

6404/95

LIMITE

JUSTPEN 47

OUTCOME OF PROCEEDINGS

of: Working Party on Criminal and Community Law

on: ~~3, 4 and 5 April 1995~~

Subject: Draft Convention for the protection of the Communities' financial interests

I. INTRODUCTION

At its meeting on 3, 4 and 5 April 1995 the Working Party on Criminal and Community Law examined the provisions of the draft Convention concerning:

- penalties,
- the liability of the person with decision-making powers and
- jurisdiction, extradition and the "ne bis in idem" rule,

on the basis of 6112/95 JUSTPEN 44 and, as regards the liability of the person with decision-making powers, the outcome of Coreper's discussions of 30 March 1995 set out in point II(b) of 6252/95 JUSTPEN 45.

The outcome of the Working Party's discussions on these matters is given in Articles 2, 3, 4, 5, 6 and 7 in the Annex hereto, accompanied by footnotes.

The Working Party also discussed the possibility of the Court of Justice of the Communities having competence to rule on the interpretation of the Convention. The conclusions of that discussion are briefly set out in II below.

The outcome of the Working Party's meeting on 22, 23 and 24 March 1995 on the definition of fraud appears in Article 1 in the Annex hereto ⁽¹⁾, accompanied by footnotes.

It should be pointed out that apart from the issue of the liability of the person with decision-making powers, Coreper also considered at its meeting on 30 March 1995 the scope of the Convention (VAT) and the advantages and drawbacks of a specific offence of fraud.

The outcome of this examination is given in points II(a) and (b) of 6252/95 JUSTPEN 45.

II. COMPETENCE OF THE COURT OF JUSTICE OF THE COMMUNITIES

Article K.3(2)(c) of the TEU lays down that conventions drawn up under that Article may stipulate that the Court of Justice has jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements that they may lay down.

The Working Party held an initial discussion on whether the Court of Justice should not have competence to rule on the interpretation of the Convention.

Generally speaking, in particular the German and Italian delegations ⁽²⁾, and the Commission representative ⁽³⁾, were in favour of including competence for the Court in the Convention.

However, the French and United Kingdom delegations were unable to accept such an approach, at least as regards the first Convention to be drawn up on key matters.

The other delegations had an open mind on the matter or had not yet taken up definitive positions.

⁽¹⁾ The Annex incorporates the Annex to 6112/95 JUSTPEN 44 on this point.

⁽²⁾ See note from the Italian delegation in 6108/95 JUSTPEN 43.

⁽³⁾ See Article 11 of the draft Commission Convention in 8076/94 JUSTPEN 46 ECOFIN 100.

With regard to the scope of any competence, a number of delegations thought the Court should have competence both to rule, at the request of a Member State or the Commission, on any disputes concerning the application of the Convention, and to give a preliminary ruling on the application of the Convention. Other delegations considered that preliminary rulings should not be included.

At the close of the discussion the Working Party agreed to ask for the Council Legal Service's opinion on certain issues. These issues, to be defined at a later stage, should at least cover the following aspects:

(a) **Substantive issues;** possible competence for the Court for:

- all the provisions of the Convention,
- only certain provisions of the Convention,
- disputes between the Member States and the Commission on the application of the Convention,
- preliminary rulings
 - = "compulsory" system (in line with Article 177 of the EC Treaty)
 - = "optional" system (the national court – of last instance – would not be obliged to refer the matter to the Court).

(b) **Procedural issues;** the possibility for Member States to decide to what extent they are subject to the Court's jurisdiction in the form of:

- a reservation to be entered in accordance with a provision to be included in the Convention, or

- the confirmation of the Court's jurisdiction in an additional protocol to the Convention. The protocol would be drawn up by the same act as the one bringing into force the Convention but would not necessarily be ratified by all Member States.

DRAFT CONVENTION ON THE PROTECTION OF THE COMMUNITIES' FINANCIAL INTERESTS

Article 1

1. For the purposes of this Convention, fraud against the Communities' financial interests shall mean:

- (a) in respect of expenditure, any intentional ⁽²⁾ act or omission ⁽⁴⁾ relating to:
 - [the preparation, supply,] ⁽⁵⁾ use or presentation of false, incorrect or incomplete statements or documents, which has as its (...) effect the misappropriation or wrongful retention of funds from the general budget of the Communities or budgets managed by or on behalf of the Communities, this effect being covered by the intention ⁽⁶⁾;
 - non-disclosure of information in violation of a specific obligation ⁽⁷⁾ with the same object and effect;
 - or the misapplication of these same funds for purposes other than those for which they were originally granted; ⁽⁸⁾

⁽⁴⁾ Reservation by the Spanish delegation.

