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~~LIMITE~~

JUSTPEN 34

REPORT

from : K.4 Committee
on : 21 and 22 April 1997
to : Permanent Representatives Committee/Council

No. prev. doc.: 7188/97 JUSTPEN 27
No. Cion prop.: 4727/96 JUSTPEN 17

Subject: Draft second Protocol to the Convention on the protection of the European Communities' financial interests

I INTRODUCTION

The Convention on the protection of the European Communities' financial interests was drawn up by the Council and signed by the Representatives of the Governments of the Member States on 26 July 1995⁽¹⁾. The Convention constitutes a first agreement in this area and is concerned with combatting fraud affecting the European Communities' financial interests.

A first Protocol to the Convention was drawn up and signed on 27 September 1996⁽²⁾. The Protocol is aimed primarily at acts of corruption that involve national and Community officials and damage or are likely to damage the European Communities' financial interests.

⁽¹⁾ OJ N° C 316, 27.11.1995, page 48.
⁽²⁾ OJ N° C 313, 23.10.1996, page 1.

The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests was drawn up and signed on 29 November 1996⁽¹⁾. The instrument allows Member States to accept, by a declaration made at the time of the signing of the Protocol or any time thereafter, the jurisdiction of the Court to give preliminary rulings on the interpretation of the above Convention and first Protocol.

Alongside the drawing up of the above instruments within the framework of the third Pillar, two instruments of particular interest in this context have been adopted within the framework of the first Pillar. These are Council Regulation of 18 December 1995 on the protection of the European Communities' financial interests⁽²⁾ and Council Regulation of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities⁽³⁾.

The Commission submitted on 19 January 1996 a draft second Protocol to the above Convention⁽⁴⁾, taking into account what had already been achieved, the Commission proposal submitted to the Council in July 1994⁽⁵⁾ and the Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities⁽⁶⁾.

The European Parliament was consulted in June 1996 by the Italian Presidency pursuant to Article K.6 of the Treaty on European Union. The European Parliament gave its opinion on 24 October 1996.⁽⁷⁾

The K.4 Committee examined the draft Protocol at its meeting on 21 and 22 April 1997 on the basis of 7188/97 JUSTPEN 27.

⁽¹⁾ Doc. 11899/96 JUR 348 COUR 21.

⁽²⁾ OJ N° L 312, 23.12.1995, page 1.

⁽³⁾ OJ N° L 292, 15.11.1995, page 2.

⁽⁴⁾ Doc. 4727/96 JUSTPEN 17.

⁽⁵⁾ OJ N° C 216, 06.08.1994, page 14.

⁽⁶⁾ OJ N° C 355, 14.12.1994, page 2.

⁽⁷⁾ OJ no C 347, 18.11.1996, page 150.

Delegations will find:

- in Annex I, the text of the draft Protocol as it emerged from proceedings;
- in Annex II, a list of items to be dealt with in the explanatory report to the Protocol;
- in section II below, an outline of the questions still outstanding.

II OUTSTANDING QUESTIONS

a) Money laundering (Articles 2 and 1(e))

The present definition in Article 1(e) covers money laundering "related to the proceeds of fraud, at least in serious cases of fraud, and active and passive corruption".

The Austrian and German delegations have laid down a reservation as they thought that the reference to serious cases should cover not only fraud but also active and passive corruption.

b) Liability of legal persons and sanctions for legal persons (Articles 3 and 4).

The state of affairs regarding this point is as follows:

- Scrutiny reservation by the United Kingdom delegation on Article 3(1) and (2),
- The Austrian and German delegations have maintained their reservations as they would prefer to merge paragraphs 1 and 2. It should at least in the view of these delegations be made clear in the text, that the sanctions covered by paragraph 2 contain a punitive element going beyond the concept of covering damages.
- The Austrian delegation has maintained a general reservation on Articles 3 and 4 as it would not be possible to implement these provisions within the framework of the existing national law in Austria. The delegation would, however, be prepared to consider a solution, whereby each Member State could declare, that it was entitled not to apply Articles 3 and 4. The declaration, which should be given at the ratification, would be valid for only five years (from the date of the entry into force of the Protocol) and could not be renewed. This solution would allow Austria to ratify the Protocol and at the same time mean the implementation of Articles 3 and 4 in Austria on longer term.

c) Publication of data protection rules (Article 9)

The Austrian delegation retained a scrutiny reservation on Article 9.

d) Court of Justice (Article 13)

- General reservation on Article 13 by the United Kingdom delegation.
- Reservation by the Austrian delegation on the deletion of the second subparagraph of Article 13(2), (see Article 13(2) of 7188/97 JUSTPEN 27).
- The German delegation and the Commission representative have laid down a reservation as they thought that all the provisions of the draft Protocol should be covered by Article 13(2). They considered in particular, that a reference to Articles 3, 4 and 5 should be introduced.
- The Irish, Spanish and United Kingdom delegations retained a reservation on the reference to Article 7 in Article 13(2).

e) Entry into force (Article 16)

The Commission representative retained a reservation on Article 16(4).

