-7 Nations Launch Global Laundering Assault, Money Laundering Alert 1* (May 7, 1990) (NEXIS, MLA file). Experts from the International Monetary Fund, the Bank for International Settlements and the Organization for Economic Cooperation and Development also participated. *Highlights of G-7 Finance Minister Talks*, Reuter Financial Report (July 16, 1989) (NEXIS, Intl file). In December 1990 Denmark, Greece, Ireland, Norway, Portugal, Turkey, Finland and New Zealand were formally invited to join the Task Force. *Group of Seven Nations Invite Nine More Countries*, *Money Laundering Alert 8* (December 1990) (NEXIS, MLA file).

27. Stephen Labaton, *Group of 7 Asks Money-Laundering Curbs*, *New York Times* D:1 (April 20, 1990).

28. *Economic Declaration Issued by Group of Seven Industrial Nations at the Conclusion of Their Economic Summit in Houston*, 7 Intl Trade Rptr 1127, 1133 (July 18, 1990).

29. Proposed EC Directive (cited in note 9), reviewed by the Economic and Social Committee (opinion delivered on September 19, 1990) OJ N L 106 (1990), and amended by the European Parliament, COM(90) 593 final-SYN 254 (November 30, 1990) ("Parliament Amendment"). [As of the editorial deadline, the E.C. Council's Committee of Permanent Representatives was reviewing the proposed E.C. Directive, authored by the E.C. Commission, in order to settle upon a common position.]

30. Proposed EC Directive (Preamble) (cited in note 9) (referring to the Treaty Establishing the European Economic Community, 298 UNTS 11 (signed March 25, 1957; in force January 1, 1958)).

31. Lucy Kellaway, *EC To Make Drug Money Laundering A Crime*, *Financial Times* 16 (December 18, 1990).

islation which meets the directive's objectives no later than January 1993.³²

The Proposed E.C. Directive embodies a novel form of community legislation. It requires all member states to include specific money laundering provisions in their domestic criminal law.³³ Whether the E.C. Council has authority to compel member states to enact criminal legislation is in dispute.³⁴ The United Kingdom, while supportive of the directive's aims, expressed reservations about the criminal approach to money laundering because it believed the European Community should not enjoy competence in the field of criminal law.³⁵ Recognizing that anti-money laundering measures cannot be effective without severe penalties, the E.C. Finance Ministers agreed to supplement the directive with a "Declaration Between Governments" committing member states to enforce the directive with criminal sanctions.³⁶ This unusual form of legislation will protect the integrity of the European Community's financial markets while preserving each member's sovereignty over criminal matters.

E. Council of Europe Convention

In November 1990 the 23-member Council of Europe promulgated the Convention on Money Laundering, Search, Seizure and Confiscation of Proceeds From Crime ("Council of Europe Convention").³⁷ It was signed during the ninth ministerial conference of the Pompidou Group, the committee that deals with law, order and security.³⁸

The Council of Europe Convention will extend the network of countries within Europe working together to trace and confiscate illicit pro-

32. Proposed EC Directive at Art 16 (cited in note 9).

33. *Id.* at Art 2. The European Community may feel a particular compulsion for creating this money laundering magnet. "With the progressive implementation of the Community's internal market in financial services comes a heavy responsibility to ensure that these new freedoms and opportunities cannot be abused," declared Sir Leon Brittan, Vice President of the European Community. Dobie, *EC Package on Laundering Soon* at 21 (cited in note 10).

34. Jonathan Petre, *Lords Back Money Launder Law*, Daily Telegraph 12 (December 14, 1990) (NEXIS, Intl file).

35. Peter Guilford, *Britain Blocks EC Move on Drugs Cash*, The Times (December 17, 1990) (NEXIS, Intl file).

36. Kellaway, *EC to Make Drug Money Laundering a Crime* at 16 (cited in note 31).

37. Council of Europe Convention (cited in note 9).

38. Peter Archer, *New Euro-Pact to Fight Serious Crime*, Press Association Newsfile (December 1, 1990) (NEXIS, Intl file). On November 8, 1990, the Council of Europe Convention was signed by the representatives of the following countries: Belgium, Cyprus, Denmark, Federal Republic of Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. *Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*, 30 ILM 148 (1991).

ceeds.³⁹ Although it may be more difficult to enforce than the Proposed E.C. Directive,⁴⁰ the Council of Europe Convention offers two vital features which the Proposed E.C. Directive lacks. First, it gives the Council of Europe competence to propose criminal law and recognizes the need to pursue a common criminal policy in this area.⁴¹ Second, because many Eastern European countries are expected to join the Council of Europe soon,⁴² this convention could be effective in curbing the rising tide of crime in Eastern Europe.⁴³ The convention will be opened to accession⁴⁴ and will enter into force three months after three states have ratified it.⁴⁵

III. CRIMINALIZATION: ELEMENTS AND ISSUES

For purposes of analysis it is useful to distinguish between principal violators of the money laundering laws and those who aid and abet their unlawful enterprise. Principal violators include professional money launderers, typically lawyers,⁴⁶ who either are employed by one particular drug cartel or who make their services available to clients on a commission basis.⁴⁷ These parties are the primary targets of all money laundering legislation. Aiders and abettors are the otherwise legitimate financial institutions that are utilized by the principals as conduits for their money laundering activities. Defining the parameters of liability for these secondary parties is considerably more problematic.

A. The Principal Offense

The challenge faced by lawmakers is to prevent criminals from transforming their voluminous cash proceeds from retail drug transactions into inconspicuous investments or negotiable instruments. This can be achieved by proscribing the conversion or transfer of property derived

39. Archer, *New Euro-Pact to Fight Serious Crime* (cited in note 38).

40. Peter Guilford, *Council Aims At No Hiding Place For Laundered Money*, *The Times* (October 1, 1990) (NEXIS, Intl file). While E.C. directives are enforceable by the European Court of Justice, the Council of Europe has no court system and no enforcement mechanism.

41. Council of Europe Convention (Preamble) (cited in note 9).

42. Hungary, Poland and Yugoslavia will join the anti-drug Pompidou Group as full members while Czechoslovakia will obtain observer status. Other Eastern European countries, notably the Soviet Union, are considering membership. See Archer, *Task Force to Boost Battle Against Drugs* (cited in note 15).

43. Guilford, *Council Aims at No Hiding Place for Laundered Money* (cited in note 40).

44. Council of Europe Convention at Art 37 (cited in note 9).

45. *Id* at Art 36(3).

46. *Cash Recording Proposed in Canada; Report Issued*, *Money Laundering Alert 2* (December 1990) (NEXIS, MLA file).

47. In 1989 the basic rate charged for laundering drug cash and other "hot" money was 7-10 percent. Jonathan Beary and Richard Hornik, *A Torrent of Dirty Dollars*, *Time* 50 (December 18, 1989) (US ed).

from illicit activity, as well as the concealment or disguise of the true nature of such property.⁴⁸

All of the European agreements propose that the first step in effectively stopping money laundering globally is criminalizing it locally.⁴⁹ Domestic criminalization serves many purposes. For instance, some states will be able to take advantage of laws already enacted which excuse a bank from its duty of confidentiality when it cooperates in a criminal investigation.⁵⁰ Also, in the international arena, mutual legal assistance may be conditioned on the prior criminalization of the relevant offense.⁵¹

These proposals depend on cooperation; however, economic factors discourage compliance. States which criminalize money laundering must forego the profits which illicit investment generates.⁵² In addition, they

48. Four of the five European proposals which define money laundering provide a definition similar, if not identical, to the following:

-the conversion or transfer of property, knowing that such property is derived from a criminal offense, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions;

-the concealment or disguise of the true nature, source, location, disposition, movement rights with respect to, or ownership of property, knowing that such property is derived from a criminal offense;

Task Force Report at Part I(B) (cited in note 1). See also Council of Europe Convention at Art 6 (cited in note 9); UN Convention at Art 3(1)(b) (cited in note 9); Proposed EC Directive at Art 1 (cited in note 9).