⁽²⁾ The Commission representative entered a reservation; gross negligence should be covered as well, as in the Commission's draft Convention.

⁽⁵⁾ The French, Netherlands and United Kingdom delegations and the Commission representative wanted to retain these terms in the text.

⁽⁶⁾ Text which may be acceptable to delegations.

⁽⁷⁾ The German delegation felt that it should be specified that an act of deception was meant.

⁽⁸⁾ Reservations by the Danish and German delegations; scrutiny reservation by the Swedish delegation.

(b) in respect of revenue, any intentional ⁽⁹⁾ act or omission ⁽¹⁾ relating to:

- [the preparation, supply,] ⁽¹⁾ use or presentation of false, incorrect or incomplete statements or documents which has as its (...) effect the illegal diminution of the resources of the general budget of the Communities or budgets managed by or on behalf of the Communities, this effect being covered by the intention ⁽¹⁾;
- non-disclosure of information in violation of a specific obligation ⁽¹⁾ which has the same object and effect;
- misapplication of a legally obtained benefit ⁽¹⁰⁾.

2. The intentional character of an act or omission as referred to in paragraph 1 may derive from circumstances and objective considerations [in particular inadequate conduct where an obligation exists to take due care] ⁽¹¹⁾.

3. Each Member State shall take the necessary measures to make fraud against the financial interests of the Communities a [specific] criminal offence ⁽¹²⁾.

⁽⁹⁾ See the reservations and comments indicated in the footnotes to paragraph 1(a).

⁽¹⁰⁾ The German, Danish, French, Finnish and Austrian delegations entered reservations on the third indent. The Commission representative tabled a meeting document containing examples of cases that would be covered by that indent, while being excluded by the first two indents.

⁽¹¹⁾ Scrutiny reservations by the Spanish, Danish, Swedish and Portuguese delegations on paragraph 2; reservations by the Austrian, Greek, Irish and United Kingdom delegations and scrutiny reservations by the German, Finnish, Netherlands, French and Belgian delegations on the text in square brackets.

⁽¹²⁾ See point II(b) in 6252/95 JUSTPEN 45 (outcome of Coreper proceedings on 30 March 1995).

Article 2: Penalties ⁽¹³⁾

1. Each Member State shall take such measures as may be necessary to ensure that the offences referred to in Article 1, and the related complicity in, instigation of or attempt to fraud, are punishable by criminal ⁽¹⁴⁾, effective, proportionate and dissuasive penalties, including prison sentences and are extraditable.
2. In cases of minor fraud involving a total amount of less than ECU 4 000 ⁽¹⁵⁾ and not involving particular serious circumstances ⁽¹⁶⁾ under Member States' laws, a Member State shall not be obliged to impose the penalties laid down in paragraph 1 ⁽¹⁷⁾.

⁽¹³⁾ Reservations or scrutiny reservations by several delegations. In the course of several meetings the Working Party considered the question of penalties and in particular the possibility of distinguishing between serious cases, less serious cases and minor cases on the basis of the amount of the fraud and/or other criteria. Several texts were considered. In view of the difficulties encountered the present text of Article 2 makes provision for a distinction between fraud in general and minor fraud. Paragraph 1 stipulates that fraud is punishable by criminal penalties. These penalties do not, in all instances, necessarily involve prison sentences which are extraditable but may also involve financial penalties. The text confers on Member States the task of defining the (serious) cases punishable by prison sentences and which constitute extraditable offences. Paragraph 2 stipulates that, in cases of minor fraud, penalties other than criminal penalties may be imposed.

⁽¹⁴⁾ The Austrian delegation entered a reservation and called for the inclusion of a reference in the text to administrative criminal penalties, provided for by its country's legislation. The reason for such a reference (the Austrian system) could be explained in the explanatory report to be drawn up.

The other delegations were in general willing to take account of the Austrian delegation's comments. A broad majority of delegations said, however, they were in favour of a text in the explanatory report which made it clear that the term "criminal penalties" covered the Austrian administrative penalties, rather than being in favour of amending the text of Article 2.

⁽¹⁵⁾ This amount was too low (Spanish delegation).

⁽¹⁶⁾ Reservations by a number of delegations on the words "not involving particular serious circumstances".

⁽¹⁷⁾ Member States should not be obliged to impose penalties for attempted minor fraud (Portuguese delegation).

