



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.12.1995
COM(95) 693 final

95/0360 (CNS)

Proposal for a
COUNCIL ACT

drawing up the additional Protocol to the Convention on
the protection of the European Communities' financial interests

(presented by the Commission)

EXPLANATORY MEMORANDUM

The Council signed the Convention on the protection of the financial interests of the European Communities⁽¹⁾ on 26 July 1995. The Council Act specifies that this first Convention instrument is "to be supplemented shortly afterwards by another legal instrument, in such a way as to improve the effectiveness of protection under criminal law of the European Communities' financial interests".

The present proposal corresponds to this Council request, taking account of the fact that the Convention signed on 26 July 1995 covers only some of the questions which featured in both the Commission proposal submitted to the Council in July 1994⁽²⁾ and in the Council Resolution of December 1994 on the protection of the financial interests of the European Communities⁽³⁾.

I. The draft Council Act establishing the Protocol

With reference to the institutional framework of the present initiative, the Commission is aware that the choice of an instrument falling under Title VI of the Union Treaty rather than a Community instrument continues to provoke objections. The Parliament defends the position according to which legislative action in the area of the protection of Community financial interests should be set in the Community framework⁽⁴⁾.

In the absence of substantial amendments to institutional data since the Commission's 1994 proposal, the reasoning which led it at the time to base its initiative on penal protection on Title VI of the Union Treaty remains valid, even if that does not prejudice any eventual Community competence in penal matters and even though the Council in its Act of 26 July 1995 left open the question of the legal nature of the second instrument.

II. The draft Protocol

Article 1 defines the concepts of "Convention", "fraud", "fraud offences" and "legal person" for the needs of the present Protocol.

Title II mentions liability of legal persons.

Article 2 establishes the criminal liability of legal persons for fraud.

Article 3 provides for an additional liability for legal persons which applies in situations in which any damage has been caused to the financial interests of the European Communities without constituting a de facto or de jure criminal offence.

Article 4 specifies that the liability of legal persons is without prejudice to the liability of natural persons who perpetrate offences.

Article 5 determines the nature of the penalties to be provided in cases of liability of legal persons.

(1) OJ No C 316, 27.11.1995, p. 48.

(2) OJ No C 216, 6.8.1994, p. 14; COM(94) 214 final.

(3) OJ No C 355, 14.12.1994, p. 2.

(4) Legislative Resolution of 15 March 1995, OJ No C 89, 10.4.1995, p. 82.

Title III is concerned with laundering.

Article 6 makes laundering of the profits from a fraud affecting the Communities' financial interests a criminal offence.

Title IV lays down the rules applicable for the priority jurisdiction mechanism.

Article 7 sets out the principles applicable for centralizing proceedings in cases of complex cross-border fraud.

Article 8 specifies the criteria to be applied to determine priority jurisdiction.

Title V is concerned with assistance and judicial cooperation.

This Title is added for reflection only and does not form part of the Commission initiative, given its limited powers of proposal, in the framework of Title VI of the Union Treaty, on questions falling under Article K.1.(1) to K.1.(6) but excluding K.1.(7) on judicial cooperation.

Article 9 sets out the principles for direct cooperation based on a network of liaison magistrates.

Article 10 provides the procedures to be used for direct cooperation.

Article 11 establishes the mechanism for cooperation in the implementation of centralized proceedings.

Article 12 specifies the cooperation procedures.

Title VI deals with the setting up of a register on fraud prosecutions.

Article 13 sets up the register which centralizes information on fraud prosecutions which are before the competent judicial authorities in the Member States.

Article 14 specifies the procedures to be used for this register.

Article 15 ensures the protection of personal data.

Title VII provides for applicable measures which will be taken in accordance with Article 16.

Title VIII establishes the jurisdiction of the Court of Justice.

Article 17 confers on the Court the power to give preliminary rulings in the framework of dispute procedures.

Title IX contains final provisions.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Parliament⁽²⁾,

Whereas Articles 209a of the EC Treaty, 78i of the ECSC Treaty and 183a of the Euratom Treaty require the Member States to combat fraud against the financial interests of the Communities;

Whereas, by Act⁽³⁾ of 26 July 1995, the Council drew up the Convention on the protection of the European Communities' financial interests;

Whereas for the purposes of attaining the objectives of the Union, the fight against fraud affecting the financial interests of the European Communities is a matter of common interest falling in part within the scope of the cooperation established by Title VI of the Treaty;

Whereas the Convention of 26 July 1995 is only a first measure;

Whereas, to fight fraud effectively, that Convention must be amplified by the attached Protocol so as to improve the level of criminal protection of the financial interests of the European Communities;

HAS DECIDED to draw up the additional Protocol to the Convention annexed hereto, which has been signed today by the Representatives of the Governments of the Member States of the Union;

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional requirements.