49. The Task Force Report recommends that "[e]ach country should take such measures, as may be necessary, including legislative ones, to enable it to criminalize drug money laundering." Task Force Report at Part III(B) Rec 4 (cited in note 1). As of June 1990, only the United Kingdom, France, Italy and Luxembourg had criminalized money laundering in Europe. Belgium, Germany and Switzerland have laws awaiting adoption. Task Force Report, Annex on Money Laundering Offense, Asset Confiscation or Forfeiture at 24 ("Money Laundering Offense Annex") (cited in note 1). Ireland, Portugal and Greece have no laws regulating this type of conduct. See *Money Laundering Measures Approved* (cited in note 11).

50. In Germany and the United Kingdom there are long-standing provisions which lift bank secrecy. In Germany, for example, bank secrecy is lifted (1) when the bank is cooperating in a criminal proceeding; (2) in cases of necessity; (3) with consent by the customer. Peter Q. Noack, *West German Bank Secrecy: A Barrier to SEC Insider-Trading Investigations*, 20 UC Davis L Rev 609, 621 (1987). In the United Kingdom, the exceptions to the bank secrecy obligation are: (1) compulsion of law; (2) duty to the public to disclose; (3) interests of the bank requiring disclosure; and (4) consent of the customer. *Barclays Bank Plc v Taylor*, [1989] 1 WLR 1066, 1173. Also see Joan Wadsley, *Banks' Confidentiality: A Much Reduced Duty*, 106 L Q Rev 204, 205 (April 1990).

51. Typical extradition and mutual legal assistance treaties require "dual criminality;" the violation must be actionable under the laws of both treaty partners. James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 Case W Res J Intl L 405, 418-19 (1988). For example, see Council of Europe Convention at Art 18(1)(f) (cited in note 9).

52. See Mark A. Uhlig, *Panama Resisting Move to Clean Up Banking System*, New York Times A:5 (October 22, 1990). The two previous times that banking secrecy was lifted in European history (Hitler's Germany in 1933 and Occupied France in 1945), heavy outflows of funds resulted. *European Finance and Investment — Offshore Center 2; European Banking Secrecy and Disclosure — Requirements; The Record*, Financial Times 38 (March 29, 1990). Many bank secrecy jurisdictions are reluctant to lift bank secrecy rules because they fear another massive outflow of funds. See Édouard Chambost, *Bank Accounts: A World Guide to Confidentiality* (John Wiley & Sons, 1983). However, this fear may

must bear the considerable administrative costs associated with money laundering regulation.⁵³ Finally, states recognize that money launderers, who engage in "forum-shopping," will have fewer host countries from which to choose as more nations criminalize money laundering. Therefore, unscrupulous states will naturally be inclined to hold themselves out as safe havens for money launderers and the laudable objectives of more responsible states will have been for naught.⁵⁴

Due to these economic disincentives, member states must be pressured to comply. Most European international organizations, however, lack the legal power to force change,⁵⁵ and the European Community, while it has the power to coerce legal action, may lack jurisdiction in this area.⁵⁶

be unfounded. When the Swiss and the Cayman Islands recently compromised their bank secrecy laws, incoming funds actually increased. Nadelmann, 18 *Inter-Am L Rev* at 58 (cited in note 2).

53. For example, the U.S. House of Representatives rejected a bill to record international wire transfers because the cost of compliance was an estimated \$350 million a year. Rosalind Resnick, *Money Laundering*, Nat'l L J 1, 45 (May 7, 1990).

54. States that enact lenient money laundering measures or no measures at all can generate considerable revenues from the investment of illicit proceeds. See Task Force Report at Part I(B)(3), Part III(A) Rec 3, Part III(C) Rec 20 (cited in note 1).

55. Nonetheless, there are a number of viable methods available which might be used to coerce cooperation. The European Parliament has recommended monitoring the security standards of non-E.C. countries and discouraging member countries from doing business with those countries whose standards fall below those of the European Community. *Europe in Drug Profit Plan*, New York Times D:4 (November 26, 1990). In May, "fifteen Western nations agreed to step up their drive against drug trafficking by attacking money laundering in tax havens and not just in their own banking systems." *Western Nations Agree to Expand Fight Against Money Laundering*, Reuter Library Report (May 30, 1990) (NEXIS, Intl file). This approach is similar to the one exemplified in the Kerry Amendment to the U.S. Anti-Drug Abuse Act of 1988, 31 USC § 5311 (1988). The Kerry Amendment threatens termination of U.S. banking relationships when institutions of a foreign country do not negotiate Mutual Legal Assistance Treaties ("MLATs") "in good faith." *Secrecy Issues Slow Approval of Global Accords*, Money Laundering Alert 7 (December 1989) (NEXIS, MLA file). Alternatively, concern about reputation has proven to be an effective motivating factor. Luxembourg was embarrassed when a U.S. sting operation caught its Bank of Credit and Commerce International laundering drug money. Luxembourg responded by enacting money laundering legislation and cooperating with foreign investigators. Greg McCune, *Luxembourg Treads Carefully in Drug Money Laundering Case*, Reuter Library Report (February 6, 1990) (NEXIS, Intl file). Swiss banks were chastened by the disclosure that their accounts were used in a \$1 billion dollar money laundering operation. The resulting political scandal, which forced the Justice Minister to resign, led to a series of new money laundering laws there. Christine Gorman, *Crackdown on Swiss Laundry*, Time 53 (April 24, 1989) (US ed). By way of positive inducement, states also offer financial aid in return for cooperation. The United Kingdom offered part of a £6 million aid package to Caribbean states in return for measures taken against money launderers. See Archer, *Task Force to Boost Battle Against Drugs* (cited in note 15). The U.S. Congress also conditions aid on progress in money laundering MLAT negotiations. Uhlig, *Panama Resisting Move to Clean Up Banking System* at A:5 (cited in note 52).

56. See notes 29-35 and accompanying text.

B. Accomplice Liability

1. *Covered Parties.* All the European proposals implicitly recognize that principal violators cannot launder money by themselves;⁵⁷ they need to transact with reputable parties in order to make their proceeds appear legitimate. Since these targeted institutions normally would not be inclined to turn down business, their cooperation must be induced by law. The issue is which financial institutions should be obliged to identify and report money launderers. Who should be responsible for ensuring that illicit funds do not re-enter the stream of commerce?

The most conservative proposal would extend liability only to banks. As gatekeepers to the world financial network, banks are a logical choice for the imposition of liability. Banks are the most attractive target for money launderers because of the many financial services they provide.⁵⁸ The institutional infrastructure of banks also enables them to bear the burdens associated with money laundering detection. Finally, banks are already regulated heavily by their home state, making it easier for lawmakers to fuse monitoring regulations with pre-existing banking laws.⁵⁹

The Task Force proposal has a slightly broader reach, seeking to enlist the cooperation of non-bank financial institutions such as loan societies, credit card companies and securities brokers and dealers.⁶⁰ The Proposed E.C. Directive has an even more expansive definition of "financial institution" which ultimately could include casinos, currency exchange bureaus⁶¹ and which may be amended to include professional firms of accountants and lawyers.⁶² Some finance ministers want to extend liability beyond financial institutions and target other cash-intensive

57. However, money launderers could use banks for this purpose if they owned them. The Task Force recommends that nations guard against the penetration or acquisition of financial institutions by "criminals or their confederates." Task Force Report at Part III(C) Rec 29 (cited in note 1).

58. Criminals use banks "to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank notes through a safe-deposit facility." Basle Statement at Preamble ¶ 1 (cited in note 9).

59. European banks are regulated by their governments' central bank supervisors.

60. For additional examples, see Task Force Report at Part III(C) Rec 10 (cited in note 1).

61. Proposed EC Directive at Art 12 (cited in note 9). See also *Money Laundering Measures Approved*, Financial Regulation Report (March 1990) (cited in note 11).