Article 3: Criminal liability of heads of businesses ⁽¹⁸⁾

Proposal 1 (text proposed by the Swedish delegation)

Each Member State shall take the necessary measures to provide criminal liability for any person who exercises legal or delegated powers within a business if the person has failed to prevent personnel subordinated to him from committing an act referred to in Article 1 on behalf of the undertaking, subject to conditions as determined by the legislation of the Member States.

Proposal 2 (Article 11 of 10700/94 JUSTPEN 84 – draft joint action by the United Kingdom delegation)

Member States shall ensure that their laws do not have the effect of exempting from criminal liability for fraud against the financial interests of the Communities the heads of businesses or any persons having the powers to take decisions within businesses ⁽¹⁹⁾.

Proposal 3 (text submitted by the Commission representative)

Member States shall establish, under appropriate conditions to be defined in accordance with their national law, the criminal liability of heads of businesses or any other person having the powers to take de jure or de facto decisions within businesses in cases of fraud against the Communities' financial interests by one of the members of the business on its behalf.

⁽¹⁸⁾ The question of the liability of the person with decision-making powers was discussed by Coreper on 30 March 1995. The outcome of the discussion appears in point II(c) of 6252/95 JUSTPEN 45. The three texts are due to be re-examined at a forthcoming meeting.

⁽¹⁹⁾ Proposal by the Luxembourg delegation that the following words be added:
"committed by one of the members of the business on its behalf".

Article 4

Each Member State shall take such measures as may be necessary to establish its jurisdiction over the criminal offences it has established in accordance with Article 2, when:

- fraud, participation in fraud or attempted fraud against the financial interests of the Communities is committed in whole or in part ⁽²⁰⁾ within its territory including fraud for which the benefit was obtained in that territory;
- a person within its territory knowingly assists or induces ⁽¹⁾ the commission of such fraud within the territory of any other States; ⁽²¹⁾
- [the perpetrator is a national of the Member State concerned and, where the Member State so requires, the criminal offence is punishable in the country where it was committed]. ⁽²²⁾

⁽²⁰⁾ Reservation on "in part" and on "assists or induces" (Danish delegation).

⁽²¹⁾ Reservation (United Kingdom delegation). It should be made clear in the explanatory report to be drawn up that the principle of dual criminality applies and that Member States may decide not to prosecute if the principal perpetrator has not been judged definitively (French delegation).

⁽²²⁾ Reservation; the Convention is unacceptable if the principle of universal competence regarding own nationals is included (United Kingdom delegation).

It has been suggested that the third indent be examined together with Article 5(1) at a future meeting.

Article 5

1. Any Member State which under its law may refuse extradition of its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Articles 1 and 2, paragraph 1, when committed by its own nationals outside its territory.
2. Each Member State shall aim to ensure that, when a person in its territory is alleged to have committed elsewhere a criminal offence involving the conduct described in Articles 1 and 2, paragraph 1, which is also a criminal offence in that Member State ⁽²³⁾, if it refuses the extradition of that person ⁽²⁴⁾ in respect of that offence solely on the grounds that the person is a national of that Member State, it shall submit the case to its competent authorities for the purpose of prosecution ⁽²⁵⁾ (unless otherwise agreed with another Member State which requested extradition).
3. A Member State may not refuse extradition in respect of an offence of fraud against the financial interests of the Communities solely on the grounds that it is a fiscal or customs offence.

⁽²³⁾ The words "which is also a criminal offence in that Member State" are superfluous (the Commission representative).

⁽²⁴⁾ Scrutiny reservation by the German delegation on the expression "if it refuses the extradition of that person".

⁽²⁵⁾ Suggestion from the Swedish delegation to add:

"... unless otherwise requested by the requesting party for the purpose of preserving its legitimate jurisdiction". This text corresponds to Article 6(9)(b) of the Vienna Convention on drugs.

Seven delegations (DK/B/S/FIN/UK/NL/F) were in favour of adding this text, whereas the other delegations and the Commission representative preferred to keep the text as it is.

Article 6

1. If an act of fraud constituting a criminal offence against the Communities' financial interests concerns at least two Member States, those States shall cooperate effectively in the investigation, the judicial proceedings and punishment of the offence by means, for example ⁽²⁶⁾, of mutual assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.
2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member State where possible.

Article 7

1. Member States shall apply in their national criminal laws the "ne bis in idem" rule, under which a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a sanction was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State.
2. Member States shall indicate in a declaration made when depositing their instruments of ratification, acceptance or approval the conditions under which they will apply the "ne bis in idem" rule ⁽²⁷⁾.

⁽²⁶⁾ Reservation by the Netherlands delegation on the words "for example".

⁽²⁷⁾ Reservation by the Spanish delegation which said that a reference to the Convention on "ne bis in idem" would be unacceptable.