Done at Brussels,

For the Council
The President

(1) OJ No C

(2) OJ No C

(3) OJ No C 316, 27.11.1995, p. 48.

PROTOCOL

drawn up pursuant to Article K.3 of the Treaty on European Union,
to supplement the Convention on the protection of the
European Communities' financial interests

The High Contracting Parties to this Protocol, being Member States of the European Union,
Referring to the Act of the Council of the European Union of,
Desiring to,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

TITLE I
Definitions

Article 1

For the purposes of this Protocol, the following definitions shall apply:

- (a) "Convention" means the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by Act⁽¹⁾ of the Council on 26 July 1995;
- (b) "fraud" means fraud against the financial interests of the European Communities as defined in Article 1 of the Convention, regardless of the nature of the participation in the fraud, and attempts to commit fraud;
- (c) "offences of fraud" means the acts or omissions set out in Article 1 of the Convention, without prejudice to Article 2(2) thereof;
- (d) "legal person" means any legal person under the applicable national law, not including States exercising the prerogatives of a State and public international organizations.

TITLE II
Legal persons

Article 2

Any legal person is criminally liable where an offence of fraud is committed on its behalf.

This liability may be incurred by any body, legal representative or any person having de jure or de facto decision-making power in the enterprise, and by any other person acting on behalf of the legal person.

Article 3

In the absence of an offence of fraud being legally established in conformity with Article 2, any legal person shall be liable where harm is caused by an act or omission, either of them being committed intentionally or negligently, by one of the persons mentioned in the second paragraph of Article 2 acting on behalf of the legal person.

⁽¹⁾ OJ No-C 316, 27.11.1995, p. 48.

Article 4

The liability of a legal person under Articles 2 and 3 shall be without prejudice to the liability of natural persons who are perpetrators, instigators, accessories or jointly responsible in relation to the same acts.

Article 5

1. Each Member State shall take the necessary measures to ensure that the legal person held liable may be subject to penalties which are proportionate to the nature and the seriousness of the acts.

Each Member State shall take the necessary measures to ensure that a legal person criminally liable under Article 2 shall be liable to:

- fines;
- disqualification measures;
- measures for public exposure and publication of the judgment delivered;
- placing under judicial supervision;
- a judicial winding-up order.

Each Member State shall take the necessary measures to ensure that a legal person liable under Article 3 shall be liable to:

- pecuniary penalties;
- disqualification measures;
- measures for public exposure and publication of the judgment delivered.

2. In all cases, direct or indirect profits from acts done to the detriment of the Community's financial interests shall be confiscated.

TITLE III Laundering

Article 6

1. The laundering of profits made from fraud shall be established as a criminal offence and shall be regarded as a form of criminal conduct as defined by Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purposes of money laundering⁽²⁾.
2. The laundering of the said profits includes all acts done intentionally, as set out in the third indent of Article 1(1) of Directive 91/308/EEC.
3. Where an offence of money laundering is committed for the benefit of a legal person, that person shall be criminally liable in accordance with Article 2.

⁽²⁾ OJ No L 166, 28.6.1991, p. 77.

TITLE IV
Priority jurisdiction

Article 7

1. In the interests of the sound administration of justice, investigations shall be grouped together within a centralized procedure each time a fraud offence concerns several Member States, or when one or more offences arise from a series of acts done by persons acting together in pursuance of a jointly agreed plan, or when offences are linked with one another.
2. The procedure in paragraph 1 is not intended to confer exclusive jurisdiction. It shall be applicable unless there are overriding objective reasons for derogation.
3. To implement the centralized proceedings, each Member State shall deem acts done on the territory of another Member State to have been committed on its own territory.

Article 8

1. The power to implement the centralized procedure shall lie with the authorities responsible for investigation for the purpose of prosecution in the Member States on whose territory the greatest number of the following are satisfied:
 - place where the material acts or omissions occur;
 - place of arrest of persons having participated in the fraud;
 - home or usual residence of the same persons;
 - place where the evidence is identified or located;
 - head office of the legal person or other business establishment involved in the fraud.
2. Where jurisdiction cannot be determined on the basis of the criteria set out in paragraph 1, the Member State whose authorities are responsible for investigation for the purpose of prosecution and to whom the essential facts of the fraud were first submitted shall have jurisdiction to implement the centralized procedure.

TITLE V
Assistance and judicial cooperation⁽³⁾

Article 9

1. Member States shall provide mutual assistance for all judicial proceedings relating to fraud in accordance with Article 6 of the Convention.

The provisions of this Protocol relating to judicial cooperation in the area of protection of financial interests of the European Communities shall not affect the supplementary provisions of any other Conventions binding the Member States concerned.

2. Member States shall develop regular cooperation at operational level between members of the judiciary or persons vested with prosecution powers in national criminal proceedings, based whenever possible on a network of liaison judges.