62. *Dirty Money; Closing Down the Launderette*, *The Economist* 90 (October 27, 1990). Even where law firms are not expressly recognized as covered parties, they may be implicated by interpretation of the definition of money laundering. The U.N. Convention includes a broad provision, similar to that found in other proposals, which makes illegal the "transfer of property, knowing that such property is derived from any [narcotics] offense . . . for the purpose of . . . assisting any person who is involved in the commission of such an offense . . . to evade the legal consequences of his actions. . . ." (emphasis added) United Nations Convention at Art 3(1)(b)(i) (cited in note 9). See also U.N. *Treaty on Drugs Worries the Defense Bar*, *Natl L J* 5 (September 25, 1989).

businesses, including football clubs and cinemas.⁶³ This proposal approaches the extreme exemplified by U.S. money laundering legislation, which conceivably covers any individual regardless of his or her business.⁶⁴

Extending liability to the corporate entity is another option European legislatures are considering. The Task Force recommends that the corporations themselves, not only their employees, should be subject to criminal liability.⁶⁵ Requiring covered parties to appoint officers in charge of compliance with the money laundering laws would facilitate the establishment of corporate liability.⁶⁶

2. *The Duties to Identify, Record and Report.* Once lawmakers have determined which parties should help to enforce the money laundering laws, the next step is to determine their obligations under the laws. In order to fight money laundering effectively, it is crucial that financial institutions screen undesirable customers.⁶⁷ Consequently, most of the European proposals recommend that subject institutions check the identification of all prospective account holders when establishing business relations.⁶⁸ The Proposed E.C. Directive also will require banks to acquire and record the identification of customers who enter into transactions of European Currency Unit 15,000 or more.⁶⁹ Some proposals would impose a duty to determine the ultimate beneficiary of the ac-

63. George Graham, *The Paris Summit; Task Force To Hunt Drug Money Laundering*, Financial Times 2 (July 17, 1989).

64. See 31 USC § 5312 (1988) (covering records and reports on monetary instruments transactions).

65. Task Force Report at Part III(B) Rec 7 (cited in note 1).

66. *Id.* at Part III(C) Rec 20(a).

67. *Id.* at Part II(C) Rec 12.

68. Basle Statement at Part II (cited in note 9); Task Force Report at Part III(C) Rec 12 (cited in note 1); Proposed EC Directive at Art 3 (cited in note 9). The Proposed E.C. Directive requires all financial institutions to take "reasonable measures" to ascertain the real identity of the person on whose behalf a transaction was carried out. *Id.* The Bank of England recently published "Guidance Notes" ranking in order of reliability the best possible identification documents: (1) passport; (2) armed forces identity card; (3) employer identity card; and (4) full driving license. Birth certificates, credit cards, student union cards and provisional driving licenses may not be acceptable because they can be forged easily. David Lascelles, *Bankers Seek to Scrub Out Money Laundering*, Financial Times 7 (December 11, 1990).

69. Proposed EC Directive at Art 3(2) (cited in note 9). The Task Force recommends that financial institutions require full identification of persons engaging in "large" transactions (including the identification and location of transferees), especially when they are acting on behalf of others. Task Force Report at Part II(C) Rec 12 (interpreted in *Changes to Money-Laundering Measure*, Financial Regulation Report (April 1990) (NEXIS, MLA file).

count.⁷⁰ This could toll the death knell for the infamous "anonymous" and "numbered" accounts.⁷¹

Once covered parties have acquired this identification information, some proposals would require them to record it.⁷² The Task Force determined that these records are invaluable to law enforcement authorities for conducting their inquiries.⁷³ The Proposed E.C. Directive stands for the same proposition and probably will require financial institutions to keep recorded identification information on file for five years, even after relations with their clients have ended.⁷⁴

The most critical element of any scheme to prevent money laundering is the financial institutions' duty to report particular activities to the proper authorities. The international agreements differ in regard to which predicate acts should trigger this duty to report. All of the proposals would have subject institutions report any "unusual" or "suspicious" transactions, but none of them define these terms.⁷⁵ The Task Force proposes that all complex and "unusually large" transactions be treated as inherently suspicious.⁷⁶ Others would consider legally suspicious any transaction involving an offshore banking haven.⁷⁷ The Proposed E.C.

70. Proposed EC Directive at Art 3(5) (cited in note 9); Task Force Report at Part III(C) Rec 12 (cited in note 1).

71. The Task Force specifically recommends that "anonymous accounts or accounts in obviously fictitious names" should be prohibited. *Id.* As a consequence, attorneys would no longer be able to open an account on a client's behalf and protect that client's anonymity through the attorney-client privilege.

72. *Id.* at Part III(C) Rec 12; Proposed EC Directive at Art 3 (cited in note 9).

73. Task Force Report at Part III(C) Recs 12, 15 (cited in note 1).

74. Proposed EC Directive at Art 4 (cited in note 9).

75. The Proposed E.C. Directive's use of "unusual transactions" is intentionally vague. *Dirty Money; Closing Down the Launderette*, *The Economist* 90 (cited in note 62). Australia is the only nation that has attempted to define "suspicious transaction" in its money laundering legislation. According to the Cash Transaction Reports Act of 1988, a suspicious transaction "causes a cash dealer to have a feeling of apprehension or mistrust . . . considering its unusual . . . circumstances or . . . the persons with whom they are dealing, and is based on . . . all relevant factors including knowledge of the person's . . . business or social background, behavior and personal appearance." Brent Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transaction Reporting Law*, *Money Laundering Alert* 7 (July 1990) (NEXIS, MLA file). See also *Cash Transaction Reports Act*, No 64 (Austl 1988).

76. The Task Force recommends that financial institutions scrutinize and record "in writing" the details of all large transactions, especially those with no "visible lawful purpose." Task Force Report at Part III(C) Rec 15 (cited in note 1).

77. The Australian legislature has determined that transactions to which "known narcotic source or transit countries" are parties are to be considered inherently suspicious. In its guidelines the Cash Transactions Reporting Act of 1988 lists nineteen countries "known to facilitate money laundering . . . due to strict bank secrecy laws." This list includes Luxembourg, the Cook Islands and Switzerland. Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transactions*, *Money Laundering Alert* at 7 (cited in note 75). See also, Task Force Report at Part III(C) Rec 21 (cited in note 1).

Directive may require special attention for transactions "particularly likely, by [their] nature, to be related to money laundering."⁷⁸

Because the "suspicious transaction" concept is so critical, yet difficult to define adequately, some authorities have advocated an entirely different approach. Some members of the Task Force recommend that every nation adopt mandatory reporting laws covering all currency transactions over a legislatively determined amount.⁷⁹ Such a system currently exists in the United States and Australia, where all transactions above \$10,000 (U.S. and Australian currency respectively) must be reported.⁸⁰ A related proposal suggests all electronic wire transfers be recorded regardless of their amount.⁸¹ These suggestions are widely criticized as too expensive, technologically impracticable, and not especially helpful to the enforcement agencies. A more popular option is to ban all cash transactions above a designated limit.⁸² In June 1990 Italy's cabinet approved a draft law that would ban all cash transactions in excess of L 20 million (\$16,000).⁸³ France recently passed a similar law.⁸⁴ The European Community also may wish to consider a recent U.S. Senate proposal to put bar codes on currency of \$20 or more.⁸⁵ This proposal may be easier to implement in the European Community than in the United States if a new pan-European currency is introduced. The rationale behind these laws is that cash is no longer the preferred method of payment for legitimate transactions, whereas it is virtually indispensable for a wide range of illegal activities.⁸⁶

78. Proposed EC Directive at Art 5 (cited in note 9).

79. Task Force Report at Part III(C) Rec 24 (cited in note 1).

80. Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transaction Reporting Law*, Money Laundering Alert at 7 (cited in note 75). See also 31 USC §§ 5311-5326 (1988); 26 USC § 6051 (1986); Cash Transaction Reports Act (cited in note 75).

81. Amendment to the Council Directive On Prevention of Use of the Financial System for the Purpose of Money Laundering, COM(90) 593 final-SYN 254 at recital IIa (November 30, 1990) ("Amended Proposal for EC Directive"). See also Task Force Report at Part III(C) Rec 24 (cited in note 1). Recording all wire transfers will be problematic as \$1 trillion or more passes through the banking wires each day. *Money Laundering; Putting an Ear to the Wires*, Time 60 (October 16, 1989) (US ed).

82. See Lucy Kellaway, *Commission Wheels Out Some Heavy Guns in War Against Dirty Money*, Financial Times 3 (February 15, 1990); *Cash Recording Proposed in Canada; Report Issued*, Money Laundering Alert 12 (December 1990) (NEXIS, MLA file).