III CONCLUSIONS

The K.4 Committee invites the Permanent Representatives Committee to examine the questions set out under II above with a view to reaching agreement on the draft second Protocol at the meeting of the Council (JHA) in May 1997.

COUNCIL ACT
of

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Whereas, for the purposes of achieving the objectives of the Union, the Member States regard the combating of crime affecting the European Communities' financial interests as a matter of common interest coming under the cooperation provided for in Title VI of the Treaty;

Whereas by its Act of 26 July 1995 the Council drew up, as a first agreement, the Convention on the protection of the Communities' financial interests which is intended more specifically to combat fraud that damages those interests;

Whereas by its Act of 27 September 1996 the Council drew up, as a second stage, a protocol to the Convention directed in particular at acts of corruption that involve national and Community officials and damage or are likely to damage the European Communities' financial interests;

Whereas the Convention needs to be further supplemented by a second protocol directed in particular at the liability of legal persons, confiscation, money laundering and the cooperation between the Member States and the Commission for the purpose of protecting the European Communities' financial interests and protecting personal data related thereto;

DECIDES that the Second Protocol, the text of which is set out in the Annex hereto and which is signed today by the Representatives of the Governments of the Member States of the Union, is hereby drawn up;

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

Done at Brussels,

For the Council
The President

SECOND PROTOCOL,
DRAWN UP ON THE BASIS OF ARTICLE K.3
OF THE TREATY ON EUROPEAN UNION,
TO THE CONVENTION ON THE PROTECTION
OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union,

REFERRING TO THE ACT OF THE Council of the European Union of ...,

DESIRING to ensure that their criminal laws contribute effectively to the protection of the financial interests of the European Communities;

RECOGNIZING the importance of the Convention on the protection of the European Communities' financial interests of 26 July 1995 in combating fraud affecting Community revenue and expenditure;

RECOGNIZING the importance of the Protocol of 27 September 1996 to the said Convention in the fight against corruption damaging or likely to damage the European Communities' financial interests;

AWARE THAT THE FINANCIAL INTERESTS OF THE European Communities may be damaged or threatened by acts committed on behalf of legal persons and acts involving money laundering;

CONVINCED of the need for national law to be adapted, where necessary, to provide that legal persons can be held liable in cases of fraud or active corruption and money laundering committed for their benefit that damage or are likely to damage the European Communities' financial interests;

CONVINCED of the need for national law to be adapted, where necessary, to penalize acts of laundering of proceeds of fraud or corruption that damage or are likely to damage the European Communities' financial interests and to make it possible to confiscate proceeds of such fraud and corruption;

CONVINCED of the need for national law to be adapted, where necessary, in order to prevent the refusal of mutual assistance solely because offences covered by this Protocol concern or are considered as tax or customs duty offences;

NOTING that cooperation between Member States is already covered by the Convention on the protection of the European Communities' financial interests of 26 July 1995, but that there is a need, without prejudice to obligations under Community law, for appropriate provision also to be made for cooperation between Member States and the Commission to ensure effective action against fraud, active and passive corruption and related money laundering damaging or likely to damage the European Communities' financial interests, including exchange of information between the Member States and the Commission;

CONSIDERING that, in order to encourage and facilitate the exchange of information, it is necessary to ensure adequate protection of personal data;

CONSIDERING that the exchange of information should not hinder ongoing investigations and that it is therefore necessary to provide for the protection of investigation secrecy;

CONSIDERING that appropriate provisions have to be drawn up on the competence of the Court of Justice;

CONSIDERING finally that the relevant provisions of the Convention on the protection of the European Communities' financial interests of 26 July 1995 should be made applicable to certain acts covered by this Protocol,

HAVE AGREED ON THE FOLLOWING PROVISIONS :

Article 1
Definitions

For the purposes of this Protocol:

- (a) "Convention" shall mean the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by the Council Act of 26 July 1995 ⁽¹⁾;
- (b) "fraud" shall mean the conduct referred to in Article 1 of the Convention;
- (c) "passive corruption" shall mean the conduct referred to in Article 2 of the Protocol to the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by the Council Act of 27 September 1996⁽²⁾ and "active corruption" shall mean the conduct referred to in Article 3 of the same Protocol;
- (d) "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations;
- (e) "money laundering" shall mean the conduct as defined in the third indent of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering, related to the proceeds of fraud, at least in serious cases of fraud, and active and passive corruption.⁽³⁾

Article 2⁽³⁾
Money laundering

Each Member State shall take the necessary measures to establish money laundering as a criminal offence.

⁽¹⁾ OJ No C 316, 27.11.1995, p. 48.

⁽²⁾ OJ No C 313, 23.10.1996, p. 1.

⁽³⁾ See point II a), page 3.

Article 3⁽¹⁾

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of a legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

⁽¹⁾ See point II b), page 3.

Article 4⁽¹⁾
Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as :

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 5
Confiscation

Each Member State shall take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

⁽¹⁾ See point II b) on page 3.

Article 6

Tax and customs duty offences

A Member State may not refuse to provide mutual assistance in respect of fraud, active and passive corruption and money laundering for the sole reason that it concerns or is considered as a tax or customs duty offence.

Article 7⁽¹⁾

Cooperation with the Commission

1. The Member States and the Commission shall cooperate with each other in the fight against fraud, active and passive corruption and money laundering.

To that end, the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.

(¹) The Legal Service of the Council has in its opinion set out in 8031/96 JUR 179 JUSTPEN 84 concluded that it is possible to bind the Commission by means of a Convention established on the basis of Article K.3 of the Treaty. The Legal Service has suggested that there should be an active acceptance by the Commission of the tasks the Protocol would entrust to it. At an earlier meeting, the Commission representative agreed in principle with the said opinion but observed that the Commission needed to examine further which form the active acceptance would take.

2. The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering. The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may impose specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

Article 8

Data protection responsibility for the Commission

The Commission shall ensure that, in the context of the exchange of information under Article 7(2), it shall observe, as regards the processing of personal data, a level of protection equivalent to the level of protection set out in Directive 95/46/CE of the European Parliament and the Council on the protection of physical persons with respect to the processing of personal data and the free movement of such data.

Article 9

Publication of data protection rules

The rules adopted concerning the obligations under Article 8 shall be published in the Official Journal of the European Communities.⁽¹⁾

Article 10

Sharing data with other Member States and third countries

1. Subject to any conditions referred to in Article 7(2), the Commission may transfer personal data obtained from a Member State in the exercise of its functions under Article 7 to any other Member State. The Commission shall inform the Member State which supplied the information of its intention to make such a transfer.
2. The Commission may, under the same conditions, transfer personal data obtained from a Member State in the exercise of its functions under Article 7 to any third State provided that the Member State which supplied the information has agreed to such transfer.

Article 11

Supervisory authority

Any authority designated or created for the purpose of exercising the function of independent data protection supervision over personal data held by the Commission pursuant to its functions under the Treaty establishing the European Community, shall be competent to exercise the same function with respect to personal data held by the Commission by virtue of this Protocol.

⁽¹⁾ See point II c), page 4.

Article 12

Relation with the Convention

1. The provisions of Articles 3, 5 and 6 of the Convention shall also apply to the conduct referred to in Article 2 of this Protocol.
2. The following provisions of the Convention shall also apply to this Protocol:
 - Article 4, on the understanding that, unless otherwise indicated at the time of the notification provided for in Article 16(2) of this Protocol, any declaration within the meaning of Article 4(2) of the Convention, shall also apply to this Protocol;
 - Article 7, on the understanding that the "ne bis in idem" principle also applies to legal persons as defined in Article 1(d), and that, unless otherwise indicated at the time of the notification provided for in Article 16(2) of this Protocol is being given, any declaration within the meaning of Article 7(2) of the Convention shall also apply to this Protocol;
 - Article 9;
 - Article 10.

Article 13⁽¹⁾
Court of Justice

1. Any dispute between Member States on the interpretation or application of this Protocol must in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution.

If no solution is found within six months, the matter may be referred to the Court of Justice of the European Communities by a party to the dispute.