⁽³⁾ Title V of the Protocol does not form part of the Commission initiative pursuant to Article K.3(2). It is submitted for the Council's reflection as guidance to supplement the substance of the text.

Article 10

1. Requests for judicial assistance shall be transmitted direct between judicial authorities and returned in the same way.
2. The request and the accompanying documents shall be translated into one of the languages of the Member State on whose territory the person to whom it is addressed is established.
3. Procedural documents may be addressed to the recipients direct, by any means.
4. Facts lawfully established in one Member State shall in all the other Member States constitute admissible evidence in the same way as evidence established in accordance with national law.

Article 11

Where a centralized procedure is appropriate, the appropriate authority, either direct or via the liaison judges, shall make immediate contact with the competent authority in the Member State concerned, for the purpose of cooperating in determining responsibility for prosecution and assigning the case-file, specifying the relevant points in favour of centralization. In all appropriate cases, the authorities concerned shall contact the Commission, which shall provide all the necessary assistance.

Article 12

1. The appropriate authority of the Member State to which the proceedings are assigned shall decide without delay if it will take charge of them. Any refusal must be explained.
2. Until the decision on assignment of the file is made, the appropriate authority of the Member State which assigns the proceedings shall carry out all urgent action falling within its jurisdiction.
3. Member States shall recognize reciprocally the validity of actions taken in accordance with national procedural rules before the centralization of prosecution. Action taken in this way shall be presumed to be in order.
4. Any appropriate authority of a Member State of which the proceedings are not taken up shall inform the Commission of the refusal so as to enable the Commission to provide all the necessary support to bring the proceedings to a successful conclusion.

TITLE VI

Register of fraud prosecutions

Article 13

1. There shall be a central register of prosecutions commenced by the judicial authorities (prosecutors, public investigating officials and assistants) of the Member States for fraud offences. Its establishment shall be without prejudice to Community powers.

A committee consisting of representatives of each Member State and of the Commission shall be given responsibility for the proper application of the provisions of this Title as regards the register.

2. The register shall contain the following data on persons who are prosecuted:
 - (a) name, date, place of birth, nationality and other elements enabling the person to be identified;
 - (b) the acting judicial authority and the case references;
 - (c) the offences and the charges brought, together with dates and places;
 - (d) previous convictions, in so far as they relate to offences involving organized crime or economic and financial crime.

Article 14

1. The judicial authorities shall communicate the data to be recorded and shall update them.
2. Direct access to data shall be granted only to an investigating authority designated by each Member State. Such data shall be communicated only to a judicial authority responsible for prosecution of fraud offences.
3. The establishment of computerized processing procedures which allow transmission of specific information on a unilateral request from the relevant authorities shall be authorized on condition that this form of transmission is considered appropriate on account of the number of transmissions or the urgency of the matter, while respecting the legitimate interests of the persons concerned.

Article 15

Personal data shall be protected against unauthorized access. Member States and the Commission shall give this protection in the light of the principles laid down in European Parliament and Council Directive 95/46/EC⁽⁴⁾.

TITLE VII Implementation

Article 16

1. The Council, on the initiative of any Member State or on a proposal from the Commission, shall adopt the necessary measures for the implementation of this Protocol.
2. Implementing measures may provide for practical arrangements for cooperation between the Member States concerned and the Commission to resolve particular cases.

TITLE VIII Jurisdiction of the Court of Justice

Article 17

The Court of Justice of the European Communities shall have jurisdiction to give:

- preliminary rulings on the interpretation of this Protocol and its implementing rules (if any), and also of the Convention itself;

⁽⁴⁾ OJ No L 281, 23.11.1995, p. 31.

- at the request of a Member State or the Commission, rulings on any point of contention concerning this Protocol;
- at the request of a judicial authority, rulings on any conflict of jurisdiction in the application of rules on the centralized proceedings.

TITLE IX
Final provisions

Article 18

1. This Protocol shall be submitted for adoption by the Member States in accordance with their several constitutional requirements.
2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the procedures required by their several constitutional rules for the adoption of this Protocol.
3. This Protocol shall enter into force ninety days after notification under paragraph 2 by whichever Member State of the European Union is, following the adoption by the Council of the European Union of the Act establishing this Protocol, the last to accomplish to this formality. However, if the Convention has not entered into force by that date, this Protocol shall enter into force when the Convention enters into force.

Article 19

1. This Protocol is open to any State which becomes a Member of the European Union.
2. The text of this Protocol in the language of the Member State, prepared by the Council of the European Union, shall be deemed authentic.
3. Accession instruments shall be deposited with the depositary.
4. This Protocol shall enter into force for all Member States ninety days after the deposit of its instrument of accession or on the date of the entry into force of this Protocol, if it has not yet entered into force by the end of the said period.

Article 20

1. The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.
2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and reservations, and also any other notification concerning this Protocol.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have hereunto set their hands.

Done at, on in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the Secretariat-General of the Council of the European Union.

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