83. Transactions over L 20 million would be permitted if made by check, bank transfer or credit card so that they could be traced. *Italian Cabinet Moves to Stem Mafia Money Laundering*, Reuter Library Report (June 1, 1990) (NEXIS, Intl file).

84. Task Force Report at Part I(B)(1) Rec 6 (cited in note 1) (prohibiting cash transactions over FR 150,000).

85. Robert Safian, *Making News With Money Laundering*, Am Law 82 (December 1989).

86. Jonathan J. Rusch, *Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act*, 37 Cath U L Rev 465, 466 (1988). See also Task Force Report at Part I(B)(1) (cited in note 1) (discussing cash intensiveness of European countries) and Task Force Report at Part III(C) Rec 25 (cited in note 1) (encouraging the replacement of cash transfers).

3. *When to Report.* A subject firm's next concern is when to report a suspect transaction to the appropriate authorities. In the United Kingdom that duty is conditional on the nature of the underlying offense.⁸⁷ In some instances the bank need not report to the authorities unless requested to do so.⁸⁸ The Task Force recommends that firms report their suspicions promptly rather than wait for a request.⁸⁹ In order to provide certainty of when reporting is required, it recommends lawmakers prescribe a uniform compliance period running from the day that the principal proposed the transaction. Finally, it suggests that it be illegal for bankers to tell customers that they are under investigation.⁹⁰

There also are a number of practical problems that no proposal has yet addressed. It is not clear how firms should handle a client who proposes a suspect transaction. If a bank refuses to execute a transaction, it may expose itself to civil liability.⁹¹ If it executes the transaction, it could face criminal money laundering charges. One solution to this predicament is to provide a safe harbor allowing banks to execute suspicious transactions so long as they report them promptly to the authorities.⁹² This approach preserves bank-customer relations and is less likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering operation. However, conditioning such a safe harbor on an obligation to report raises another problem. It would require the bank to breach the duty of confidentiality which banks in some states owe to their customers so that, once again, the bank may face civil liability.⁹³ To avoid this problem, the European proposals expressly provide a safe harbor from bank secrecy laws for banks that cooperate in good faith with money launder-

87. When a bank suspects that deposited funds will be used for terrorist purposes, it must report the transfer immediately. A bank's failure to report due to negligence could result in conviction. Similarly, when the funds appear to be related to drug trafficking, a bank has a legal obligation to report its suspicions. With regard to any other criminal offense, a bank has the right, but not the duty, to report its suspicions, and must cooperate when requested to do so. *Money Laundering Measures Approved*, Financial Regulation Report (cited in note 11).

88. *Id.*

89. Task Force Report at Part III(C) Rec 16 (cited in note 1) (interpreted in *Changes to Money Laundering Measure* (cited in note 69)).

90. Task Force Report at Part III(C) Rec 17 (cited in note 1). See also Proposed EC Directive at Art 8 (cited in note 9).

91. Some U.S. courts recognize a cause of action in tort when a bank refuses credit to a customer who the bank wrongfully suspects is involved with organized crime. See *Ricci v Key Bancshares of Maine, Inc.*, 662 F Supp 1132 at 1139 (Me 1987).

92. In Australia, financial institutions and their personnel have a "safe harbor" from a money laundering offense if they cooperate by giving information about suspicious transactions to the Commission as soon as practicable. Therefore, they have the opportunity to continue a transaction without running the risk of money laundering prosecution. United States law provides no comparable safeguard. Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transaction Reporting Law*, Money Laundering Alert at 7 (cited in note 75).

93. See note 119 and accompanying text.

ing investigations.⁹⁴ In countries where there is no obligation to report, the Task Force recommends that banks which are suspicious about the operations of a customer should close that customer's accounts.⁹⁵

4. *Scienter*. The element of *scienter* also is likely to be a charged issue in the parliaments of Europe. The U.N. Convention and French law require the bank to have knowledge of the concealment or conversion of proceeds in order to impose liability.⁹⁶ However, if the laws aimed at aiders and abettors allow bankers to assert the defense that they did not think or did not know that a particular transaction was "suspicious" or otherwise reportable, they are likely to be ineffectual.⁹⁷ Recognizing this, some delegates of the Task Force have determined that a negligence standard is more appropriate.⁹⁸ Moreover, a negligent failure to comply with the money laundering laws may carry penalties just as severe as willful violations.⁹⁹

Large banks with multiple branches present a particularly problematic *scienter* issue. Knowing or negligent acquiescence of bank employees in these transactions may bring about separate corporate liability for the bank. Monitoring the many teller windows of a multi-branch institution to prevent such corporate liability presents practical difficulties for the bank. Through a practice called "smurfing," money launderers are able to structure their transactions in ways that avoid suspicion.¹⁰⁰ To frustrate this practice, banks now use computers to aggregate and record each customer's daily transactions and bring suspicious figures to the attention

94. See note 121 and accompanying text.

95. Task Force Report at Part III(C) Rec 19 (cited in note 1).

96. UN Convention at Art 3(1), (3) (cited in note 9); Task Force Report, Money Laundering Offense Annex at 2 (cited in note 1).

97. A likely development is that constructive knowledge will be imputed to banks as more information concerning money laundering practices proliferates. Pursuant to the Basle Statement mandate, national bank supervisors regularly publish "Guidance Notes" to keep their members apprised of what constitutes "suspicious transactions" by bank customers. Lascelles, *Bankers Seek to Scrub Out Money Laundering* at 7 (cited in note 68).

98. Task Force Report at Part I(B) Rec 6 (cited in note 1). A survey of *scienter* standards in different countries is provided in the Task Force Report, Money Laundering Offense Annex at 2-4 (cited in note 1). The Council of Europe Convention also allows for states' imposition of a negligence standard. Council of Europe Convention at Art 6(3)(a) (cited in note 9).

99. Luxembourg bankers may face a prison term just for looking the other way. *Bank Secrecy Laws Stronger; Laundering Now a Crime*, Money Laundering Alert 7 (March 1990) (NEXIS, MLA file). McCune, *Luxembourg Treads Carefully in Drug Money Laundering Case* (cited in note 55).

100. "Smurfing" is the practice of structuring currency transactions to avoid triggering a bank's legal reporting obligation. See Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla L Rev 287 (1989).

of bank supervisors.¹⁰¹ The law should take these technological developments into account when evaluating corporate scienter.¹⁰²

Another factor which will influence the scienter standard of corporate liability is legislatively imposed compliance programs. Most of the international initiatives call upon financial institutions to introduce and maintain systems of internal controls, training programs for employees, and regular audits to test the system.¹⁰³ The courts would be remiss not to consider the state of these programs when they make determinations concerning imputed awareness of money laundering practices.¹⁰⁴ Furthermore, states should coordinate their efforts and assume responsibility for the development of these programs; otherwise, scienter standards could vary dramatically throughout Europe.¹⁰⁵

5. *Predicate Offenses.* The European proposals vary with regard to the types of underlying activity which should trigger a firm's reporting requirement.¹⁰⁶ The Council of Europe and Basle Committee Supervisors concluded that the proceeds from any illicit activity could qualify.¹⁰⁷

101. See 1990 *Banking Software Directory*, *The Magazine of Bank Management* 52 (July, 1990) (formerly *Magazine of Bank Administration*).

102. In September 1990 the U.S. Treasury Department issued a regulation which requires financial institutions to use aggregation-capable computers if they already have them. *Mandatory Aggregation of Currency Transactions for Certain Financial Institutions and Mandatory Magnetic Media Reporting of Currency Transaction Reports*, 55 Fed Reg 36663 (September 6, 1990). See also *Treasury Proposes Two Regulations*, *Money Laundering Alert* 1 (October 1990) (NEXIS, MLA file).

103. In order to maintain their licenses, U.K. banks must have sufficient controls in place to detect and report money laundering and suspicious banking practices. *Secrecy Issues Slow Approval of Global Accords*, *Money Laundering Alert* 7 (December 1989) (NEXIS, MLA file). The Proposed E.C. Directive would require firms to set up internal procedures to help them detect and defeat laundering operations. It recommends that firms train their staff to understand both the directive and how to recognize and deal with suspect transactions. Proposed EC Directive at Art 11 (cited in note 9). The Task Force recommends that financial institutions be required to develop internal controls, carefully screen their employees, audit the controls, and maintain an ongoing employee training program. Task Force Report at Part III(C) Rec 20 (cited in note 1). See also, Basle Statement at Part V (cited in note 9).