2. Any dispute between one or more Member States and the Commission concerning the application of Article 2 in relation to Article 1e), and Articles 7, 8, 10 and 12(2), fourth indent of this Protocol which it has proved impossible to settle through negotiation may be submitted to the Court of Justice.

(...)

3. The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Union of the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by the Council Act of 29 November 1996, shall apply to the present Protocol, on the understanding that a declaration made by a Member State pursuant to Article 2 of that Protocol is also valid regarding the present Protocol unless the Member State concerned makes a declaration to the contrary when giving the notification provided for in Article 16(2) of the present Protocol.

⁽¹⁾ See point II d), page 4.

Article 14
Non-contractual liability

In the activities covered by this Protocol, the non-contractual liability of the Community is governed by Article 215(2) of the Treaty establishing the European Community. Article 178 of the same Treaty is applicable.

Article 15
Judicial control

1. The Court of Justice of the European Communities shall have jurisdiction in actions brought by any natural or legal person against a decision of the Commission addressed to that person or which is to his or her direct and individual concern, on grounds of infringement of Article 8 or any rule adopted (...) pursuant thereto, or misuse of powers.

2. Articles 168a(1) and (2), 173(5), 174(1), 176(1) and (2), (...) 185 and 186 of the Treaty establishing the European Community, as well as the Statute of the Court of Justice (EC), shall apply, mutatis mutandis.

Article 16
Entry into force

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.
2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the procedures required under their respective constitutional rules for adopting this Protocol.
3. This Protocol shall enter into force ninety days after the notification provided for in paragraph 2, by the (...) Member State which, being a member of the European Union on the date of the adoption of the act drawing up the Protocol, is the last to fulfil that formality. If, however, the Convention has not entered into force on that date, the Protocol shall enter into force on the date on which the Convention enters into force.
4. However, the application of Article 7(2) shall be suspended if, and for so long as, the relevant institution of the European Communities has not complied with its obligations pursuant to Article 9 or the supervisory authority referred to in Article 11 is not operational.⁽¹⁾

⁽¹⁾ See point e), page 4.

Article 17

Accession of new Member States

1. This Protocol shall be open to accession by any State that becomes a member of the European Union.
2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.
3. Instruments of accession shall be deposited with the depositary.
4. This Protocol shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of the Protocol if it has not yet entered into force at the time of expiry of the said period of ninety days.

Article 18

Reservations

No reservation shall be authorized, with the exception of those provided for in Article 12(2), first and second indent.

Article 19

Depositary

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 any other notification concerning this Protocol.

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

Done at, this 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 General Secretariat of the Council of the European Union.

Items to be included in the explanatory report on the Second Protocol to the Convention
on the protection of the European Communities' financial interests.

Article 1

- Paragraph (d)

It will be indicated that the expression "the applicable national law" means the national law of the Member State taking measures against a legal person in accordance with the Protocol.

- paragraph (e)

It will be recalled that the expression "property" used in the third indent of Article 1 of Directive 91/308/EEC is defined in the fourth indent of the said Article 1.

Article 3

It will be explained

- that external persons auditing accounts of the legal person in question, for example persons from audit companies, are not covered by Article 3(1).
- that the measures to be taken according to Article 3(2) may be other measures than criminal law measures, and that Ireland intends to fulfil its obligations regarding this provision by civil law measures;
- that Article 3(2) does not necessarily imply an objective responsibility for the legal person but may be interpreted as limited to covering cases where the legal person as such may be blamed for its irresponsible behaviour.

Article 5

It will be explained that the expression "seizure" covers "freezing" and "seizure" as defined in Article 1(l) of the United Nations 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Article 7

The relations between Article 7 of the Protocol and Article 6 of the Convention will be explained.

Articles 7(2) and 10

The explanatory report will contain an explanation regarding procedure and public interest issues in relation to Articles 7(2) and 10.

Articles 8 and 9

It will be explained that Articles 8 and 9 have been adopted with the understanding that the Member States will be consulted during the drafting of the rules concerning the obligations under Article 8.

The draft report in general

The joint room document of the Presidency and the Commission on "shared responsibilities" which was circulated at the meeting of the Working Party on Criminal and Community Law on 14 January 1997 was intended as a contribution at a later stage to the draft explanatory report to the Protocol. The delegations were generally happy with the paper but needed to study it further. Some delegations thought that it was inappropriate to include references to first pillar instruments in the paper as it concerns third pillar matters. It was agreed by the Working Party to further examine the paper at a later stage.