104. The Task Force appears to advocate government-issued guidelines only as educational tools. Task Force Report at Part III(C) Rec 28 (cited in note 1). However, it seems reasonable to assume that prosecutors will not hesitate to resort to these guidelines for their own legal ends to establish what a bank knew or should have known.

105. Discrepancies in scienter standards are not merely of academic concern. The Task Force has recognized that different standards concerning the intent element of "a money laundering infraction could affect the ability and willingness of countries to provide each other with mutual legal assistance." Task Force Report at Part III(D) Rec 33 (cited in note 1).

106. Laundering is illegal only when it relates to some sort of illicit activity. Lawmakers must determine which sorts of activities should qualify as the predicate acts for the money laundering offense. Jonathan Beaty and Richard Hornik, *A Torrent of Dirty Dollars*, *Time* 50 (December 18, 1989) (US ed) (observing that multinational corporations and wealthy individuals regularly launder money with impunity for accounting and tax reasons).

107. The Council of Europe Convention applies to the proceeds of any criminal offense. Council of Europe Convention at Art 1(e) (cited in note 9). However, parties may limit covered categories of

The Task Force targets all "serious crimes,"¹⁰⁸ the same approach proposed by the European Parliament and the E.C. Commission.¹⁰⁹ According to the European Parliament, "serious crimes" include money counterfeiting, prostitution, kidnapping and hostage-taking.¹¹⁰ After much debate, the E.C. Council resolved that only drug-affiliated funds should qualify.¹¹¹ Similarly, the U.N. Convention and Luxembourg's new money laundering statute cover only money connected with drugs.¹¹²

There is much controversy over whether to include tax evasion and other fiscal offenses as criminal behavior in the money laundering statutes. In several European states this sort of behavior is not even considered criminal.¹¹³

6. *The Penalty.* Penal sanctions for aiding and abetting the violation of money laundering laws vary widely throughout the world.¹¹⁴ Fines

offenses in their instruments of ratification. *Id.* at Arts 2(2), 6(4). The Basle Statement applies "not only to drug money but to the deposit, transfer and concealment of money derived from many forms of illicit activity, including robbery, terrorism and fraud." David Lascelles, *Banks Warned About Controls on Money Laundering*, Financial Times 28 (November 14, 1989) (quoting Roger Barnes, Head of Banking Supervision for the Bank of England). Italy, Belgium and the Netherlands each have general provisions concerning the proceeds of crime. The United Kingdom and France would prefer that only funds related to drugs fall within the purview of money laundering legislation. Kellaway, *Commission Wheels Out Some Heavy Guns in War Against Dirty Money* at 3 (cited in note 82). *Money Laundering Directive Drafted*, Financial Regulation Report (December 1990) (NEXIS, Intl file).

108. Task Force at Part I(B) Rec 5 (cited in note 1).

109. Amended Proposal for EC Directive at Art 2 (cited in note 81).

110. *Money Laundering Directive Drafted*, Financial Regulation Report (December 1990) (cited in note 103). By comparison, the U.S. list of "specified unlawful activities" is much longer and continues to expand. It now includes crimes such as fraud and environmental offenses. *US Banks Seek UK-Style 'Safe Harbor' Protection*, Money Laundering Alert 6 (January 1990) (NEXIS, MLA file).

111. *Europe Community Diary*, Origin Universal News Service Limited (December 20, 1990) (NEXIS, Intl file). The European Commission will set up a working party to consider the possibility of uniformly extending the directive to other criminal activities. *Banking: Political Agreement on Money Laundering Proposal*, European Information Service (January 1991) (NEXIS, Intl file).

112. UN Convention at Art 3 (cited in note 9). In January, the government of Luxembourg issued a statement underscoring that the new money laundering laws were not aimed at tax evasion, but rather at cases where there is "material proof of an offense of drug money laundering." *Bank Secrecy Laws Stronger; Laundering Now a Crime*, Money Laundering Alert at 7 (cited in note 99).

113. In the United Kingdom, Luxembourg and Switzerland, violations of tax and currency control laws do not carry criminal sanctions. As proposed, the original U.K. Criminal Justice (International Cooperation) Bill included fiscal offenses as predicate offenses, but this was reconsidered after much public criticism by the British Bankers Association and the Law Society; "Tax law in unscrupulous hands can be a powerful instrument of oppression." D.J. Elvidge and E.J. Henbrey, *Bill Offers Britain's Co-operation Too Freely*, Financial Times 21 (March 6, 1990).

114. The United Kingdom's Drug Trafficking Offenses Act of 1986 imposes a prison term of up to fourteen years on those who facilitate the concealment, removal or transfer of drug trafficking proceeds by or on behalf of another. *Secrecy Issues Slow Approval of Global Accords*, Money Laundering Alert at 7 (cited in note 103). In Hong Kong this same offense carries a fourteen-year prison term and a \$5 million fine. *Id.* In Luxembourg "the law imposes a prison term of up to five years and a fine of up to 50 million Luxfrancs." *Bank Secrecy Laws Stronger; Laundering Now a Crime*, Money Laundering Alert at 7 (cited in note 99). Under U.S. law, "bank officials who knowingly conceal the source of

range from \$500,000 to \$5 million and prison terms extend to twenty years.¹¹⁵ Banks in the United States and United Kingdom may lose their charter for egregious violations.¹¹⁶ Banks in other states may face additional penal regimes administered by self-regulating organizations.¹¹⁷ Unfortunately, none of the proposals currently under consideration by the European legislatures addresses the prescription of uniform sanctions. Presumably this is because considerations of resources and national policy concerning deterrence, rehabilitation and retribution drive decisions of this sort. Nonetheless, major discrepancies in penalties between states could eviscerate everything that this collective regional effort seeks to achieve.

C. The Most Formidable Obstacle: Bank Secrecy

The principal objection to money laundering legislation is that it is a direct affront to the consumer's right to privacy secured by bank secrecy laws. Bank secrecy has a long and distinguished history in Europe.¹¹⁸ Today, every Western European nation imposes some form of obligation on bankers to maintain the confidentiality of their clients' dealings.¹¹⁹ Even

illicit money can be fined up to \$500,000 or twice the amount of the money they launder, and imprisoned for up to 20 years." Janice Castro, *The Cash Cleaners*, Time 65 (October 24, 1988) (US ed).

115. See sources cited in note 114.

116. Pursuant to their Basle Statement mandate, national bank supervisors now threaten to revoke the licenses of member banks that blatantly fail to comply with promulgated money laundering policy. Lascelles, *Bankers Seek to Scrub Out Money Laundering* at 7 (cited in note 68). Banks in the United Kingdom must employ adequate safeguards to uncover and report money laundering and suspicious banking practices in order to retain their licenses. *Secrecy Issues Slow Approval of Global Accords* at 7 (cited in note 103). "[A U.S.] bill which passed the House by a 406-0 vote on April 25, 1990 contains a 'death penalty' clause, allowing regulators to revoke a bank or savings institution charter and lift its deposit insurance if the institution or its officials are convicted of money laundering charges." Resnick, *Money Laundering* at 45 (cited in note 53).

117. A self-regulating organization in Switzerland recently fined eleven Swiss banks for breaching voluntary rules designed to prevent money laundering. Fines ranged from SFR 1,000-250,000. *Eleven Swiss Banks Fined for Lack of Diligence*, Reuter Financial Report (September 26, 1990) (NEXIS, Intl file).

118. The first written reference to banking secrecy is found in the statutes of Italy's Banco Ambrosiano in 1593. *European Finance and Investment—Offshore Centre 2; European Banking Secrecy and Disclosure—Requirements*, Financial Times 38 (March 29, 1990) (cited in note 52). There are at least five justifications for individual use of bank secrecy jurisdictions: (1) capital flight from political, religious, and racial prosecution; (2) freedom from oppressive government, confiscatory taxes and the risks of war; (3) freedom from unwanted popularity and threats to one's reputation; (4) protection from legal judgment; and (5) protection from the increasing threat of robbery. Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 Tex Intl L J 133, 134-35 (1985).

119. The Task Force provides a survey of the laws in bank secrecy jurisdictions. Task Force Report, Annex on Bank Secrecy Laws and Reporting Requirements Annex ("Bank Secrecy Annex") (cited in note 1). Most have developed some sort of banking secrecy law. Silvia P. Piñera-Vasquez, *Extraterritorial Jurisdiction and International Banking: A Conflict of Interests*, 43 U Miami L Rev 449, 467 (1985). These laws are prescribed in the privacy codes of civil law countries, and in the common law of Great Britain. *Toumier v National Provincial and Union Bank* [1924] 1 KB 461. See also *Barclays*

E.C. law requires that banks doing business in the European Community observe bank secrecy laws.¹²⁰ Consequently, bankers argue that compliance with the money laundering laws would subject them to either criminal or civil liability. Taking this into consideration, most proposals provide an express exemption of the bank secrecy laws for banks that cooperate in good faith in money laundering investigations.¹²¹ In this manner the parliaments of Europe hope to reconcile the two conflicting policies.¹²²

IV. ENFORCEMENT: INTERNATIONAL COOPERATION ISSUES

Criminalizing the conduct of money laundering is only half the battle. The next step is to detect and punish the perpetrators. This will require unprecedented cooperation among the investigative, prosecutorial and judicial authorities of the European nations.¹²³

A. Investigation

The practice of modern day money laundering rarely occurs solely in one country. Furthermore, no single transaction is likely to provide enough evidence upon which to build a case. The objective of the reporting requirements outlined above is to provide a "paper trail" for enforce-

Bank Plc v Taylor, [1989] 1 WLR 1066 (cited in note 50) (common law duty of confidentiality between a banker and his customers has survived despite recently enacted money laundering legislation). In comparison, the U.S. position, as enunciated in *US v Miller*, 425 US 435 (1976), is that records about an individual, created and maintained by a third party such as a bank, do not belong to that person, but instead belong to the institution. Thus, a U.S. citizen has no right to control the release or transfer of those records.

120. *Hillegom Municipality v Cornelis Hillenius*, (Case 110/84) [1986] 3 CMLR 422 (European Court of Justice Decision) (interpreting Art 12(1) of EC Council Directive 77/780).

121. Proposed EC Directive at Art 9 (cited in note 9); UN Convention at Art 5(3) (cited in note 9); Task Force Report at Part III(A) Rec 2, Part III(C) Rec 16 (cited in note 1). The United Kingdom made such a change three years ago and France proposed a similar law in May 1990. William Dawkins, *OECD Meeting in Paris; Drug Money Laundering Laws to be Tightened*, Financial Times 6 (May 31, 1990).

122. One of the drafters of the U.S. Right to Financial Privacy Act argues that privacy protections and effective money laundering laws can be reconciled. Abbe David Lowell, *Privacy, Tough Money Laws Do Mix*, Nat'l L J 13, 28 (September 15, 1986). However, the problem may not be so simple. If the right to privacy recognized in many European codes and constitutions does reach bank accounts, then the legislature cannot lift it simply by fiat. The European Convention on Human Rights also may protect depositors' privacy. European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 213 UNTS 221 (signed November 4, 1950; in force September 3, 1953).

123. "The development of cross-border transactions and financial services and the removal of exchange controls . . . can easily complicate the process of tracing the origin of relevant funds. Thus, in order to combat money laundering, an international approach is required." *Money Laundering Directive Drafted*, Financial Regulation Report (cited in note 107).

ment agents to trace back to the principal offender. The challenge is to follow this trail across multiple national boundaries.

All five European proposals encourage efforts to coordinate law enforcement assistance, cooperation and training.¹²⁴ Without explicitly outlining a means for putting international enforcement into practice, the proposals yield two viable approaches to coordinate investigation efforts. The first is to create a network among state-designated financial intelligence offices.¹²⁵ In order to be effective, each state need have only one such office and the authority to share information with sister offices in foreign states.¹²⁶ The French have taken the initiative in this area by creating a state agency modelled after the U.S. Financial Crimes Enforcement Network ("FinCEN").¹²⁷ FinCEN is a multi-agency operation which serves as the primary intelligence and analysis resource to support money laundering investigations in the United States.¹²⁸

The second approach envisions a supranational European police force, possibly under the aegis of the European Community, with a single coordinating bureau.¹²⁹ This body presumably would have access to all the financial intelligence of its member states. The Task Force Report recommends that the Customs Cooperation Council and Interpol have responsibility for monitoring the global flow of money and dissemination

124. UN Convention at Art 9 (cited in note 9); Task Force Report at Part III(C) Recs 31-32 (cited in note 1); Basle Statement, Parts IV-V (cited in note 9); Proposed EC Directive, Preamble ¶ 6 (cited in note 9).

125. The Task Force characterizes this proposal as an "international information exchange" through which information relating to suspicious transactions, persons and corporations is relayed spontaneously between competent authorities. Task Force Report at Part III(C) Rec 32 (cited in note 1).

126. Confidentiality concerns may affect this exchange of information. The Council of Europe Convention implies that failure to assure confidentiality may justify refusal to cooperate. Council of Europe Convention at Art 33 (cited in note 9). In several recent cases, foreign governments have declined to provide information to U.S. prosecutors because they know it would become subject to public disclosure. Strasser, *Crime Has No Borders* at 40 (cited in note 16).

127. FinCEN is a federal agency of 200 employees with a \$16 million budget and includes former employees of the U.S. Customs Service, the Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, Federal Bureau of Investigation, Secret Service, Drug Enforcement Administration and liaisons with the Central Intelligence Agency and the Defense Intelligence Agency and the French government. *Bruh Named Director of Treasury's FinCEN*, Money Laundering Alert 3 (April 1990) (NEXIS, MLA file).

128. *Id.*

129. The E.C. Ministers of Justice and Home Affairs are discussing the possibility of developing an information system for use by all member states. The project is expected to start with a European drug file. *Closer Co-operation on All EC Borders*, Financial Times (December 1989) (NEXIS, Intl file). The European Community already has taken steps toward creating a supranational European police force with a central coordinating bureau in Brussels. Strasser, *Crime Has No Borders* at 40 (cited in note 16).

of information on money laundering.¹³⁰ The United States has suggested that the Bank for International Settlements, the International Monetary Fund, and the Organization for Economic Cooperation and Development could also play a role in this endeavor.¹³¹ The banks themselves would not have any investigative duties in any case.¹³²

Regardless of which approach is chosen for policing the global financial network, it is clear that national legislation must be harmonized in order to assist and accommodate the investigative authorities. The Council of Europe contemplates extensive use of telephone wiretapping and official access to computer systems.¹³³ The U.N. Convention expressly endorses the investigative technique of "controlled delivery" as a means of identifying drug traffickers.¹³⁴ Broad investigative powers such as these may raise constitutional issues in many states.¹³⁵

Technological problems can be addressed once a model is chosen and the institutional infrastructure is in place. Computers must be developed to record and trace the tremendous volume of financial activity that transpires every day.¹³⁶

B. Extradition

Provisions in the Task Force Report and the U.N. Convention should make it easier for prosecuting states to obtain the extradition of

130. Task Force Report at Part III(D) Rec 31 (cited in note 1). Interpol, the 67-year-old International Police Organization, has a staff of 280 and offices in each of its 150 member nations (soon to include the Soviet Union). Resources recently have been committed to a new \$20 million headquarters in Lyons, France which features advanced data-processing and communications technology. Today, well over half of the organization's criminal files are dedicated to drug trafficking and money laundering. Alan Riding, *Interpol Regrets Shady Past, Vows Better Future*, New York Times A:4 (February 22, 1990). The Council of Europe also recognizes Interpol as an appropriate conduit for communications related to money laundering. Council of Europe Convention at Art 24(3) (cited in note 9).

131. *World Laundering Awareness Grows, U.S. Report Says*, Money Laundering Alert 6 (April 1990) (NEXIS, MLA file) (referring to 1989 Annual State Department Report to Congress on the International Narcotics Problem).

132. According to Sir Leon Brittan, E.C. Commissioner for Financial Institutions, "[W]e are not seeking to convert (banks) into policemen." (as quoted in Dobie, *EC Package on Laundering Soon* at 21 (cited in note 10)).

133. Council of Europe Convention at Art 4(2) (cited in note 9).

134. UN Convention at Art 11 (cited in note 9). Controlled delivery is the technique of allowing an illicit consignment of drugs to pass through the territory of one or more countries under the supervision of competent authorities with a view to identifying persons involved in the commission of a covered offense. *Id* at Art 1(g).

135. For example, the U.S. Supreme Court recently decided that the Fourth Amendment of the U.S. Constitution does not apply to searches by U.S. agents of property that is owned by a nonresident alien and located in a foreign country. *US v Verdugo-Urquidez*, — US —, 110 S Ct 1056 (1990).

136. Finance experts have long called for increased surveillance of wire transfers. See note 75 and accompanying text. Two principal U.S. clearing houses process more than \$174.1 billion in wire transfers per hour. *Wire Transfer Rules Proposed, 40,000 Are Affected*, Money Laundering Alert 1 (November 1990) (NEXIS, MLA file).

money launderers abroad.¹³⁷ In fact, the U.N. Convention may serve as a universal extradition treaty.¹³⁸ It provides that when no extradition treaty exists, a party to the convention may rely on it.¹³⁹ It also amends and updates existing treaties between party states to include the offense of money laundering.¹⁴⁰

Two of the proposals call upon states to expedite extradition procedures and to simplify evidentiary requirements relating to those procedures.¹⁴¹ The Task Force encourages states to allow direct transmission of extradition requests between appropriate ministries and to extradite persons based solely on warrants of arrest or judgment.¹⁴² The U.N. Convention provides that states may not refuse requests for the extradition of money launderers on the grounds that they involve fiscal, political or politically motivated offenses.¹⁴³ Arrangements such as these may account for the fact that the number of criminals extradited for money laundering is already increasing.¹⁴⁴

C. Acquiring Admissible Evidence

Modern law enforcement requires a means for the acquisition of evidence abroad in a form admissible in the courts of the requesting state. The Basle Statement and the Proposed E.C. Directive do not propose any means for facilitating this exchange. The Task Force endorses a network of bilateral and multilateral arrangements¹⁴⁵ to provide compulsory meas-

137. Task Force Report at Part III(D) Rec 40 (cited in note 1); UN Convention at Art 6 (cited in note 9). Extradition appears to be one weapon that the drug lords truly fear. On January 24, 1988, Columbia's drug lords declared "total war" on anyone who favors extradition. The next day Colombian Attorney General Hoyos was assassinated. Jill Smolowe, *The Drug Thugs*, Time 28 (March 7, 1988) (US ed).

138. Strasser, *Crime Has No Borders* at 41 (cited in note 16).

139. UN Convention at Art 6(1)-(4) (cited in note 9).

140. *Id.* at Art 6(1)-(2).

141. Task Force Report at Part III(D) Rec 40 (cited in note 1); UN Convention at Art 6(7) (cited in note 9).

142. Task Force Report at Part III(D) Rec 40 (cited in note 1).

143. UN Convention at Art 3(10) (cited in note 9). However, see Council of Europe Convention at Art 18(1)(d) (cited in note 9), which sanctions refusal to cooperate in confiscation proceedings on the grounds that the offense to which the request relates is a political or fiscal offense.

144. Nadelmann, 18 *Inter-Am L Rev* at 79 (cited in note 2).

145. There is a growing trend among states to negotiate mutual legal assistance treaties ("MLATs") to facilitate and expedite the exchange of evidence. An MLAT is a treaty which creates a binding obligation on the treaty partners to render assistance to each other in criminal investigations by providing evidence in a form admissible in judicial proceedings. These have been bilateral for the most part. There are three reasons states may prefer bilateral to multilateral treaties: (1) a bilateral treaty usually goes farther than a multilateral one (which may only reflect the most general and common elements of agreement among several states); (2) in a bilateral treaty a government selects a single country with whom it wishes to negotiate and to whom it wishes to provide information; (3) MLATs can involve a variety of legal systems which may be hard to reconcile (such as the common law and the civil law systems). Nadelmann, 18 *Inter-Am L Rev* at 74 (cited in note 2).

ures for the production of evidence.¹⁴⁶ The U.N. Convention implicitly adopts the multilateral approach by authorizing the use of Article 7 procedures as a universal Mutual Legal Assistance Treaty ("MLAT") for covered offenses.¹⁴⁷

The U.N. Convention extensively reforms the existing system for acquisition of evidence in foreign jurisdictions.¹⁴⁸ Article 7 creates a general treaty obligation to provide "the widest measure of mutual legal assistance [to other party states] in investigations, prosecutions and judicial proceedings in relation to [money laundering]."¹⁴⁹ Such assistance includes taking evidence, serving documents, executing searches and seizures, examining objects and sites, providing financial and business records, and identifying and tracing proceeds and instrumentalities of crime.¹⁵⁰ It expressly provides that "a party shall not decline to render mutual legal assistance . . . on the ground of bank secrecy."¹⁵¹ This convention operates to amend existing MLATs to include the offense of money laundering.¹⁵² As between states which are not party to any existing bilateral or multilateral treaties on mutual legal assistance, the convention specifies the procedures for making and executing such requests.¹⁵³

All proposals which address the subject seem to agree that each state must designate a single authority with the responsibility for coordinating requests for mutual legal assistance.¹⁵⁴ These authorities should be the exclusive means for exchange of information;¹⁵⁵ however, international proposals do not suggest with which branch of government this authority should be affiliated. This authority must have diplomatic sensitivity in order to recognize which requests are in compliance with the treaty.¹⁵⁶ It

146. Task Force Report at Part III(D) Recs 34, 37 (cited in note 1).

147. UN Convention at Art 7(7)-(19) (cited in note 9).

148. Treaty provisions providing for regional assistance in acquiring admissible evidence abroad have been attempted before in Europe. Stewart, 18 Denver J Intl L & Policy at 398 (cited in note 8). In addition, the Council of Europe has considered extending the "mutual assistance machinery" of its Convention on Insider Trading to deal with money laundering matters. *Untitled*, Financial Times 3 (September 14, 1989) (NEXIS, Intl file).

149. UN Convention at Art 7(1) (cited in note 9).

150. *Id* at Art 7(2). Compare Task Force Report at Part III(D) Rec 37 (cited in note 1).

151. UN Convention at Art 7(5) (cited in note 9).

152. Stewart, 18 Denver J Intl L & Policy at 399 (interpreting the UN Convention at Arts 7(1), 7(6) and 7(7)) (cited in note 8).

153. UN Convention at Art 7(7)-(19) (cited in note 9).

154. *Id* at Art 7(8); Council of Europe Convention at Art 23 (cited in note 9). See also Task Force Report at Part III (D) Rec 32 (cited in note 1).

155. A single authority can expedite the execution of requests and would simplify the jobs of overtaxed prosecutors who do not have time to familiarize themselves with foreign law. This device would also save defendants the attorneys' fees associated with letters rogatory.

156. In the United Kingdom, an application for legal assistance from a foreign state must be approved by the Secretary of State before it is presented to the courts. Critics there find it extraordi-

must also determine when the outflow of requests has a deleterious effect on established relationships.¹⁵⁷ Moreover, it must have the executive authority and legal acumen necessary to inform prosecutors of more effective and less abrasive techniques for gathering evidence.¹⁵⁸ A foreign evidence officer also must have the political accountability to certify that the requested evidence will be confidential¹⁵⁹ and will be used only for the purpose designated by the requesting party.¹⁶⁰ At the same time, this foreign evidence coordinator must possess the judicial impartiality necessary to recognize both frivolous requests and potential violations of fundamental rights.¹⁶¹ Therefore, the establishment of a designated central authority in each state is likely to be the most difficult hurdle in implementing a European mutual legal assistance treaty.

D. Forfeiture

To penalize the offender and to make money laundering prosecution pay for itself, party states must enact legislation providing for the forfeiture (freezing, seizure and confiscation) of the property and proceeds used in or derived from covered offenses. All of the European proposals either expressly or implicitly support the use of forfeiture as an enforcement mechanism.¹⁶² The U.N. Convention and the Council of Europe Convention go further and actually provide the legal basis for execution of international forfeiture requests.¹⁶³

The scope of confiscation provisions varies among the European proposals. The U.N. Convention provides for confiscation up to the assessed value of the intermingled proceeds.¹⁶⁴ More expansive provisions

nary that such vital protection is limited purely to executive discretion. Elvidge and Henbrey, *Bill Offers Britain's Co-operation Too Freely* at 21 (cited in note 113).

157. Nadelmann, 18 *Inter-Am L Rev* at 55 (cited in note 2).

158. *Id.*

159. UN Convention at Art 7(14) (cited in note 9). Prosecutors are reluctant to supply evidence in support of a request under an MLAT because they fear that the information would be released due to "corruption, carelessness, or legal process." Nadelmann, 18 *Inter-Am L Rev* at 56 note 66 (cited in note 2).

160. UN Convention at Art 7(13)-(14) (cited in note 9). The fear is that the requested nation will initiate a rival prosecution of its own.

161. The U.S. defense bar is concerned that constitutional and human rights will be violated unless defendants are given equal access to this discovery clearinghouse. Excluded from existing MLATs, defendants have been forced to resort to letters rogatory "—essentially toothless requests—in place of subpoenas for exculpatory evidence." Strasser, *Crime Has No Borders* at 40 (cited in note 16).

162. Basle Statement, Part IV (cited in note 9); Task Force Report at Part III(B) Rec 8 (cited in note 1); UN Convention at Art 5 (cited in note 9); Council of Europe Convention at Art 2 (cited in note 9).

163. UN Convention at Art 5 (cited in note 9); Council of Europe Convention at Art 2 (cited in note 9).

164. UN Convention at Art 5(6)(b) (cited in note 9).

in existing legislation have raised human rights and constitutional issues.¹⁶⁵ Recognizing the potential for abuse, the Council of Europe Convention provides that each state must create effective legal remedies for affected individuals in order to preserve their rights.¹⁶⁶ Likewise, the Council of Europe and U.N. conventions seek to preserve the rights which *bona fide* third parties may have in such situations.¹⁶⁷ However, none of the European proposals exempts living and legal expenses while the defendant is on trial.¹⁶⁸

Both the Council of Europe Convention and the U.N. Convention emphasize the importance of international cooperation in forfeiture proceedings. They require a party state, upon request of another party state, to assist in freezing or seizing illicit proceeds for the purposes of eventual confiscation.¹⁶⁹ More importantly, both conventions establish procedures by which one party may ask another to assist it by forfeiting proceeds located in the requested party's territory.¹⁷⁰ The distinguishing features of the Council of Europe Convention are (1) the designation of a central authority responsible for sending and answering requests;¹⁷¹ and (2) the provision that the requested party shall be bound by the findings of fact stated in the conviction or judicial decision of the requesting

165. Courts in the United Kingdom can confiscate proceeds derived from trafficking. The courts also may assume, "unless the contrary is shown, that all the trafficker's current property, and everything that he has held during the previous six years, is the proceeds of drug trafficking." *Secrecy Issues Slow Approval of Global Accords*, Money Laundering Alert 7 (December 1989). Under U.S. law, if an account is used to launder any amount of money, "everything passing through it is subject to seizure." Strasser, *Crime Has No Borders* at 41 (cited in note 16). The Task Force Report recommends the confiscation of laundered property, or alternatively, "property of corresponding value." Task Force Report at Part III(B) Rec 8 (cited in note 1). The forfeiture provision of the U.N. Convention would have all parties to the treaty allow confiscation of drug proceeds or substitute assets. U.N. Convention at Art 5(1)(a) (cited in note 9). These broad confiscation provisions may violate the European Convention for the Protection of Human Rights (right to property). Protocol to the Convention of Human Rights and Fundamental Freedoms, 213 UNTS 262 (signed March 20, 1952; in force May 18, 1954). They also could eviscerate a money laundering defendant's right to effective assistance of counsel. *U.N. Treaty on Drugs Worries the Defense Bar*, Nat'l L J 5, 27 (September 25, 1989) (hypothesizing that a lawyer's fees, paid from non-tainted funds, conceivably could be subject to forfeiture by a foreign power as a substitute for other drug-related assets).

166. Council of Europe Convention at Art 5 (cited in note 9).

167. UN Convention at Art 5(8) (cited in note 9); Council of Europe Convention at Arts 21-22 (cited in note 9). It is not clear whether these provisions would suffice to protect a defendant's right to effective assistance of counsel.

168. The law in New South Wales is unique in that it allows for "reasonable living and legal expenses to be excluded from the scope of a restraining order." Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transaction Reporting Law*, Money Laundering Alert at 7 (cited in note 75).

169. UN Convention at Art 5(4) (cited in note 9). Council of Europe Convention at Art 7 (cited in note 9).

170. UN Convention at Art 5(4) (cited in note 9). Council of Europe Convention at Arts 23-35 (cited in note 9).

171. Council of Europe Convention at Art 23 (cited in note 9).

party.¹⁷² The U.N. Convention makes no reference to a central authority and allows for the initiation of *in rem* proceedings in the requested state on the basis of evidence provided by the requesting state.¹⁷³ There also are discrepancies between the two conventions as to when the proceeds should be subject to seizure.¹⁷⁴

The appropriate disposition of the confiscated proceeds is also the subject of much uncertainty. The U.N. Convention contemplates that the parties may enter into agreements on a regular or case-by-case basis providing either to share the confiscated proceeds between them¹⁷⁵ or to contribute the proceeds to inter-governmental bodies specializing in the fight against illicit drug trafficking.¹⁷⁶ The Council of Europe Convention leaves the matter of disposition totally to the discretion of the requested state.¹⁷⁷

V. CONCLUSION

It is absolutely critical to compare and reconcile the five European proposals for combatting money laundering before turning them over to the national legislatures for implementation. The unaddressed issues and fundamental differences revealed in this comparative study have the potential to undermine everything that these plans individually seek to achieve.

States must never lose sight of the fact that only a single, comprehensive and coordinated plan can effectively exterminate the illicit laundering of money. Inconsistencies in the laws of different states make the eradication of money laundering impossible. Criminal elements will be quick to

172. *Id.* at Art 14.

173. UN Convention at Art 5(3)-(4)(a)(i) (cited in note 9).

174. Timing may be critical. Any delay will give the suspect an opportunity to conceal the location of the illicit funds. Compare UN Convention at Art 5(4)(b) (cited in note 9) (freeze on request); Council of Europe Convention at Art 11(1) (cited in note 9) (freeze after requesting party has instituted criminal proceedings). New South Wales law allows the Drug Crime Commission to apply for a restraining order as soon as they "reasonably suspect" a person of drug trafficking. Fisse, *France, England Press Money Laundering Initiatives; Australia Begins Implementation of Cash Transaction Reporting Law*, Money Laundering Alert at 7 (cited in note 75). Swiss bank officials shocked the financial community when they froze the assets of the Marcos family even before the Philippine government requested them to do so. William W. Park, *Legal Policy Conflicts in International Banking*, 50 Ohio St L J 1067, 1102 (1989).

175. UN Convention at Art 5(5)(b)(ii) (cited in note 9). The Cartagena Declaration, an agreement signed by Columbia, Bolivia, Peru and the United States to curtail money laundering, stipulates that the countries which cooperate to discover the assets of international drug traffickers may share those assets. Juan Carlos Parmenion, *United States: World Cooperation Key to Anti-Drug Campaign*, Inter Press Service (February 15, 1991) (NEXIS, Intl file). See also Task Force Report at Part III(D) Rec 39 (cited in note 1).

176. UN Convention at Art 5(5)(b)(i) (cited in note 9).

177. Council of Europe Convention at Art 15 (cited in note 9).

recognize the opportunities presented by even subtle distinctions and will not hesitate to exploit them. Driven by their own economic self-interest, some nations may ignore these proposals or seek to adopt only their weakest provisions. Ironically, they will be able to do so with impunity by making reference to particular international agreements and the issues they left unresolved.

Multinational organizations have developed five proposals that collectively represent a principled and viable approach for solving the world's money laundering problem. Now these proposals must be completed, reconciled, and finally transformed into a single coordinated blueprint from which there can be no deviation. Only after the implementation of a uniform system among states can Europe expect to stave off the rising tide of money laundering that is otherwise inevitable.

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